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THE

Weekly Reporter,

APPELLATE HIGH COURT.

CONTAINING

DECISIONS OF THE APPELLATE HIGH COURT IN ALL ITS BRANCHES, VIZ., IN CIVIL, REVENUE, AND CRIMINAL CASES, AS WELL AS IN CASES REFERRED BY THE MOFUSSIL SMALL CAUSE COURTS AND THE RECORDERS' COURTS; TOGETHER WITH RULES AND THE CIVIL AND CRIMINAL CIRCULAR ORDERS ISSUED BY THE HIGH COURT; ALSO DECISIONS OF HER MAJESTY'S PRIVY COUNCIL IN CASES HEARD IN APPEAL FROM COURTS OF BRITISH INDIA.

UNIVERSITY OF CALCUTTA
NOT TO BE REMOVED
DEPARTMENT OF LAW

BY D. SUTHERLAND, MIDDLE TEMPLE.

13

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ERRATA (VOL. XVII.)

CIVIL RULINGS.

Page 14, *for* "to him," in line 4 of marginal note, *read* "to the Collector."

Page 16, 2nd col., *for* "Mr. Lounces," in line 13 from bottom, *read* "Mr. Lance."

Page 18, *for* "in way affected?," in last line of marginal note, *read* "in any way affected" (omitting the mark of interrogation).

Page 197, *for* "mortgagor," in line 1 of marginal note, *read* "mortgagee;" and *for* "mortgagee," in line 6 of ditto, *read* "mortgagor."

Page 289, *for* "Code of *Criminal* Procedure," in the heading, *read* "Code of *Civil* Procedure."

Page 339, *for* "decree-holder," in line 1 of marginal note, *read* "judgment-debtor."

Page 369, *for* "plaintiff," in line 2 of marginal note, *read* "defendant."

Page 372, *for* "Plaintiff," in line 6 of marginal note, *read* "Defendant."

Page 393, *after the word* "signed," in line 8 of marginal note, *insert* "by any person authorized."

Page 413, *for* "between," in line 4 of marginal note, *read* "below."

Page 442, *for* "drawers against the drawees," in line 2 of marginal note, *read* "drawees against drawers."

Page 461, *for* "is barred," in line 3 of marginal note, *read* "is not barred."

Page 530, *for* "Act XI," in the heading, *read* "Act XIV."

Page 551, *for* "has," in line 9 of marginal note, *read* "had."

CRIMINAL RULINGS.

Page 11, *for* "This," at the beginning of the marginal note of the second case, *read* "It."

Page 15, *for* "discharge," in line 9 from bottom of marginal note, *read* "discharged."

N. B.—The decision referred to in p. 373, as reported in 4 B. L. R., p. 94, will be found reported as a foot note in 14 W. R., p. 437.

The case of *Nobodeep Chunder Gossamee and others* which is partly printed as a foot note at p. 36, Criminal Rulings, Vol. XVII, is printed *in extenso* at p. 71, Criminal Rulings, Vol. XV.

The paging of the Criminal Rulings in Volume XVI, after page 52, has been incorrectly numbered as from page 63 (instead of 53) onwards.

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In a suit to close a —— cut by defendant and to restrain him from injurious cuttings in future, it is material to try if plaintiff has a cause of action, and to whom the property belongs ... 359

BURMAH TIMBER TRADE.

According to the —— the holding of *taiasahs* does not give possession of the timber; and where the parties in a contract use the word "received," the word must be taken to mean having obtained possession, and not merely having entered and got *taiasahs* ... 120

BUTWARRA.

See Partition (2) (6) (8)

BYE-MOKASA.

See Mahomedan Law (9)

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CARRIERS.

See Contract (1)

CAUSE OF ACTION.

(1) A compromise by which a lessee relinquishes the land, and to which the owner is no party, creates no —— on the part of the owner or of any person holding under him 377

(2) The —— accrues to a joint tenant for damages caused by the digging of a tank by his co-sharers from the time the tank is dug 387

(3) The objection that plaintiffs had no —— was not allowed to be taken for the first time after the case had been three times before the first Court and twice before the High Court in special appeal 400

(4) The mere claiming of three shares of money due under a bond executed in favor of plaintiff and others jointly, under different titles derived from different persons in different ways, cannot affect the unity of the —— ... 528

See Act VIII of 1859 (10)
See Bund.
See Death of Plaintiff.
See Ejectment (2)
See Limitation (16)
See Mesne Profits (4)
See Putnee (2)
See Res adjudicata (2)

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CERTIFICATE.

(1) Under Section 7 Act XL of 1858, a claimant by virtue of a genuine will is entitled to a ——, notwithstanding the existence of a natural guardian in the person of the minor's mother ... 99

(2) A —— under Act XXVII of 1860 may not be recalled because there is an heir in a nearer degree to the deceased than the certificate-holder, the object of that Act not being to assist parties in establishing a disputed right or title 174

(3) A —— of administration may be granted to illegitimate sons of a deceased Hindoo to whom the latter had assigned his property, and whom he had acknowledged as his sons ... 189

(4) A —— under Act XXVII of 1860 cannot be limited to particular debts 238

(5) Such a —— cannot be appealed against on the ground that the Judge joined with the appellant another person who had an interest in the debts to be collected 238

(6) When a —— under Act XXVII of 1860 is claimed by reason of an alleged will, the Judge should decide whether under the will the claimant has a preferable right instead of granting a —— to the widow upon security ... 277

(7) The object of a —— under Act XXVII of 1860 is to enable representatives to recover debts due to the deceased at the time of his death, not claims accruing subsequently 343

(8) A —— under Act XXVII of 1860 should be issued directly it is granted, provided the proper stamp be furnished 489

(9) A —— of administration given to the deceased's full sister's son in possession rather than to the half-brother, was held to have been given to the party best entitled with reference to the object of Act XXVII of 1860 ... 562

See Act XL of 1858 (1)
See Execution (20)
See Hindoo Law (5)
See Minor (5)

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CHARTER-ACT. (*Section 15.*)

Petitioner, a decree-holder, allowed another decree-holder to obtain a decree upon a regular suit declaring him entitled to follow the properties in dispute in execution of his decrees, and did nothing even after that until another decree-holder applied for the attachment and sale of the properties in execution of his decree: and the Lower Court having all the parties before it, and having rejected petitioner's application, he, after more than 90 days, invoked the aid of the High Court under ——, but the Court declined to exercise that jurisdiction, leaving petitioner to a regular suit 471

CHARTER-PARTY.

HELD, by the terms of the —— in this case, that the owner of the vessel had a right to keep possession of the cargo until the freight was paid; and, as the bills of lading referred to the terms of the ——, that he had the same right as against the holders of the bills; and also that the master's allowing a portion of the cargo to be delivered would not prevent the owner of the vessel from insisting upon his lien on the remainder 49

See Short Delivery.

CIVIL ACTION.

See Principal.

CLAIM TO ATTACHED PROPERTY.

See Act VIII of 1859 (4)

CLERICAL OMISSION.

See Notice (2)

CODE OF CIVIL PROCEDURE.

(1) Under the —— property may be attached without view to immediate sale. The process of attachment and the order for sale may be distinct and separate, and there may be complete execution of a decree under an attachment without any order for sale 289

CODE OF CIVIL PROCEDURE.—(*Continued.*) Page.

(2) Where lands are situate in other zillahs, the —— contemplates the issuing of separate orders subsequent to the attachment for the sale or other disposition of them, and allows the transmission of a decree with certificate to several Courts concurrently for execution. At the same time the Privy Council considered that in any case it would be a right exercise of the discretion of any Court not to act on the power and to bind the decree-holder not to proceed to sale under all the attachments at once 289

(3) To invalidate an attachment on the ground that no copy of the decree was sent (assuming that it could be so invalidated), it would be necessary to prove non-transmission; the maxim *omnia præsumuntur rite esse acta* must prevail until the contrary is shown 289

(4) An order adding a party to a case is not one affecting the merits in the sense of Section 363; but where such order is made without postponing the case (Section 73) for a reasonable time, it is a very important matter (*foot-note*) 370

CODE OF CRIMINAL PROCEDURE.

Section 321. *See Declaratory Suit* (2).
See Limitation (8)

COLLECTOR'S COURT.

Before bringing a suit to recover back money which defendant had received in a —— in execution of a decree, and to which he was no longer entitled; plaintiff is not bound to make application to the Collector 14

COMPENSATION.

See Occupancy.

COMPROMISE.

(1) A —— of a claim of debt, confirmed by a decree of a Court, cannot be set aside after many (16) years without distinct proof of fraud, the burden of proof lying with the party who alleges fraud 117

(2) Before a petition of —— presented by a vakeel in due course, and which operated to stay execution, can be declared a forgery, evidence must be taken. 402

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Confirmation (*of Judgment*).

See New Trial.

Conjugal Rights.

See Hindoo Law (6)

Consecutive Pottahs.

See Right of Occupancy (1)

Consent of Parties.

See Death of Plaintiff.
See Limitation (12)

Consideration.

See Bona fides (2)
See Bond (3)
See Indigo Contract.
See Rents (2)

Construction.

See Decrees (1) (2) (3)
See Execution (1)
See Interest (2)
See Mortgage (6)
See Pottah.
See Shipping Order.
See Short-delivery.
See Will (2)
See Zur-i-peshgee Lease.

Contract.

(1) Plaintiff delivered jute to the I. G. S. N. Company at Serajgunge for the delivery at the E. B. Railway Company's station at Sealdah, where freight was payable on delivery and was so paid. A portion of the jute was not delivered, and a suit to recover its value was brought against the E. B. Railway Company. Held, that the suit could not be dismissed on the ground of want of privity without further investigation 240

(2) Defendant agreed to purchase from plaintiff 2,000 maunds of indigo-seed, "guaranteed growth of 1870-71." Defendant's agent took delivery of 865 maunds after full opportunity of examination. Defendant was held to have accepted the 865 maunds as in accordance with the contract although not really so; yet, as plaintiff had not delivered the whole quantity contracted for, he could not recover for the 865 maunds at the contract-rate, but as upon a new contract according to their value at the time 244

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Contract.—(*Continued.*)

(3) Where parties stipulate that on the borrower's failure to re-pay with interest at a certain rate on a certain day, the lender is to be entitled to a different rate of interest, Court must give effect to such stipulation which is not a penalty 373
See Agent.
See Joint Hindoo Family (2)

Contribution.

(1) In a suit for —— by the managers of a joint family estate against other members of the family, the claim was considered inequitable where plaintiffs had failed to show that the assets and liabilities of the alleged joint family had been divided fairly and honestly, and that they had duly accounted to the defendants for anything that had come into their hands 335

(2) A zemindar who holds partly as a *dur-putneedar* is entitled to look to his co-sharers in the zemindaree for —— of Government revenue paid by him to save the entire estate from sale; and the fact of his being a sharer in the *dur-putnee* cannot bind him to recover his over-payments from the *putneedars* 461

(3) In a suit for —— it must be distinctly proved that both parties enjoyed the benefit of the object to the gaining of which they executed a bond jointly ... 530
See Interest (1)

Copies.

When a copy is received, what a Judge should do in order to test its authenticity and that he may come to a definite conclusion as to its genuineness. There is considerable difference between cases in which documents come in as mere links in the evidence and those in which the whole cause depends on proof of the original instrument 285
See Evidence (11)

Co-plaintiffs.

See Death of Plaintiff.

Co-sharers.

(1) A single co-sharer cannot sue for his share of the rent, much less for enhanced rent 408

Page.

Co-sharers.—(*Continued.*)

(2) A co-sharer cannot sue a tenant of the joint estate for his share of the rent unless the tenant has paid or agreed to pay to him separately; consequently a suit for enhancement by him will not lie 414

(3) Although one co-sharer cannot lease out the whole property belonging to himself and the others, he may give a lease of his share binding against himself ... 420

(4) A suit for rent by the 15 annas 6 pies share-holders was held to be maintainable in the absence of dispute as to the extent of their share, and where the 6 pies co-sharer was made a defendant and found to have collected the rents of his share separately ... 452

See Evidence (5)
See Limitation (22)

Costs.

Where the defence is common and not separate, one set of costs should be awarded to all the defendants, even though they appear by separate vakeels ... 188

See Act VIII of 1859 (9)
See Wrongful Attachment.

Court Fees Act.

Construction of the word "furnished" in Section 6 489

Court of Wards.

Held, with reference as well to Section 79 Act IV 1870, as to the justice and equity of the case, that the power of the —— to represent the estate, or bring a suit in behalf of a minor, does not cease with the death of the minor 560

Covenant.

See Mortgage (10)

Criminal Court.

See Principal.

Customs.

See Hindoo Law (8)
See Putneedar (2)

D

Dakhilas.

... *See Act X of* 1859 (7)

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Damages.

(1) In a suit for —— for abuse and assault, plaintiff's position should be considered with a view to the compensation being commensurate with the injury, but not for giving a decree which defendant can never satisfy 280

(2) A suit to recover money as —— measuring the loss to which plaintiff was put by having to pay on behalf of defendant money which defendant had agreed to pay out of the purchase-money, in order to save from sale in execution an estate which plaintiff had purchased from him, is a suit cognizable by a Small Cause Court, and one, therefore, in which no special appeal lies 446

See Cause of Action (2)
See Fishery.
See Jurisdiction (3)
See Limitation (6)
See Wrongful Attachment.

Daughter.

See Hindoo Law (2)

Death of Plaintiff.

In a suit by a Hindoo widow to recover possession of her husband's estate, the cause of action was held to have survived ——, and the irregularity of admitting two claimants to have been cured by consent of parties, the co-plaintiffs being left to settle any question themselves in other proceedings 475

Debts.

See Certificate (4)

Debuttur Lands.

A person who succeeds his father as *shebait* or trustee of —— is not bound by any acts of his father done in fraud of the trust 444

Declaratory Suit.

(1) There is nothing in Section 15 Act VIII of 1859 to prevent the entertainment of a suit to ascertain how the shares of a deceased person are vested, notwithstanding that no overt act has occurred to give rise to relief in the shape of damages or a decree for possession 169

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DECLARATORY SUIT.—(*Continued.*)

(2) Plaintiff's right to a declaratory decree as to the erroneousness of a Magistrate's order under Section 321 Criminal Procedure Code, is not affected by the fact that the order has not been put in force 281

See Act VIII of 1859 (10)
See Alluvial Land (1)
See Onus Probandi (7)

DECREES.

(1) The decision of a Subordinate Judge confirmed on appeal by High Court, as to the amount of costs under a decree, was held to be final; the Officiating Subordinate Judge not being entitled thereafter to put an entirely new construction upon the decree ... 130

(2) Where a decree of the High Court finds a sum due on account of a loan, and goes on to direct payment of costs and interest on the costs, it is rightly construed as making no provision for interest on the sum decreed on the loan 171

(3) Where plaintiffs were ordered to file a new plaint within three months, the period was rightly construed to be within three months of the final decree ... 183

(4) A decree awarding land may be executed, notwithstanding a change caused by the shifting of the river, if the position of the land can be ascertained ... 384

(5) A decree was affirmed in appeal, and the case having come up in special appeal, was remanded on two points by an order not affecting the judgment of the first Court. The defendant (appellant) having defaulted, the Lower Appellate Court dismissed the appeal. HELD that the decree of the first Court was untouched and final 402

(6) In a suit to recover accounts and papers, the Appellate Court's decree, instead of leaving it to be ascertained in execution what accounts and papers were in the hands of the defendant, should have remanded the case for the trial of that issue, and whether they had been wrongfully refused, and form a decision accordingly 409

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DECREES.—(*Continued.*)

(7) Appellant brought a suit under Act X for rent due by a deceased person against his widow as such, and as guardian of her infant son, but obtained a decree against her as sole heiress and representative, on the ground that the son, having been adopted into another family, was not his father's heir. He then brought a suit in the Civil Court and obtained a decree, affirmed by the High Court, declaring that the son was the heir. HELD (by P. C.), that the estate was sold in execution for the debts of the deceased, and that the interest of his widow, as well as of his son (if any), was bound by that decree; that the decree obtained in the Civil Court was merely *inter partes*, and not *in rem*; and that, as against appellant and respondent (who had obtained a decree in the Civil Court against the deceased in his lifetime, but now only sought to enforce it and to impeach the sale in execution of appellant's decree), the appellant was entitled to the benefit resulting from his greater diligence in enforcing his demand 159

See Boundary Questions (2)
See Evidence (6) (11) (14)
See Execution (1) (2) (3) (6)
See Interest (2)
See Limitation (9)
See Mortgage (9)
See Possession (2) (3)
See Set-off (1)

DEED OF COMPROMISE.

See Onus Probandi (9)

DEED OF GIFT.

See Jurisdiction (4)

DEED OF SALE.

See Jurisdiction (4)

DEFAMATION OF CHARACTER.

A suit for damages for —— cannot be maintained against witnesses for evidence given in a judicial proceeding; but may when it is substantially a suit for malicious prosecution. In such a case the *onus* is on plaintiff to prove that defendants were the prosecutors, that they were actuated by malice, and that their proceeding was without reasonable or probable cause 283

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DEFAULT.

See Appeal (1)
See Decrees (5)
See Remand (1)
See Struck off.

DELIVERY OF POSSESSION.

See Act VIII of 1859 (8)

DEPOSIT OF SHARES.

See Money-debt.

DEPUTY COLLECTOR.

See Resumption (2)

DIFFERENCE OF OPINION.

See Arbitration (2)

DIGGING A TANK.

See Breach of Contract (1)

DISMISSAL OF SUIT.

For plaintiff's non-attendance is a penalty not to be inflicted unless upon proof of deliberate disobedience of Court's distinct order to attend 141

DISPOSSESSION.

(1) The zemindar or owner is bound by the —— suffered by his ijaradar 377

(2) A party dispossessed under a certificate of sale not warranted by the sale itself, who has made no complaint to the Court executing, may sue for restoration any time within twelve years 429

See Act VIII of 1859 (5)
See Khas Possession.
See Mesne Profits (8) (9)
See Possession (7)
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DISPUTED POSSESSION.

The real question between two zemindars about certain salt lands relinquished by Government ... 181

DOCUMENT.

See Objections.

DOMICIL.

Quære.—Whether a person, if his —— of origin were Scotch, does not lose that —— and acquire an Indian —— by settling as an indigo-planter in India, and there dying 35

DOWER.

Presumption as regards amount of —— claimed where the widow's possession is not interfered with for a long time 113

See Mahomedan Law (4) (5) (8) (9).
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DOWL-DURKHASTS.

See Registration (1)

DRAWERS AND DRAWEES (*of Hoondees*).

See Hoondees.

DUTY OF COURT.

See Witnesses (2)

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EASEMENT.

See Onus Probandi (5)
See Partition (3)

EDUCATION.

See Minor (2)

EJECTMENT.

(1) During the period that litigation is going on under Clause 5 Section 23 and Section 78 Act X of 1859, for —— and arrears of rent, the defendant's tenancy and obligation to pay rent are in suspense. But, by payment of rent under the latter Section, a continuance of the tenancy is effected, the obligation to pay rent again arises, and the limitation of the right to arrears under Section 32 then begins to run 415

(2) Plaintiffs purchased the rights of B at a sale in execution and obtained symbolical possession; but, on attempting to take manual possession, were ejected by defendant. HELD that his cause of action arose from the ouster ... 464

See Act VIII (B.C.) 1869 (2)
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EKRARNAMAH.

An —— executed between plaintiffs and defendants by which plaintiffs undertook to satisfy any claims to mesne profits that might be advanced by the parties dispossessed, was held to be no protection to defendants in the case of parties dispossessed by plaintiffs 229

ENAM.

See Mortgage (1)

ENDOWMENT.

The mutwallee of a Mahomedan ——, though guilty of gross neglect in the supervision of his cash balances, is entitled to recover from the treasurer's sureties sums misappropriated by the treasurer in the absence of fraud or connivance at the delinquency of the treasurer ... 131

See Mesne Profits (5)

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Enhancement of Rent.

(1) Lands used for other purposes than agriculture and horticulture are not liable to——under Act X of 1859 Section 17, or Act VIII of 1869 (B. C.) Section 18 ... 441

(2) To maintain a suit for —— on the ground mentioned in Clause 3 Section 17 Act X of 1859, it is necessary to prove the existence of the alleged *excess* and the *rate* at which the excess land ought to be assessed ... 558

See Act X of 1859 (1)
See Co-sharer (1) (2)
See Joint Tenure (1)
See Jurisdiction (6) (8)
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Equity (*Rule in Courts of*).

See Hindoo Widow (3)

Error-in-Decree.

See Jurisdiction (11)

Error-in-law.

See Evidence (7) (12) (16)

Estoppel.

(1) An arbitration-award is not binding on an intervenor as a decree in a regular suit 233

(2) In a former suit a decree-holder sought to establish his right in execution to a talook as belonging to his judgment-debtor R R. A defendant (D S) in that suit pleaded that the talook had been conveyed to him by R R under a hibbanamah. It was then decided that the talook did not belong to D S, and was liable to be sold. Held, that it was not open to D S to sue for a declaration of right as against the decree-holder 350

(3) After failing in a former suit to establish her right to certain land as belonging to her *putnee talook*, plaintiff was not allowed to sue again for the same land as belonging to her *mowrosee*, the cause of action being the same ... 351

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Estoppel.—(*Continued.*)

(4) Plaintiff having endeavoured as representative of his father when the reversion opened out, to obtain possession under a decree which declared the father's title as reversioner, was opposed by defendants who obtained a judgment of the High Court that plaintiff's father was no longer heir under the Hindoo law on the ground of supervenient insanity. Plaintiff then sued to establish his own title as heir which was disputed by defendants on the ground that his father was not disqualified by insanity, which was not congenital. Held, that defendant's present plea was estopped by their former defence 422

See Evidence (5)
See Execution (15)
See Mortgage (3)

Eviction.

See Execution (12)
See Suit for Rent (6)

Evidence.

(1) Should receive its due weight and not be rejected from a general distrust of native testimony, nor perjury widely imputed without some grave grounds to support the imputation 1

(2) In a suit regarding a *char*, the survey having been made at a time when neither of the parties held any right in the land, and when both their villages belonged to the same proprietor, was held to be some —— of possession at that time not only of the julkur but of the right of property in the river; and possession under those circumstances to be some —— of title ... 73

(3) The Lower Appellate Court was held to have committed an error in law in admitting a plaint filed in a previous suit as —— against present defendant, and in relying on a former decision which determined no question of right as between present parties with reference to the matter in dispute 151

(4) It is an error in law to reject the ——of weavers because they are weavers by caste, or to accept the——of cultivators because they are cultivators ... 161

(5) A decision between a ryot and a body of co-sharers is not—— between the several co-sharers ... 191

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EVIDENCE—(Continued.)

(6) Decrees obtained by either party to which the other was not a party, or the proceedings of the Revenue authorities, though not binding, should be treated as evidence to which the Court should give such weight as it thinks proper 195

(7) In a suit for possession by a lessee where —— was rejected by reason of misconception of lessee's position and the decision of the case on its merits was thereby affected, the error was held to be an error in law 255

(8) A measurement made by Government from whom plaintiff derives his title, in the absence of any —— to the contrary is admissible in —— of the area found under cultivation 258

(9) Where a pottah 100 years old is found proved by the evidence of witnesses, the omission of the first Court to enquire whether it came from proper custody is not sufficient to invalidate the finding, or to justify the High Court's interference 290

(10) When a plaintiff files a very old *pottah* and *amulnamah* in his possession as their natural custodian, the Court is bound to consider them as ——, and if one of the parties is cited as witness to insist upon his attendance before *deciding* against plaintiff's —— 346

(11) Copies should not be summarily excluded from —— merely because they are not originals when no objection is taken to them, nor should a decision be rested on a decree which is not between the parties or on a decree found to have been fraudulently obtained, without enquiry 378

(12) The judgment of the Lower Appellate Court was reversed as erroneous in law, because it ignored defendant's —— on oath before the Income-Tax officer as to the extent of his holding, and because it dismissed plaintiff's claim to the cesses on account of a trifling difference between the *jumma-wasil-bakee* and *shush-mahee* papers 391

(13) The report of a record-keeper is not admissible in —— ... 400

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EVIDENCE—(Continued.)

(14) A Court finding that the amount of rent stated in an old decree had never been paid, but that for 20 years subsequently a reduced rent had been paid, came to the conclusion that the decree had been abandoned by the parties, or treated by them as a matter which was not to regulate the amount of rent. HELD that there was no error of law in this finding ... 418

(15) Where a suit between two ryots of the same zemindar was decreed by the first Court upon a verified *kyfeut* put in by the zemindar, the Lower Appellate Court holding that the *kyfeut* was not admissible in —— dismissed the suit without enforcing the attendance of the zemindar. HELD that the Lower Appellate Court ought to have enforced the zemindar's attendance and examined him ... 427

(16) Weighing evidence with some indirect reference to probabilities is no error of law ... 472

(17) The possession of receipts for Government revenue is no proof, or at best very weak proof, of possession of property ... 490

(18) It is no valid reason to disbelieve the —— of a witness who swore that he had received the amount of a decree from plaintiff, when the money was paid by plaintiff's agent 502

(19) A Judge cannot refuse to rely upon the —— of witnesses produced by one party merely because the other party says from beforehand that he and the witnesses are not on good terms ... 550

(20) A Subordinate Judge was justified in using a decree between other parties to explain an apparent inconsistency between certain statements in the plaint and in the —— of the plaintiff's witnesses on the ground of which inconsistency the Moonsiff had rejected that ——, and that the non-filing of that decree in the first Court was a matter within the discretion of the Sub-Judge, and was no ground for reversing a Judgment... 558

See Act VIII of 1859 (14) (15)
See Act X of 1859 (6) (7)
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See Ameens (3) (5) (8) (9)
See Appellate Court (1) (2) (5)
See Bond (3)
See Boundary Questions.
See Copies.
See Joint Hindoo Family (1)
See Local Investigation (2)
See Mortgage (1)
See Partition (6)
See Presumption (1)
See Privy Council Rulings (6)
See Purdah Women (1)
See Settlement Papers.
See Solehnamah.
See Summons.
See Suit for Rent (4)

EXECUTION.

(1) In —— a decree must be construed by its own terms, and not by the plaint. In a joint-decree —— cannot proceed upon an application to execute an aliquot part 19

(2) When no interest is given in a decree, none can be recovered in —— 19

(3) When an application for —— is contrary to the terms of the decree, the High Court cannot in appeal allow the application to be amended 19

(4) A decree on bond-debts was directed to be satisfied, by the sale of the mortgaged property, and if that were insufficient, by the sale of any other property belonging to the judgment-debtor ... 62

(5) A Collector has no right to refuse a *bonâ fide* application for —— made within time, because he thinks it was made only "to keep the case going" 67

(6) Before staying —— of a decree or requiring the decree-holder to give security under Section 36 Act XXIII of 1861, probable cause must be shown of the judgment-debtor's inability to recover the money if the decree be reversed 69

(7) A decree-holder's application for attachment of certain property as that of his judgment-debtor and in the possession of the heir of the latter, cannot be rejected simply because on a former application the decree-holder had failed to show sufficient grounds for proceeding against the same property 97

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EXECUTION.—(*Continued.*)

(8) No appeal lies from an order of a Lower Court refusing an application by one decree-holder under Section 207 Act VIII of 1859 to execute the whole of a joint-decree to the exclusion of his co-decree-holder ... 136

(9) The object of Section 3 Act III (B. C.) 1870 is that a judgment-debtor shall not be harassed by two sets of proceedings in —— simultaneously carried on in two different Courts 139

(10) After an infructuous —— against the judgment-debtor's property, the Court is bound, upon application made, to issue —— against his person, and the burden of proof should be put on the debtor when arrested to show that he has no means of satisfying the debt, and that he has not been guilty of misconduct 165

(11) A Judge is not bound, under Section 243 Act VIII of 1859, to allow a judgment-debtor a year's time to pay his decree without good and sufficient reason ... 193

(12) An application in —— of a decree for possession, asking for eviction of defendant is different from an application for possession under Section 224 Act VIII of 1859, and may be refused where there are no grounds for refusing the latter except as to decree-holder's request for an order on the ryots to pay rent to him ... 236

(13) A decree-holder (A) in —— sold certain lands belonging to the judgment-debtor; but before being allowed actual possession, she was required to give security for the proceeds of the sale. Some time elapsing before she found the security, the lands were attached and sold in —— of R's decree, and purchased and taken possession of by him. HELD that A's omission to give security could not affect her title by the previous sale, and that the order for the second sale was an error 289

(14) A District Judge was held to have no authority in an —— case not before him to direct a precept to be sent to a Sub-Judge, upon which precept the latter stayed execution; the decree-holder being entitled to proper execution 341

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EXECUTION.—(*Continued.*)

(15) A judgment-creditor, by putting up the rights and interests of his judgment-debtor in a talook for sale in——is not estopped from afterwards claiming a portion of that talook under a different title, *e. g.* under a mortgage.. 342

(16) An application to arrest which is not carried out is a *bonâ fide* proceeding only when it can be shown that circumstances render it unnecessary to proceed further in——thereof 355

(17) No appeal will lie from an order of a Lower Court refusing an application by one decree-holder under Section 207 Act VIII of 1859 to execute the whole of a joint-decree. Procedure incumbent on the Court with a view to the protection of the interests of decree-holders not before the Court 415

(18) A subsequent declaration of illegitimacy cannot affect the right of persons who were parties to a decree when it was made to execute the decree which is in their names ... 428

(19) Where a decree of 1850 could not be executed by the Revenue authorities in consequence of the transfer of their jurisdiction to the Civil Courts, it was HELD that the latter had jurisdiction to execute 471

(20) Decree-holders are *primâ facie* entitled to take proceedings in —— and draw the money *standing* to their credit, without a certificate under Act XXVII of 1860, when there are no debts to be collected as due to the estate of a deceased decree-holder ... 510

See Act VIII of 1859 (1) (3) (13)
See Attachment (1) (3) (4)
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(8) An arrangement between a Mahomedan widow (a claimant for unpaid dower) and son, whereby the latter relinquished his share in his late father's property, having been construed by the High Court as giving the mother only a life-interest, the son retaining the legal reversion; the ruling was reversed by the Privy Council who were of opinion that the creation of such a life-estate did not appear consistent with Mahomedan usage 525

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(1) The order for the issuing of a —— is not a "judgment" within the meaning of Clause 15 of the Letters Patent of 1865, and is not therefore open to appeal ... 364
(2) The High Court has still the power, which the Supreme Court had, to issue a writ of —— in certain cases 364

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MARRIAGE.

Where a man and woman, after cohabiting for some time, became Mahomedans and contracted a Mahomedan ——, the man being already the husband in Christian marriage of a living Christian wife, the Privy Council, agreeing with the High Court, N. W. P., doubted the validity of the Mahomedan —— ... 77
See Legitimacy.

MEASUREMENT (*by Government*).
See Evidence (8)

MEASUREMENT.
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MERGER.
See Right of Occupancy (3)

MESNE PROFITS.

(1) A successful claimant in ejectment is entitled to —— not only against the judgment-debtor, but also against an *ijaradar* who has taken an *ijara* of the property pending litigation; the position of such *ijaradar* as to title being wholly different from that of a ryot 148
(2) Rule for general measurement of the loss of the party wrongfully kept out of possession .. 156
(3) As regards the produce and value of lands in such cases, the judgment-debtor should produce his accounts and prove the real assets 156
(4) In calculating six years —— due to a decree-holder, the cause of action was held to have arisen at the end of the year in which the ouster took place 208
(5) In the case of endowed lands, the judgment-debtor is entitled to a deduction from the amount of —— ascertained to be due, of the expences incurred by him in carrying on the worship of idols 208
(6) Where neither period nor amount of —— is specified in the decree, they are left to be ascertained in execution, and where the suit was instituted after Act XIV of 1859 came into operation, the decree-holder is not entitled to —— for more than six years prior to date of suit ... 209
(7) Though the practice is to make interest payable from the date on which —— are assessed, a party is not debarred from suing for —— with interest ... 228

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MESNE PROFITS.—(*Continued.*)

(8) The mode of estimating ——, in respect of a *talook* is to ascertain the amount which could have been realized if claimant had not been dispossessed by the wrongful act of defendant: the revenue paid by the latter cannot be treated as an element in the calculation, but the rent payable to him ought to be deducted from the gross assets 257

(9) The same rule applies where the wrong-doer is the landlord ... 257

(10) In the execution of a decree for possession with mesne profits of certain estates, where, owing to the mode in which the Government revenue has been assessed upon the estates in question and estates in another district, the revenue cannot be respectively apportioned, the Court has no jurisdiction to determine the —— for the latter estates 298

(11) A Court ought not to assess —— by relying upon *jumma-bundy* papers made by Revenue officers many years ago without looking into the actual proceeds during the period of dispossession 298

(12) An ordinary cultivating ryot, recovering possession after ejectment, is entitled to get as —— the net amount that he himself would have got from the land had it remained in his own cultivation 348

See Ekrarnamah.
See Fishery.
See Jurisdiction (11)
See Res Adjudicata (2)

MINOR.

(1) The Privy Council affirmed an order of the High Court, confirming the order of a Zillah Judge removing an infant ward, the issue of a Christian marriage, from the custody and guardianship of her mother and the mother's second husband who had both become Mahomedans and contracted a Mahomedan marriage, the second husband being already the husband in Christian marriage of a living Christian wife 77

(2) The Privy Council suggested, in the selection of a school in such cases, the desirableness of having some independent trustworthy person as guardian to whom the ward could apply, and whose duty would be to communicate to the Court any matter which might arise 77

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MINOR.—(*Continued.*)

(3) HELD by Privy Council, that from the necessity of the case, a child in India, under ordinary circumstances, must be presumed to have his father's religion and his corresponding civil and social *status*, and that therefore it was ordinarily, and in the absence of controlling circumstances, the duty of a guardian to train his infant ward in such religion ... 77

(4) In a suit against a minor's father as his guardian during his minority, where the good faith of the parties is not impugned, the minor is liable 374

(5) A Court is competent under Section 3 Act XL of 1858 to permit any relative of a —— to institute or defend a suit on his behalf without a certificate under that Act 492

(6) In not removing a ——, 5½ years old from the custody of his natural mother, a Judge was held to have not improperly exercised the discretion vested in him by Section 3 Act IX of 1861 ... 561

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MISCONDUCT.

See Purchaser (5)

MISDESCRIPTION.

See Suit for Rent (2)

MISTRANSLATION.

See Privy Council Rulings (5)

MITAKSHARA.

See Hindoo Law (1) (5)

MOFUSSIL.

See Bailment.

MOKURUREE POTTAH.

A mokururreedar, who, according to his pottah, is entitled to possession at once, and never gets possession, may be bound by limitation, and statements made by the zemindar in petitions filed in Court are not admissions under Act XIV of 1859 to take a case out of the ordinary rule of limitation 271

See Possession (1)

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MONEY-DEBT.

A right of lien and power of sale by virtue of a power-of-attorney over certain shares pledged as security for the repayment of a loan originally secured by a first promissory note, is not lost by the lender taking subsequently a second promissory note in lieu of the first which is receipted and returned, the second promissory note being given in security for the same loan, and no new debt being created. HELD, also, that the borrower is not justified in trying to prevent the lender selling by revoking the power-of-attorney 201

MONEY-DECREE.

See Purchaser (2)

MOOKHTARS.

A mere *mookhtar* is not the recognized agent of the judgment-debtor on whom notice can be rightly served within the meaning of the Criminal Procedure Code 389

MOOSTAGIRI RIGHTS.

See Possession (4)

MORTGAGE.

(1) When appellants (plaintiffs) claimed to be entitled to redeem property alleged to be held by respondents as mortgagees, and the latter claimed to hold it as an *enam* free from the payment of Government revenue, and were found to have held it under this title since 1824, the Privy Council refused to disturb their title thus fortified by long enjoyment without clear and unmistakable proof of the alleged —— ... 8

(2) In a suit by a mortgagee after foreclosure to recover possession, where one of the defendants (who was in possession of a part of the property after purchase at a sale in execution) pleaded collusion between mortgagor and mortgagees in fraud of creditors, the Privy Council justified a finding of the Principal Sudder Ameen that the —— was not a *boná fide* transaction, because it was not only necessary for, but in the power of, the mortgagee to produce better evidence than he had given to establish the reality and *boná fides* of the transaction 9

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MORTGAGE.—(*Continued.*)

(3) Where defendant, in consideration of money advanced by S, entered into a mortgage with plaintiff who sues for possession after foreclosure, it does not lie in defendant's mouth to object to the suit brought by S in plaintiff's name 192

(4) After a mortgagee had foreclosed, obtained a decree, and been put into symbolical possession, the zemindar brought a summary suit for rent against the heirs of the mortgagor, obtained an *ex parte* decree, and in execution sold the talooks at a grossly inadequate price to his *mookhtar*, who, as well as zemindar, had full notice of mortgagee's title before the decree for sale. HELD (by P. C.) that, under the Regulations in force at the time, such a sale against the real owner was invalid, and zemindars had no power to sell tenures of this kind for arrears of rent as a right inherent in or incident to the tenure, and no such power rightfully exists, unless by special stipulation, independently of the Regulations 197

(5) If a notice of foreclosure addressed to a deceased mortgagor reaches his representatives, they are bound to pay the amount of the —— 230

(6) According to the Privy Council's construction of a mortgage agreement, it was contended that the interest accruing upon the debt might be set off against the rents and profits, the mortgagee accounting for any such, and interest thereon, over and above the interest due upon the debt. HELD that Section 7 Regulation XV of 1793 did not apply ... 261

(7) Under an assignment executed by the mortgagor, it was arranged that the mortgagee should pay himself from the rents of a *ticca* lease at a certain rate annually until the realization of the mortgage-debt with interest. HELD that, until something happened to disturb the arrangement, the mortgagee could not call for payment of the balance, or realize it from the sale of the mortgaged property 263

(8) A mortgagor cannot ask for a decree for possession without tendering the whole of the —— debt 342

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MORTGAGE.—(*Continued.*)

(9). In a suit by mortgagor for possession of mortgaged land, where the sum tendered is insufficient to liquidate the mortgage-debt, the plaintiff has no right to a decree contingent upon his paying such sum as shall be found due 408

(10). A —— bond which covenanted that, until the debt was paid off, the mortgagor should not create any new incumbrance upon the property mortgaged, was held to prevail over a subsequent lease assigning the rents in liquidation of a debt ... 560

See Redemption.
See Shares (of Decree).

MORTGAGED PROPERTY.

See Execution (4)
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MUNICIPALITIES.

See Act III (B.C.) of 1864.

MUTATION (*of Names*).

See Registration (3)

MUTWULLEE.

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NECESSITY.

See Mahomedan Law (7)

NEW EVIDENCE.

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NEW PLAINT.

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NEW TRIAL.

A Subordinate Judge may, on the ground of fraud and false personation, grant a —— where judgment has been passed on confession 48

NIJJOTE.

This term as used in a pottah was held to mean not lands cultivated by the cultivator himself, but lands held by the zemindars in their own possession or their own private lands 404

NON-ATTENDANCE OF PLAINTIFF.

See Dismissal of Suit.

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NON-TRAVERSE.

See Admission (1)

NOTICE (*Service of*).

See Putneedar. (1)

NOTICE.

(1). Informality in a —— of enhancement of rent, was not allowed to prevail where the defect was made good by the evidence, and the tenant knew exactly the nature of the demand he had to meet 32

(2). A clerical omission which in no way prejudices defendant, cannot invalidate a —— of enhancement under Section 17 Act X of 1859, where he knows the grounds on which the demand is made ... 354

(3) A —— of enhancement based on the first of the grounds specified in Section 17 Act X of 1859, and specifying "that the rates paid are below those paid for similar lands in adjacent places" was held to be bad 355

(4) Where a ryot well knew and pleaded to the grounds of enhancement, the omission of the words "same class of ryots" in the —— was held not fatal to the plaintiff's suit 495

(5) Nor was the omission of the words "otherwise than by the agency and at the expense of the ryot" considered material where the plaintiff distinctly stated in his plaint that the productive powers of the soil had increased owing to the land having been irrigated from his *khas* tank ... 495

See Act X of 1859 (3) (4)
See Insolvency (3)
See Local Investigation (1)
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NUGDEE LANDS.

See Settlement-papers.

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OBJECTIONS

By an Appellate Court to a document, after witnesses to it have been examined and dismissed without being questioned as to its genuineness, are unfair and unsafe ... 502

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OCCUPANCY.

The permissive —— of land does not give a right to possession or compensation when landlord desires to determine the tenancy even if occupant's huts have been standing there many years and he has surrounded it with a *kutcha-pucka* wall. Section 6 Act X of 1859 has no bearing on such a case 383

OFFICIAL ASSIGNEE.

See Attachment (5)
See Insolvency (1)
See Insolvency Act.

OLD DOCUMENTS.

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ONUS PROBANDI.

(1) Where a defendant pleaded that the *ousut talook* in dispute, which they had hitherto claimed as their purchase for valuable consideration, was a mere fiction, the —— was held to lie on them ... 15
(2) In a suit for malicious prosecution without probable cause ... 101
(3) Where defendant has an award under Section 15 Act XIV of 1859, he cannot be called upon to prove his case until plaintiff specifically proves his allegation of possession and dispossession... 161
(4) In a suit between zemindars as to salt lands relinquished by Government where one is in possession under a possessory award of the Criminal authorities 181
(5) In a case where an easement is claimed over plaintiff's water ... 281
(6) In a suit for a declaration of right to a certain *julkur* or fishery 400
(7) In a suit for confirmation of possession and for declaration of plaintiff's *lakhiraj* and *mokurruree* title 449
(8) Where a defendant admits the cause of action and pleads payment 509
(9) Where a deed of compromise clearly showed that the lands granted to plaintiff were in exchange for the alleged *khoodkast* and *khamar* lands of her father: HELD that the —— was not on the defendants as to the fact of the exchange, but on the plaintiff to start her case by some *primâ facie* evidence 559

See Compromise (1)
See Defamation of Character.
See Execution (20)
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OUSTER.

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OUSUT TALOOK.

See Onus Probandi (1)
See Purchaser (1)

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PARTIES.

See Code of Civil Procedure (4)
See Evidence (10)
See Special Appeal (4)
See Suit for Rent (3)

PARTITION.

(1) A sale notification having been issued under Sections 5 and 6 Act XI of 1859, with a view to realize a fine which had been imposed for non-attendance after due notice under Regulation XIX of 1814, the proprietors before the day fixed for sale tendered the fine; but the tender was refused, and the estate sold: HELD that the sale was illegal, irrespective of the question of substantial injury 21
(2) Where plaintiff and defendant were in one sense purchasers from the same vendor, although acquiring their titles from sales by the Collector, and defendant was in possession of the original talook, together with the *kalabadee mehal* belonging to the plaintiff, the latter was held entitled to demand as against the defendant an adjudication of a line of boundary 26
(3) In a suit for —— it was held that the right of the plaintiff as a joint owner could not be questioned unless barred by limitation, or by any right of easement which the defendants enjoyed; and that the defendants as joint proprietors with plaintiff could not, by the use of the land, with the tacit assent of the plaintiff,

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PARTITION.—(*Continued.*)

create a right contrary to his interest, nor would their use of it before they became proprietors create such right... ... 74

(4) In giving a decree for —— the Court refused to make any decree permitting plaintiff to build a house, but left him to do what he pleased with his own land consistently with the legal rights of others 74

(5) In effecting a —— of a *lakhiraj* tenure, a Civil Court may well be guided by the Rules of Regulation XIX of 1814 so far as applicable 137

(6) A suit for rent of a share consequent on a —— under Regulation XIX of 1814, having been dismissed because plaintiff could not file either *jumma-wasil-bakee* or *kubooleut:* HELD that, before dismissing the suit, the Lower Appellate Court was bound to put the intervenor to the proof that the land appertained to the share which he got from his vendor who obtained it by inheritance from one of the shareholders and to notice plaintiff's evidence; it being no defence to the intervenor that he was not invited to attend the *butwara* ... 143

(7) The acts of different members of a family in allowing separate portions of the banks of a tank to be held severally from time immemorial, constitute a separation which cannot be disturbed at the instance of one member without proof that he has jointly or otherwise held possession within 12 years 210

(8) *Butwarra* proceedings conducted with the assent of guardians do not bind a minor unless it is found that the guardians acted *bonâ fide* and with a due regard to the interests of the minor ... 217

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PART PERFORMANCE.

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PERMISSIVE ENJOYMENT.

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PETITION.

(1) A —— transferring rights cannot be regarded as collusive where no attempt at fraud is proved ... 218

(2) An unregistered —— cannot operate as a transfer of rights, or be used in evidence before a Court. 218

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PLAINTIFF.

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See Remand (2)

PLEADERS.

(1) A pleader is not guilty of grossly improper conduct, but complies sufficiently with the 2nd of the rules of 23rd May 1870, if he examines only *copies* of the record before he draws and certifies the grounds of appeal 338

(2) In a case of an application to stay execution on the ground of compromise, a pleader's omission to examine the record, or to verify the statements made to him by the parties, or to obtain the concurrence or authority of his senior, was held not to amount to grossly improper conduct within the meaning of Act XX of 1865 ... 405

PLEADINGS.

See Limitation (14)

POSITION (*Plaintiff's*).

See Damages (1)

POSSESSION.

(1) In a suit for —— of a tenure on the allegation that plaintiff's father had held it on a *mokururree pottah* till his death, though the pottah was found invalid, the plaintiff was held entitled to —— of the tenure which admittedly was his father's, and which it had not been proved that he ever abandoned 47

(2) Where a party remains in undisturbed —— for 12 years, notwithstanding a decree for —— obtained by another, the former acquires a good title, the decree obtained intermediately becoming null under Section 20 Act XIV of 1859 119

(3) In this country the period of —— sufficient to bar the remedy is also sufficient to transfer the right 119

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Possession.—(*Continued.*)

(4) A —— which amounts simply to a right to collect rent from ryots is not such a —— as confers a right of occupancy 242

(5) The legal principle that no suit for confirmation of —— will lie if ——at the time is not shown, refers to cases where no —— of any kind is shown within a reasonable time before suit, not where legal —— under a decree has been found 421

(6) Possession for (say) 30 years gives a title by prescription, notwithstanding any title to the contrary however good 490

(7) In a suit to recover —— of a jote from which plaintiff had been ousted by defendant, it was HELD that the fact of ouster on a particular date was not material; the real issue being whether plaintiff was entitled to the *jote*, and was kept out of it by defendant or not 501

(8) Of a Collectorate *challan* by a mookhtar is *primâ facie* proof of payment by him 502

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See Right of Occupancy (2)

Possessory Award.

See Limitation (18)
See Onus Probandi (4)

Postponement.

See Code of Civil Procedure (4)
See Sales in Execution (2)

Pottah.

Where a —— after providing for payment "year by year, month by month, and *kist by kist*" contained a distinct declaration that, if the *dur-putneedar* did not at the end of each month pay up the amount due for that month, he should pay interest from the 1st of the succeeding month, it was held that the *dur-putneedar* was bound to pay rent in monthly *kists* and was liable to interest on failure 173

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Power-of-Attorney.

See Money-debt.

Practice.

See Stamps (2)

Pre-emption.

(1) A claimant of the right of—— who made a demand three times offering the money and demanding back the *kobala*, and who upon refusal of vendor and vendee constituted the parties present his witnesses, was held to have sufficiently complied with the requirements of Mahomedan law, the use of the precise words given there not being imperative. 264

(2) The right of——exists among Hindoos in Behar 264

(3) A sharer in the appendages has not an equal right to——with a sharer in the body of the estate 343

Prescription.

See Possession (6)

Presumption.

(1) The ordinary legal and reasonable presumptions of fact must not be lost sight of in the trial of Indian cases, nor an entire history thrown aside because the evidence, or some of the evidence, of some of the witnesses was incredible or untrustworthy ... 1

(2) In a suit for enhancement of rent where a Subordinate Judge decided that the tenure originated at the time a kuboolent (of the year 1200) had been given, and that there was no——under Section 4 Act VIII (B.C.) of 1869 of uniform rent, there was held to be no error of law... 349

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Price.

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Principal.

The acquittal of the——in a Criminal Court on a charge of misappropriation of funds, is no bar to a civil action against the sureties ... 131

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PRINCIPAL AND AGENT.

In a suit to set aside a lease as granted without authority by an agent to the defendant, who was the *Naib* of the estate, HELD that the owner must be presumed to know what was being done on her behalf by the agent, and that the mere circumstance of the rents being low did not give rise to the presumption of fraudulent conduct or concealment on the part of the *Naib*. Even if the original transaction were liable to be set aside, the ratification by a person having authority from the owner to make enquiries and satisfy what had been done, would render it valid ... 301

PRIORITY.

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PRIVY COUNCIL RULINGS.

(1) Superfluous documents in record of appeal to —— 106

(2) Will not interfere with the finding of an Indian Court upon a question of boundary except there has been a plain miscarriage in the conduct or decision of the case constituting a tangible ground for interference ... 285

(3) *Quære.*—Whether the so-called *decrees* of the Privy Council are not subject to any law of limitation; or whether they are not merely orders of Her Majesty in Council, prescribing what shall be the final decree to be executed by the ordinary process of the Courts of India 292

(4) The presentation of an appeal to England to destroy a decree cannot be taken as a proceeding to keep it in force though, if it is allowed, the respondent is entitled to sue out execution at any time within three years after final dismissal of the appeal ... 292

(5) In confirming a decree of the High Court, the —— left it to be determined by that Court in execution whether respondents were entitled to the full amount claimed. As the doubt was found to be owing to a mistranslation of the word *shohodur* (uterine brothers), the Court allowed execution for the whole amount ... 340

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PRIVY COUNCIL RULINGS.—(*Continued.*)

(6) With reference to the laxity of Indian Courts in admitting documents, the Privy Council remarked that while it might not be desirable in all cases to apply strict and technical rules to the admissibility of evidence in Courts in India, the substantial principles on which the authenticity and value of all evidence rests should be observed ... 562

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See Act XIV of 1859 (3)
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PROCEDURE.

Where a purchaser at a sale (in execution) of rights and interests in a share of an estate, sues for possession of that share, and the sale certificate sets forth the title passed by the sale and the boundaries of the estate ... 344

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PROMISSORY NOTE.

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PROPERTY IN ZENANA.

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PROPRIETARY RIGHT.

(1) A settlement with Government for revenue does not establish —— in the land, though the settlement and possession under it being evidence of a right to possession are so far evidence of —— ... 41

(2) In a dispute between two grandsons as to —— in a village which had been registered in the name of a member of the elder branch of the family, the PRIVY COUNCIL held that the *ratio decidendi*, according to which the legal presumption was in favor of one grandson claiming against another and the *onus probandi* placed on the one claiming to be sole possessor, was more consistent with equity and common sense than requiring the party who claims a joint interest to prove that the registered proprietor had accounted to him for his proportionate share of the profits 185

See Malikana.

PURCHASE (*of Immoveable Property*).

Where a suit to set aside the —— made long before, is brought after the death of all the parties who could have explained the transaction, the evidence must be looked at with great jealousy ... 259

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PURCHASER.

(1) Where the rights of persons are purchased not only in an ousut talook, but also in the superior talooks within which it is situated, the purchaser (if the purchase of the superior talooks is valid) succeeds to all the rights of the persons first mentioned,

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PURCHASER.—(*Continued.*)

both as *talookdars* and as *ousut talookdars*, and his title cannot be affected by a former decision to which he was not a party ... 15

(2) In a suit by a —— at a sale in execution of a money-decree against defendants, claiming on the allegation of prior title, the latter proved that the *shikmee* pottah which they held from plaintiff's mortgagor had been executed 4 years before plaintiff's purchase and was duly registered, and otherwise established the *bonâ fides* of the transaction; and as plaintiff did not adduce sufficient evidence of a rebutting character, his suit was dismissed 25

(3) Where a party has purchased joint family property under circumstances which prove that he must have had notice of its having been dedicated to religious purposes, and does not show that he made any enquiries as to his grounds for supposing that the trust was legally at an end, he cannot exonerate the property from the trust attached to it ... 41

(4) A —— from the judgment-debtor was held entitled to recover the amount paid by him on account of previous mortgages, when, in making those payments, he merely acted for the debtor who had borrowed the money from him, and what he did was to see that that money so borrowed was properly applied 480

(5) Where the whole of a property was sold in execution, the purchasers agreeing as to shares, the Court was unable because of the apparent misconduct of one of the purchasers, who after having acted as pleader for the opposite party, had now become one of the purchasers, to limit the extent of that sale or to set aside the said pleader's title ... 480

(6) A —— at an auction-sale for arrears of revenue is to be bound not by what is represented to him by the Seristadar and other officers, but by the published conditions of the sale 531

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PURDAH WOMEN.

(1) A suit against —— was held by the Privy Council (dissenting from the Agra High Court) to have failed, as there was no proof that the deed upon which the suit was brought had been signed by the women or by any person authorized by them 393

(2) When a conveyance by a purdah woman is impeached, there ought to be clear evidence, not of the mere signature by the party, but that the secluded woman had the means of knowing what she was about 523

PUTNEE.

(1) One of the several grantors of a ——pottah, cannot get rid of the——as to a share in it, by a suit as *ijaradar* of that share for rent against the ryots. The —— must be upheld till set aside by regular suit 221

(2) A——-talook sold for arrears of rent passes free of all encumbrances to purchaser whose cause of action, according to Section 7 Act XIV of 1859, arises from the date of sale 407

(3) *Semble.*—The purchaser cannot recover possession with damages without previous notice or demand of possession 407

(4) Where the sale of a putnee for default was reversed on the ground of notice not having been served as required by law, the purchaser was held entitled to a refund and to his costs from zemindar 447

(5) A zemindar cannot bring a civil suit to compel the purchaser of a ——sold for arrears of rent, to furnish security for the amount of half the yearly jumma; his remedy being under Regulation VIII of 1819, Sections 5 and 7, to appoint his own *sezawul* and deduct his own rents before making over the surplus to the putneedar, who takes all the risk of the attachment. The remedy of the zemindar is not affected by the grant by him of a *dur-putnee* to another party 470

PUTNEEDAR.

(1) Personal service of notice of sale on a defaulting —— is not a sufficient service under Regulation VIII of 1819 Section 8 Clause 2. The notice should be stuck up in the cutcherry of the Collector and copy published either at the defaulter's cutcherry, or at the principal town or village on his land 447

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PUTNEEDAR.—(*Continued.*)

(2) It is contrary to the usage of the country for a —— to pay his rents by monthly *kists*, without a special agreement for that purpose 471

(3) A zemindar and putneedars being bound together by the terms of a written contract, the zemindar can only sue for rent on the terms of that contract; but not for rent for the use and occupation of his land 494

See Contribution (2)
See Settlement (2)
See Splitting a Tenure.

PUTNEE TALOOK.

(1) Where four suits are brought to set aside the sale of a —— by four joint-tenants, two of whom are not estopped under Section 7 Act VIII of 1859, the sale cannot in equity be good or bad in part, but must stand or fall for the whole talook. But if one of the joint-tenants in a former suit claimed a 2-anna instead of a 4-anna share, he cannot now be allowed to supplement the claim, or take interests independently of the sale ... 122

(2) On the death of a registered putneedar, a zemindar is not bound to recognize any one as his tenant without registration in his serishta, nor is he prevented from putting in a *sezawul* to collect the rents until a declaration of the rights of the deceased putneedar's heirs 122

(3) Before the holder of a share can sue a putneedar to register his share, he should apply for registration to the putneedar under Section 27 Act X of 1859 ... 169

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QUINQUENNIAL REGISTERS.

According to Section 14 Regulation XLVIII of 1793, no counterpart ——in the native language are authentic unless attested by the Zillah Judge 400

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RAILWAY COMPANY.

Suit against a —— for the value of goods consigned to plaintiff, which defendants had received for delivery to plaintiff, according to a railway receipt; but which they had delivered to T and Co.: HELD that the handing over by consignors of the railway receipt to plaintiff passed the right of possession and property to plaintiff who had a substantial interest in the consignment, and that the authority given to him by the consignor was coupled with an interest, which neither they nor defendants could revoke; and as defendants had no notice of T and Co.'s equitable title they were not justified in delivering to him, and were liable for the wrongful delivery 532

RAILWAY RECEIPT.

See Railway Company.

RAMGHUR RAJ.

Upon the authority of decided cases, as well as upon the evidence of custom in the family, it was held that the——being an ancestral impartible estate, and the family an undivided family governed by the *Mitakhshara*, the plaintiff as eldest male heir was entitled to succeed to the dignity and estates of the family in preference to the mother of the late infant Rajah, and widow of his father the last actual Rajah ... 316

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A —— on back of promissory note or bill of exchange is capable of being explained and may import merely substitution of another bill or note for the same debt 201

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A *mokurrureedar* holding under a mortgagor has no right to redeem when the mortgage comes to an end 271

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(1) A——cannot be made upon an application for review of judgment 94

(2) Section 28 Act XXIII of 1861 merely authorizes the——of such questions as may arise in the trial of the suit, not of such as arise on an application for review of judgment... 95

REGISTRATION.

(1) *A dowl-durkhast*, being only a preliminary to a lease, does not need —— 509

(2) In a suit under Section 53 Act XX of 1866 to recover two instalments, one due more than a year previously, the Small Cause Court, concluding that the bond was not executed by defendant and was not properly registered, dismissed the suit. The High Court refused to allow the plaintiff to waive the first instalment and alter the nature of his suit with a view to obtain a decree on the other instalment 514

(3) In cases of transactions by purdah women mere —— does go far to corroborate the proof of their validity, unless a mutation of names takes place which, if done under a mookhtarnamah, has not the same effect against a purdah woman as against a person capable of acting for himself ... 523

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RE-HEARING.

See Review (7)

RELIEF (*Special and General*).
See Hindoo Widow (3)

RELIGION.
See Minor (3)

RELIGIOUS TRUST.

The appropriation of property to the religious services of a family has never, in modern times at least, been held to require the assent of the State; and where such a trust appears to be established as to the lands dedicated, it lies on the opposite party to show some subsequent legal conversion of the lands to the ordinary uses of property 41
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(1) A case having been remanded in appeal, a reasonable time was given to the parties, and the petitioner not having appeared, the Lower Court treated it as a case of default; whereupon petitioner made application under Section 376 Act VIII of 1859. HELD that as this was not the proper form in which to apply, and as the time for applying had expired, the application was properly refused 70
(2) A Judge was held to be perfectly justified in remanding a case which was decided without a fair opportunity being given to the plaintiff to know the line of defence he had to meet 446
(3) A Judge who, after disposing of a case on the only point which the Moonsiff had decided, *viz.*, whether there was a cause of action, and satisfying himself that there was not sufficient evidence to enable him (Judge) to decide upon its merits, was held right in remanding the case to the Moonsiff 466
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(1) Money due to a plaintiff should not be denied by the Court's decision on the ground that in a former suit defendant was willing to pay and consequently that suit was unnecessary 380
(2) The cause of action in a suit for rent by a joint-tenant against his co-sharers is different from that in a suit for mesne profits . 387
(3) The plea of —— was held to apply where a question which was raised in the present suit had been decided in a former suit wherein plaintiff's mother had appeared as his guardian and it was presumed that she had the Court's permission so to appear 492
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The Government holding a —— holds it as a private zemindar, and is entitled under Regulation XI of 1825 to claim accretions... 163

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(1) An *ex parte* decree in a —— suit, where the summons has been issued after the death of one of the defendants and his representatives have not been made parties is infructuous as against such defendant, even though the summons was affixed to the gate of

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RESUMPTION.—(*Continued.*)

his house, and is not binding against any defendant who was not summoned at all 357

(2) The title of the purchaser of an estate settled by Government after —— must depend upon the —— decree, notwithstanding the opinion of a Deputy Collector to the contrary 557

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A suit by —— was held to have been properly brought before the Hindoo widow's death where the latter was colluding with other defendants claiming under a hostile title and the effect of such collusion would have been to extinguish plaintiffs' rights by the operation of the law of limitation. In such a case possession was decreed to reversioner as manager during the widow's lifetime. 11
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REVIEW.

(1) A decision of the Privy Council in 1871 as to a question of fact in another suit, or the pendency of the appeal in the High Court, is no cause for not preferring an application for —— of a judgment passed in May 1866 within 90 days from decree 163

(2) It is not sufficient ground for a —— of judgment passed on special appeal that the point on which Court's judgment was based was not raised in the Lower Courts 182

(3) An application for —— if out of time cannot be admitted without special and sufficient cause shown for the delay 230

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(4) A —— cannot be admitted for the purpose of a further investigation when there is nothing to show that the further evidence sought to be laid before the Court might not have been produced at the original trial 230

(5) Time for obtaining copies of judgment should not be allowed in applications for —— ... 230

(6) A Judge, admitting a —— on the ground of new evidence, must first satisfy himself on legal evidence that the new matter was not known to the applicant, or could not be adduced by him when the decree was passed ... 458

(7) Applicants for —— asking for a re-hearing of a matter which has been already argued and considered, and raising a point which has not, but might have, been raised previously, are bound to show some good ground for the indulgence, and it is in the discretion of the Court to allow or refuse such application ... 479

(8) In the absence of satisfactory explanations, the Court declined to entertain an application for —— of an order rejecting an application to admit a special appeal 484
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RIGHT OF OCCUPANCY.

(1) A ryot who has held or cultivated a piece of land continuously for more than 12 years, but under several written leases or pottah each for a specific term of years, is entitled to claim a —— in that land 62

(2) In order to establish a ——, a ryot is not entitled to add the possession of his vendor even with the consent of the zemindar 179

(3) Where a person held *ryottee* lands alternately as cultivator and farmer continuously for about 50 years, HELD that his cultivation for broken periods would not deprive him of his —— under Section 6 Act X of 1859, and that the doctrine of merger did not apply 274

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(4) A —— after 12 years' possession (even where defendant's *pottah* is not proved) is a sufficient answer to a suit for *khas* possession, and in such a suit the Court cannot declare plaintiff's right to enhance rent 357
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(1) A suit will lie for a malicious prosecution without probable cause 101

(2) Where a former suit for arrears of rent at enhanced rates in which defendant set up a plea of *lakhiraj* was dismissed on the ground that the *kabooleut* was not proved, plaintiff was held entitled to bring an action for declaration of title to the land as *mál* 184

(3) A suit for a *kabooleut* will lie under Act X of 1859, fixing the rate of rent to be paid in respect of lands which a competent Court has found to be the *mál* lands of the plaintiffs 363
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A —— which in express terms passes the rights and interests of a father does not necessarily transfer the interest of his minor sons unless the latter have benefited by the decree or sale, in which case the purchaser has to that extent an equitable claim against them 454
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SALE BY GUARDIAN.

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(1) All sales for recovery of Government demands, other than arrears of revenue, must be preceded by the steps prescribed in Sections 18 to 24 Act VII (B. C.) 1868; and if the proprietor of an estate in respect of which a certificate of demand has been made under that Act comes into Court either before or at the time of sale, and before the property is actually sold tenders the amount of the demand, the Collector is bound to receive it, and to abstain from selling the property 21

(2) A tender to stay a sale under Regulation VIII of 1819, must be of the whole of the zemindar's demand and without any condition as to its being kept in deposit ... 122

(3) Fraud and collusion are only imputable where a sale is for arrears not really due 122
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See Execution (21) (23)
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(1) Where property was sold in execution as far as possible on the day fixed, and what remained unsold was publicly put off to the next day, when, no higher price being obtainable, it was concluded at the price bid on the first day, and the alleged inadequacy of the price was found to be due to several claims being advanced, HELD that there was no irregularity which could prejudice the judgment-debtor 210

(2) A party cannot complain of the postponement of a sale in execution to the day following unless he can show that he has suffered substantially thereby 273

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(3) A judgment-debtor is entitled to prove substantial injury, when his property has been sold without further notice on a date subsequent to that fixed, especially when the execution-creditor is the purchaser for inadequate value 339

(4) A sale in the Revenue Court upon a decree for rent obtained at the instance of the *ijaradar* and *locum tenens* of the owner of a fractional share of the estate, being a sale of the rights and interests of the holder, cannot prevail against a prior sale in execution of a Civil Court decree 352

(5) *Quære.*—Whether a sale in the Revenue Court which passed the whole tenure, can prevail against a prior sale in execution of a Civil Court decree 352

(6) A purchaser at a sale in execution of a rent decree under Act X of 1859 against a person who at the time has no interest in the tenure sold in execution of that decree simply takes nothing .. 417

(7) Upon default of debtors to pay by certain instalments for which they had pledged their property, and had prayed that the decree might be drawn up accordingly, the effect of the decree and the sale thereunder was to make the property liable for sale in liquidation; the sale passing the property as it stood at the time it was originally mortgaged ... 480

(8) A mere general description of boundaries in a sale proclamation, or a sale certificate, does not of itself confer on the purchaser such a title as cannot be rebutted 511

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(1) A District Judge has no jurisdiction to release a surety from —— taken from him by the High Court to enable a decree-holder to take out execution pending an appeal to the Privy Council. No appeal lies from Judge's order, though improper ... 464

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(2) A party who seeks to obtain —— after the decree has been executed, must show special circumstances, *e. g.* waste or improper dealing with the property ... 521

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See Appeal to England.
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(1) Section 209 Act VIII of 1859 (allowing a ——) refers not only to decrees *of* the same Court, but also decrees *in* the same Court... 46

(2) Setting off one unascertained sum against another may be a mode of compromise, but cannot be made the basis of a decree between hostile litigants ... 113

(3) It is not equitable to allow a —— against a claim relating to a particular account of a matter of another nature... 177

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(1) A —— with Government and possession under it do not necessarily constitute proprietary right, much less can they divest and destroy trusts to which the settlor was subject 41

(2) A party declared entitled to the permanent settlement of the land as proprietor is not entitled to dispossess *putneedars* in possession 376

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Prepared at the beginning of each year, and signed by ryots, setting forth the *nugdee* lands to be held, and the rent to be paid by each tenant, are admissible in evidence, and do not require registration where the rent is under Rs. 100, and the term for only one year ... ... 227.

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Where a —— of a decree was sold, and the vendee mortgaged the same, and the judgment-debtor by order of Court paid in the money, the mortgagee entering up satisfaction, it was *held* that there was an end to the decree, as against persons liable for the mortgagor's share 159

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Where a —— authorized the receipt "of 300 bales of cotton not exceeding 52 cubic feet measurement at the screw-house," the fair meaning was taken to be that the measurement by which the parties were to be bound was a measurement at the screw-house; and, if the agent of the defendants passed the bales there, the defendants could not afterwards enquire into the size of the bales ... 545

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(1) A purchaser acquires no title to huts by a sale in execution of a decree of a ——, such Court having no jurisdiction to deal with immoveable property 309
(2) A —— Judge has no discretion to allow interest at a rate below that stipulated in the bond ... 431
(3) A suit for the *mowjjil* or exigible portion of dower due to plaintiff under a *kabinnamah* is cognisable by a —— under Section 6 Act XI of 1865, notwithstanding collateral questions as to validity of marriage. The decision of the —— on such collateral matters has not the same effect as that of a Civil Court in a suit brought for the purpose 512
(4) A point arising upon the application for a new trial may be referred to the High Court ... 518
(5) In a former suit, A, as his late mother D's heir, obtained a decree against B for certain moveable property deposited with B by D as *streedhun*. In the present suit D's grandson C sues A for the property, averring it to be ancestral. HELD that the present suit being for a share in an intestacy was not cognisable by a ——; but that the High Court would not interfere with the former decision, considering the time that had elapsed, and that the parties had made no application 520
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(1) A party coming up in —— in a certain character and on a certain state of facts, and failing to support his grounds, cannot be allowed to alter his position and appeal specially as a reversioner asking for a declaratory decree . 98
(2) A finding of fact by a Lower Appellate Court may be disturbed in —— if the reasonings and views on which it is based are erroneous in law 161

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(3) The High Court ought not, under Section 374 Act VIII of 1859, to allow a point of law to be argued in —— when it was not distinctly raised in the first Court, or alluded to in the Lower Appellate Court 214

(4) Where a suit for rent was decreed by the Lower Appellate Court as against the tenant, but dismissed as against his vendee who had been wrongly added as a defendant, no appeal was held to lie from the vendee for a declaration of her liability as purchaser 219

(5) Weight of evidence is not a point on which the High Court can interfere in —— 314

(6) A —— does not lie by one defendant against another ... 373

(7) The Court cannot in —— go behind a decree for ejectment, and hold that the tenure was of that character that no order for ejectment could pass 421

(8) Where a Judge, instead of remanding a case under Section 352 Act VIII of 1859, when the Moonsiff had not disposed of the case upon any preliminary point, ought to have disposed of it under Section 354. HELD that the irregularity was not one which affected the merits of the case, or the jurisdiction of the Court, so as to justify interference with the Judge's decision in —— ... 465

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(1) In a suit for rent the fact that a third party had been plaintiff's agent and had been receiving rent for him from defendant, was held sufficient to establish defendant's liability to pay his rent to plaintiff 1

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(2) In a —— where plaintiff described her *jote* as *dur-mourosee*, and the papers showed her to be a *mourosee ijaradar* or *dur-mourosee talookdar*, the misdescription, if any, was held to be insufficient to throw out plaintiff's claim ... 17

(3) A party who has been irregularly admitted as an intervenor in a —— before a Moonsiff, as if it was being tried under Act X of 1859, is not entitled to be treated as if he had been made a party under Section 73 Act VIII of 1859 176

(4) In a —— in which plaintiff relied on an entry in defendant's own account as naib of the village as to the rate of rent payable by him, held that, unless defendant's signature was forged, and the leaf not genuine, the entry was an admission that the rent therein mentioned was the rent paid 213

(5) An allegation of wrongful ejectment of defendant by plaintiff is no answer to a —— during the period of dispossession ... 258

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(7) Where a decree gave plaintiffs the right to assess and receive rent for each year, a notice under Section 13 Act X of 1859 was held not necessary when the rent found assessable for the years for which it was claimed varied from what was found assessable in the year of the decree ... 452

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Where immoveable property is purchased with money not belonging to the purchaser, the principle of a resulting —— is that the purchase was made with an implied —— that the property should belong to the person to whom the money belonged; but if no such —— was intended, it could not arise by implication, and the presumption would be met by the facts 259

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(1) A former abuse of trust in another instance cannot be pleaded against a —— who seeks to prevent a repetition of abuse, even if he was formerly implicated in the same indefensible courses against which he is seeking to protect the property, though it would be a reason for excluding him from the administration of the property as *sebait* ... 41

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ACT XIV OF 1866.

Section 49. *See Postage Stamps.*

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ACT XX OF 1866.

Sections 93 & 95. *See Registration.*

ACT XIV OF 1868.

Section 11. *See Contagious Diseases* (2)

ACT VIII OF 1869.

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ADJOURNMENT.

Although an improper —— of an enquiry by a Magistrate was scarcely an error in the decision upon a point of law, or involved any question of law justifying the interference of the High Court under s. 404 Code of Criminal Procedure, the Court under s. 15 of the Charter Act set aside the order of the Magistrate adjourning the enquiry when, according to s. 224, there was not the absence of a witness or other reasonable cause rendering it necessary or advisable to adjourn the enquiry; the power conferred by s. 224 being one which can only be exercised in cases which come really within the terms of that Section ... 55

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AMENDS.

Where a complaint constituted a charge of wrongful confinement under s. 343, and not one of criminal force under s. 352 of the Penal Code, the order awarding —— under s. 270 Code of Criminal Procedure was quashed as illegal 1

APPEAL.

(1) No —— lies to the High Court, under Act XXXVII of 1855, from a conviction by the Deputy Commissioner of the Sonthal Pergunnahs 11
(2) Criminal appeals to the High Court may be disposed of by single Judges. No second petition of —— can be allowed to be considered after a first one has been rejected by a single Judge 47
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The force of a warrant of——is at an end when the prisoner is brought before the Magistrate ... 55
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ATTACHED PROPERTY.

(1) The proper remedy of claimants to——belonging to an absconding offender is by a civil suit. The plea of informality can be considered on the surrender of the fugitive. Caution against sale until the needful formalities are carried out 10
(2) A Magistrate may lease land attached under s. 319 Code of Criminal Procedure 38

ATTACHMENT.

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BREACH OF THE PEACE.

(1) A Magistrate acts without jurisdiction in making an order binding a person to keep the peace, when there is no complaint before him of a —— being likely to be committed by such person and without taking any evidence in the matter 35
(2) It is illegal and contrary to the provisions of s. 282 Code of Criminal Procedure to take recognizances from one person in order to prevent another from committing a —— 54
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BREACH OF TRUST.

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CHARGE.

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See Plea of Not Guilty.

CHARTER-ACT.

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CONJUGAL RIGHTS. *(Restitution of).*
See Jurisdiction (1)

CONTAGIOUS DISEASES.
There is no appeal from a conviction under s. 11 Act XIV of 1868 for a registered prostitute neglecting to appear for examination 11

CONTEMPT OF COURT.
Before convicting a person under s. 174 Penal Code, it is necessary to prove that he had notice to appear at a certain time and place, and that he did not do so . 38

CONTEMPT OF LAWFUL AUTHORITY.
(1) An order, in writing under s. 62 of the Code of Criminal Procedure, is necessary to sustain a charge under s. 188 of the Penal Code 57
(2) *Quære.*—Whether a Magistrate has not power to proceed under the former Section, instead of under s. 308, against a party for disobeying an order issued by him directing the party to clean a privy pronounced to be a nuisance 57

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See Amends (1)

CRIMINAL INTIMIDATION, INSULT, & ANNOYANCE.
An intention to intimidate, insult, or annoy any person in possession of a house, does not mean to insult or annoy any person in constructive but actual possession of the premises 47

CRIMINAL PROCEDURE CODE.
See Act XXV of 1861.

CRIMINAL PROSECUTIONS.
As a general rule, one of two parties to an impending suit ought not to put the criminal law in motion as against the other in matters connected with the suit; or if he does so; the hearing of the criminal case ought to be postponed until the suit is concluded. But although that is a good ground for questioning the propriety of a prosecution, it is not a ground for questioning the legality of a conviction 46

CROSS-EXAMINATION.
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DACOITY
(1) Merely being seen getting on board a boat with four persons who have on their own admissions been convicted of belonging to a gang of dacoits, is not sufficient evidence against those so seen 50
(2) To make an admission of guilty knowledge of the means by which money supposed to have been acquired by——was obtained, evidence under s. 150 Code of Criminal Procedure, it must be shown that the admission was antecedent to the discovery of the money 50

DEPOSITIONS.
See Irregularity (1)

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Order of Assistant Magistrate, dismissing a case upon a Police report without giving complainant an opportunity to show cause against the ——, set aside ... 2
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See Abkaree Revenue.

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ERROR.
See False Evidence (2)
See Irregularity.
See Revision by High Court.
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EVIDENCE.
(1) Statements made before a Police Inspector are not ——, and cannot be used as —— in the trial; and unless it can be shown that the —— taken before the Magistrate has been used as —— at the Sessions trial, and laid before the Judge and assessors, and that they, after hearing that ——, based their opinion upon it, that —— cannot be laid before the High Court and made use of in support of an appeal 5
(2) The rule of —— that letters found in the house of a person after his arrest, and whilst in custody, cannot be used in ——, is subject to the exception that the existence of the letters found may be established, either by direct proof or by strong presumptive —— 15
(3) Admissions made by a prisoner's vakeel cannot be used against the prisoner. 49
(4) *Per Mitter, J.*—An Appellate Court is bound precisely in the same way as the Court of first instance to test evidence extrinsically as well as intrinsically ... 59
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See Procedure (3)

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FALSE EVIDENCE.
(1) A Magistrate, making a commitment for giving —— in respect of any offence enquired into under Chapter XIII or XIV Code of Criminal Procedure, must set out the *precise words* recorded as used by the accused containing the statement which he undertakes to prove false, and not state the *effect* of those words .. 32
(2) When certain charges did not set out the exact statement made by witnesses which the Magistrate intended to prove false, but the defect was not such as to mislead the accused, the High Court declined to interfere under s. 426, Code of Criminal Procedure, but warned the Magistrate to be careful for the future 33
(3) It would be very undesirable for the High Court, except under very peculiar circumstances, to entertain in the first instance an application to authorize a prosecution for perjury 46

FINE.
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See Procedure (2)

FIRE.
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FORCIBLE DISPOSSESSION.
See Land Disputes (3)

FORFEITURE.
See Abkaree Revenue.

FORGED DOCUMENT (USING).
(1) To support a conviction of the offence under s. 471, Penal Code, there must be a using of a document by a person who knows or has reason to believe that it is forged 32
(2) The offence of altering one part of a document executed in two parts for the mutual security of both the parties concerned, deserves to be severely punished ... 68
See Misdirection (2)

FORGERY.
The accused was charged with two others with criminal breach of trust. Evidence was taken in support of the charge of embezzlement; but, considering that there was no evidence to convict

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FORGERY.—(*Continued.*)

him under s. 408 Penal Code, the Assistant Magistrate charged him under s. 250. Five days afterward he was charged with ——, and called upon to plead to that charge, but no separate grounds of committal were drawn up. The High Court agreed with the Sessions Judge that the commitment in its present state was incomplete, and should be quashed 43

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FULL BENCH RULINGS.

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HIGH COURT.

The extraordinary power given by s. 404 Code of Criminal Procedure was declined to be exercised to quash proceedings held under a *bonâ fide* exercise of discretion in a case where a fine was imposed for keeping a piggery in a filthy state 58

See Adjournment.
See Appeal (2)
See False Evidence (3)
See Irregularity (4)
See Jurisdiction (1)
See Land Disputes (5)
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HURT.

An accused person cannot be punished, first on a charge for rioting, and afterwards on a charge for —— when the latter is included in the former 59

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IMMALLEB PROPERTY.

See Jurisdiction (3)

ILLEGITIMATE CHILDREN.

See Maintenance (1)

IMPRISONMENT.

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IRREGULARITY.

(1) The proceedings before a Magistrate preliminary to commitment are not impeachable for ——, because some of the depositions were taken before the accused persons were brought before him 15

(2) The Court declined to set aside the preliminary proceedings before the Magistrate, because, though there might have been some —— in them, they had not been objected to by the parties, notwithstanding that they had had full opportunity of doing so 35

(3) The decision in 12 W. R., 49, does not apply to a case where a regular charge was subsequently drawn up, giving the prisoner full information of the offence which it was intended to prove, still less to an ordinary Sessions case, where the regularity of the preliminary proceeding is not in question under the plea of not guilty 35

(4) The not examining a complainant and not reducing his examination into writing is not such an irregularity as to require the interference of the High Court in a trivial case, unless it appears probable (of which there was no suggestion in the present case), that a fresh investigation would produce a different result ... 37

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JULKUR.

See Jurisdiction (3)

JURISDICTION.

(1) A dufflah hill tribe woman having refused to obey the Deputy Commissioner's order directing her to return to her husband's protection, the Commissioner of Assam directed that, in case she persisted, she should be taken across the border and put back into her own country. On a protest by way of appeal against the order of the Deputy Commissioner, the Judicial Commissioner referred the matter to the High Court for orders under Chapter XXIX of the Code of Criminal Procedure. HELD that this was not a case which could be referred under Chapter XXIX of that Code; that the order of

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JURISDICTION.—(*Continued.*)

the Deputy Commissioner was a judicial order, not made in a criminal matter but in a suit for restitution of conjugal rights, and as such appealable to the Judicial Commissioner; that the proper form of the order in such a case was that the woman should return to her husband and live with him; and that the only way in which such an order could be enforced was by imprisonment of the wife and attachment of her property, or both, under s. 200 Act VIII of 1859 13

(2) Prisoner, whilst under trial before the Sessions Court upon a charge framed under s. 436 Penal Code (mischief by fire, &c., with intent to destroy a house), was charged under s. 224 with escaping from lawful custody. The Magistrate, being too late to make the latter offence the subject of another charge in the same case, made a separate commitment of the prisoner, after he had been convicted of the former offence, for the latter offence which was one cognizable by the Magistrate. The commitment was cancelled, and the Magistrate directed to deal with the case himself 14

(3) The decision of the Deputy Magistrate was quashed (1) because the property in dispute being *ijmallee*, he had no jurisdiction to try the dispute under s. 318 Code of Criminal Procedure, but ought to have proceeded in the manner laid down in Circular Order No. 10, dated 16th April 1863; and (2) because a portion of the disputed *julkur* being situated within the District of Backergunge, the Deputy Magistrate of Furreedpore had no —— with reference to that portion of the *julkur* which was admittedly not within the limits of his ——. 33

See Appeal (2)
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L

LAND DISPUTES.

(1) It is a misconception of the aim and object of the law, as well as a waste of time to the Court and of money to the parties, to come up to the Court under s. 318 Code of Criminal Procedure with questions of title to possession of land which can only be settled in a Civil Court ... 3

(2) The mere service of a notice upon a Mofussil naib who, takes no steps whatever to consult his employer or act under her directions, is not such a notice as is contemplated by s. 318 Code of Criminal Procedure in a case of —— 9

(3) The sanction of the Civil Court is not necessary to a complaint of forcible dispossession by a party who was put into possession by the Civil Court; nor is the Magistrate limited in his action by the mistake of the complainant in citing s. 188 Penal Code as the Section under which the offence charged falls 10

(4) The purchaser of an interest in land at a sale in execution of decree obtained an order for possession under s. 263 or 264 Act VIII of 1859, and a dispute arose between him and another person who had some interest in the land, as to what passed under the sale certificate. Without ascertaining the rights of the parties, the Magistrate made certain orders, the effect of which was to exclude the auction-purchaser for some time from exercising the right alleged to have passed to him under the purchase. HELD that the Magistrate ought to have made no order at all with reference to the property, leaving it to the parties to determine their rights in the Civil Court, and that he had ample power under the Section to do what was necessary to prevent a breach of the peace 37

(5) The High Court may interfere with and quash an order passed by a Magistrate under s. 62 Code of Criminal Procedure when the order is such that it was beyond the power and out of the jurisdiction of the Magistrate to make it 37

(6) *Quære.*—Whether pleaders have a right to be heard in such cases 37

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Land Disputes.—*(Continued.)*

(7) A Magistrate has jurisdiction, under s. 318 Code of Criminal Procedure, to prevent breaches of the peace in places where the rivers have dried up. The jurisdiction that was once there under s. 30, is not taken away by reason of the land having appeared and the water disappeared 53

(8) It is not competent to a party who, when there is no clear evidence of actual possession, puts in certain documents which would be evidence of title, and invites the Magistrate to consider them as bearing upon the fact of possession, to object afterwards that the Magistrate has gone into the question of title 53

(9) When a Magistrate is not satisfied that, either of the contending parties was in actual possession, his proper course is to attach the property, and not give either party what might be supposed to be the advantage of a finding on his part that there was possession 53

(10) Where a Magistrate made an order under s. 318, without previously recording a proceeding, his order was annulled, and the case sent back to him that he may proceed under the Section .. 53

(11) A Magistrate cannot, under s. 318 Code of Criminal Procedure, decide as to the respective claims or rights to actual possession, nor act upon former decisions to prove previous title or possession. All that he has to do is to find which party is in actual possession 59

See Attached Property.

Lease.

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Magistrate.

Per Ainslie, J.—A ——, as an Executive Officer, is not bound to attend to a Judge's extra-judicial observation not warranted by law 59

Maintenance.

A decision of the Civil Court, refusing to enfore a contract or agreement against a man for the—— of a woman, cannot conclude either the woman from applying, or a Magistrate from making an order, under s. 316 Code of Criminal Procedure, for the —— of their illegitimate daughter ... 49

Marriage.

In a charge under s. 498 Penal Code (of taking away a married woman) ——must be presumed from the fact of a man and woman living together, and from their own evidence (altogether unrebutted) that she is his legally married wife 5

Married Woman.

See Marriage.

Misappropriation.

It was considered to be a matter of trade betwen the prosecutrix and the prisoner who took certain hides from the former, but refused to pay for them, and was held not guilty of dishonest——under s. 403 Penal Code 11

See Postage Stamps.

Mischief by Fire.

See Abetment.

Misdirection.

(1) It was no——on the part of the Judge in not calling the attention of the Jury to cls. 1 and 2 s. 100 Penal Code, when he particularly called their attention to cl. 6 45

(2) A Judge has every right to draw the attention of the Jury to anything which appears to be a palpable alteration or blot on the face of a document alleged to be forged 58

Mofussil Naib.

See Land Disputes (2)

Mooktear.

Where a Magistate suspended a ——for three months for making a wilful false statement, it was held that the Magistrate had no power to suspend the——under Act XX of 1865, and his suspension was set aside 6

Municipal.

See Contempt of Lawful Authority.
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POLICE OFFICER.
(1) A——under suspension cannot be convicted under s. 29 Act V of 1861 of withdrawing from the duties of his office without permission 12
(2) Before a——can be convicted of an offence under s. 29 Act V of 1861, it must be found that he is guilty, not of mere neglect, but of deliberate and intentional violation of duty 34

POLICE REPORT.
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POSSESSION.
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See Dacoity.
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POST OFFICE.
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POSTAGE STAMPS.
The accused being entrusted to put a proper amount of stamps on a letter and return such as might not be required, did not return them, but misappropriated stamps to the value of two annas, and was convicted and punished under s. 49 Indian Post Office Act XIV of 1866, instead of under the Penal Code for criminal breach of trust. As the accused had not been sentenced to a larger amount of punishment than could have been awarded for criminal breach of trust, nor shown to have been prejudiced by the error of convicting him under the Post Office Act, the High Court could not, under s. 426 Code of Criminal Procedure, reverse or alter the sentence, pointing out at the same time that this was one of those cases in which it was a mistake to look at the smallness of the amount misappropriated rather than to the gravity of the offence 50

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PROCEDURE.
(1) The Court declined to say that, as a matter of law, the Magistrate acted illegally in calling upon complainant to produce proof *ex parte* to justify the issue of process, and upon default of such proof, in dismissing the charge .. 3
(2) Where a Magistrate dismissed a complaint on default under s. 259 Code of Criminal Procedure, and fined the complainant under s. 270, the fine was remitted and ordered to be refunded ... 6
(3) The Deputy Magistrate was censured for his precipitancy in dismissing a complaint of a deliberate attempt at extortion, supported as it was by evidence on the record. The prisoners having been acquitted, the Court passed no further order regarding the case 7
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REGISTRATION.
The proceedings of a Magistrate who tries prisoners charged with having committed offences under ss. 93 and 95 Registration Act XX of 1866, are not illegal and without jurisdiction or otherwise bad, merely because the prosecution was (with the sanction of the Registrar to whom he was subordinate) instituted against the accused by the same Magistrate in his official capacity of Sub-Registrar ... 39

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(1) The Sessions Court at Patna was held to have jurisdiction to try the offence of abetment of waging war against the Queen, though the waging of war did not take place in Patna, the rule of law as to abetment being that, where parties concert together and have a common object, the act of one of the parties done in furtherance of the common object and in pursuance of the concerted plan is the act of the whole 15
(2) The jurisdiction of the Sessions Court at Patna was not affected by the erroneous statement in the charge of the abetment having taken place at Calcutta, when the evidence was sufficient to show the abetment at Patna; such erroneous statement being an error or defect in the charge, which is cured by s. 426 Code of Criminal Procedure 15
(3) The issue of a warrant of commitment by the Governor-General in Council, under Regulation III of 1818, cannot be treated in the nature of a *conviction* of the person so placed under personal restraint, so as to give immunity to the person so committed and afterwards discharged from all political offences committed before that period, on the ground that he has already been tried, convicted, and punished ... 15

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(1) A Magistrate cannot refuse to allow——whom he allowed to be cross-examined by the accused previous to the preparation of a charge, to be recalled and cross-examined after the accused has been put upon his defence under s. 252 Code of Criminal Procedure, treating them as——for the prosecution 51
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The Weekly Reporter,

CIVIL RULINGS.

The 20th November 1871.

Present:

Sir James W. Colvile, Lord Justice James, Lord Justice Mellish, and Sir Lawrence Peel.

Hindoo Widows—Inheritance—Marriage—Legitimacy—Acquiescence—Presumption—Evidence—Practice.

On Appeal from the High Court at Madras.

Ramamani Ammal

versus

Kulanthai Nauchear.

In a rival claim between two Hindoo widows of a deceased husband, plaintiff sued as mother and guardian of her infant son, to establish his right as son and heir of his father. The defence was that the mother was not the wife of her alleged husband; that she was a dancing-girl or a prostitute, and incapable of contracting a marriage even if she had gone through the form of a marriage; and that her son was not legitimate, and could not inherit. Plaintiff's marriage *de facto* with the deceased was established, and supported by his recognition of their children as legitimate; but the incapacity of the children to inherit was sought to be proved (1) by plaintiff's virtual acknowledgment of defendant's title as heiress upon the grant to defendant unopposed by plaintiff of a certificate of heirship, and (2) by plaintiff's incapacity to contract marriage.

As to the 1st, the Privy Council held, that it was not the practice of the Courts in India or of that tribunal to press against either an infant or a Hindoo female a presumption by acquiescence in a rival claim, from the mere non-contestation for a limited time of an adverse title.

As to the 2nd, the Privy Council considered, that the legal presumption in favor of a child who was born in his father's house of a mother lodged and apparently treated as a wife, who was treated as a legitimate child by his father, and whose legitimacy was disputed after the father's death, was a safe and proper one to be made, and that the opposing case had not, as it ought to have, been strictly proved.

Their Lordships took the opportunity of repeating that the ordinary legal and reasonable presumptions of fact must not be lost sight of in the trial of Indian cases, nor an entire history thrown aside, because the evidence, or some of the evidence, of some of the witnesses was incredible or untrustworthy; and that evidence should receive its due weight, and not be rejected from a general distrust of native testimony, nor perjury widely imputed without some grave grounds to support the imputation.

THIS is an appeal from a decision of the High Court at Madras, which reversed a decree of the Civil Judge of the Zillah of Madura in favor of the appellant. The suit was brought by the appellant, as mother and guardian of her infant son, to establish his right as the legitimate and sole son and heir of Sivaswami Taver, of Ramnad, to inherit the property, moveable and immoveable, of his father, valued in the plaint at 94,795 rupees. The plaintiff claimed as a widow, stating herself to have been the second wife of the deceased, and made title to the subdivision zemindary of Ramnad on behalf of her son. The first defendant was the childless widow of the late zemindar,—according to the appellant's representation, the senior, and to her own, his sole widow. The other defendant, who was joined as a defendant on a ground not established, *viz.*, his having possessed himself of part of the estate of the deceased after his death, was a first cousin of the late zemindar. Both defendants disputed the marriage of the plaintiff and the legitimacy of her son.

The statement of both defendants was that the plaintiff was a dancing-girl; and treating that *status* or caste as continuing, they both insisted that she could not be the wife of her alleged husband, that her son could not, since she was a prostitute, be the son of the late zemindar, and could not have any title to inherit, even had a marriage between the zemindar and the child's mother been celebrated in fact. They denied that any marriage had taken place. It is unnecessary to repeat the very language of these statements, which, as translated, is coarse and unbecoming. It is plain that the case insisted on was that the plaintiff herself was a dancing-girl, not merely the child of one, at the time when her connection with the zemindar commenced, which the defendants represented as a connection with a dancing-girl, a prostitute by profession, attached to the Temple Service.

Their statement contains no intimation of her having abandoned that calling prior to the birth of these children, or at all. The language used plainly imports a continuing *status;* that the Judge so understood the statements appears from the issues which he framed.

The term dancing-girl was not used in the answers. A fouler name was there used, and it seems to their Lordships to have been designedly employed to mark a distinction between an intercourse with a concubine and one with a common prostitute, which might influence the decision of a question of filiation and legitimacy.

The issues were, first, whether the plaintiff was a Vellala woman or a dancing-girl.

Secondly, whether the plaintiff was legally married to the zemindar.

The third issue was one of law as to the validity of the marriage, should it be proved.

The fourth issue was one of fact as to the second defendant's possession of the property which he was alleged to have appropriated. This issue was found for the defendants. The finding is not appealed against; and this part of the case, except as the charge affects the honesty of the plaintiff's claim, need not be considered.

The plaintiff claimed to be by birth a legitimate child of one Shunmuga Pillai, a Soodra man, of the Vellala, one of the sub-divisions of the Soodra caste. As such, she would be a Vellala woman. The defendants insisted that she was a mere dancing-girl connected with the service of the Hindoo idol, at a pagoda situate at Tiruchuly, the place of her birth and of her father's residence, who was the headsman of the village. The Judge uses, in the issue which he framed, the term 'dancing-girl, as distinct from the Vellala class, to denote a particular class of women described in treatises on Hindoo Law as incapable of contracting marriage.

The parties went to trial on the issues before stated. The proofs and conduct of the case of the defendants were applied to and influenced by them.

That her alleged son really was the plaintiff's son was made out by such unquestionable evidence that it was strongly pressed on their Lordships that the defendants had in fact never intended to represent her as not having the *status* of a concubine, or the children as not having the *status* of illegitimate children; but had only denied that she was the wife, and that the children were legitimate. Their Lordships are unable so to read the case made by the pleadings with the light thrown upon it by the evidence of her exposing herself openly on the balcony with all the outward marks and costume of a professional dancing-girl, and such evidence as the following: "As Tanga Nauchear is the daughter of a dancing-girl, I did not hear who her father was. As she is a dancing-girl's daughter, who can be called her father? I know Muttu Doraiswami second plaintiff, his mother is Ramamani Ammal. I have not heard who his father is." The case originally made and attempted to be established was that of professional prostitution and of promiscuous intercourse, so that in Hindoo law and opinion, as well as in English, it would be impossible to predicate any paternity of the offspring.

The statement that she was a dancing-girl was designed to affect her case in two ways, first as to the *factum*, and then as to the legality of the alleged marriage.

The evidence that she was not a dancing-girl was adduced by the plaintiff, in support of her case by anticipation to rebut that of the defendants, which their Counsel stated to have been principally directed to prove this her original condition of life. If a marriage *de facto* were proved by the plaintiff's witnesses, it lay on the defendants to show conclusively that such *de facto* marriage could not legitimate the children of it, and thus, in that event, the failure to substantiate this issue would be fatal to the defence on the question of legitimacy.

The plaintiff called many witnesses, twenty-four in number, thirteen of whom deposed to the marriage; amongst these not fewer than five witnesses of the Zemindar family, nearly allied to him, *primâ facie* at least, unimpeached and credible witnesses, such as a Court would ordinarily desire to hear on a question of this kind in issue before it, and would be most disposed to trust, proved their actual presence at the marriage. Her father, her whole brother, and her half brother proved the plaintiff to be of the Vellala caste, and a member of their common family.

The Civil Court of Madura, of which Mr. Pochin was then the Judge, believing these witnesses, necessarily decided that the marriage was proved, and also that the plaintiff was never a dancing-girl. On appeal to the High Court, that decision was reversed upon the first point. On the second point, the High Court did not come to a positive conclusion, that the plaintiff had been a dancing-girl, but stated that they inclined to that opinion, an expression indicating distrust of the defendant's witnesses to the fact that several of them had actually seen her officiating in that character.

The zemindar was not of the Vellala caste. His caste, also an inferior Soodra caste, was that of the Malavars. The union in marriage of persons of these two sub-grades of Soodras seems to have been uncommon, and the legality of such marriage was doubted at the time when the zemindar is said to have married the appellant. The marriage between such a man and a mere dancing-girl has been described as "impossible." The Judges of the High Court express much doubt whether a marriage between the zemindar and a Vellala woman would be legal, but they do not directly affirm its illegality. On the argument of this appeal this objection was not insisted on; it was conceded on both sides that recent decisions had declared the legality of a marriage between persons of these two sub-classes of the Soodra caste. This uncertainty, which undoubtedly prevailed at one time as to the legal rights flowing from such matrimonial connections, has an important bearing on the proof of a part of this case, and will subsequently be considered.

The case before their Lordships is one of conflicting evidence and of conflicting decisions. The opinion of Mr. Pochin, the Judge who tried the case, is opposed to that of two Judges of the High Court. They differ as to the habits of natives in their domestic relations, as to the credibility of witnesses, the weight of evidence, and the proper inferences to be drawn from conduct. The decision of the case by their Lordships must necessarily involve a somewhat close examination of part of the evidence, and of the grounds of the opinions of the Judges of the respective Courts.

It was urged on behalf of the appellant that Mr. Pochin, who saw and heard the witnesses, could better judge of their respective claims to belief than the Appellate Tribunal. On the other hand, it is stated that, as he was an European, his advantage in that respect over the Appellate Court was less than that of an intelligent native Judge. It is due to Mr. Pochin to observe that he appears to have been extremely diligent and laborious in the conduct of his investigation. In a case of great uncertainty and difficulty, where no evidence is exempt from suspicion,

if in all parts of the case his
sions have not the concurrence of thei
ships' opinion, such difference of
should not weaken his just claims to
The decisions of both Courts will rece
most anxious and respectful attention.

The first in order and weightiest
objections made to Mr. Pochin's conc
by the Judges of the High Court, as
by the Counsel for the respondent i
very able argument before their Lor
is that he had failed to observe the total
bability of the story told by Shum
Pillay, the father of the appellant, as
introduction into the family by the d
zemindar, and to draw the inferences
should rationally and justly have been
from that strange story. Their Lor
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under which this lady first came to ent
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the appellant as to the origin of his
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father would be studious to conceal.
existence of such matters would aff
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satisfactory than that suggested b
Pochin,—*viz.*, that the inferiority of t
tune and social position of the father
appellant to that of the zemindar
account for an introduction and recep
a bride not usual in native famili
explanation which certainly is not satis
to their Lordships.

The story of the marriage must be
as full of suspicion in its very outs
therefore requiring a more than or
degree of jealous scrutiny, a jealousy
must extend itself to the testimony
witnesses of the marriage.

Their Lordships are led by the jud
under review, and by some portion
argument that has been addressed to
to state, as has often been stated bef
this Committee, that the ordinary leg
reasonable presumptions of facts must
lost sight of in the trial of Indian
however untrustworthy much of the ev
submitted to these Courts may commo

that its due weight must be given to evidence there as elsewhere, and that evidence in a particular case must not be rejected from a general distrust of native testimony, nor perjury widely imputed without some grave grounds to support the imputation. Such a rejection, if sanctioned, would virtually submit the decision of the rights of others to the suspicions and not to the deliberate judgment of their appointed Judges. Nor must an entire history be thrown aside because the evidence, or some of the evidence, of some of the witnesses is incredible or untrustworthy.

On the subject of the marriage, in fact, of the zemindar to this lady, the plaintiff, their Lordships think that the judgment of Mr. Pochin is fully supported by the evidence; and that so very strong a *primâ facie* case is made in favor of the marriage as to require the most conclusive evidence for its overthrow. It must be borne in mind that, whilst the evidence of the marriage given by many apparently credible witnesses having presumably no motive to misrepresent the fact or to deceive the Court, and incapable of being themselves deceived about it, is direct and positive, that by which it is met is, for the greater part, indirect and inferential, turning on the improbability and inefficacy of the marriage of a dancing-girl. The evidence in support of the marriage is that of numerous witnesses of respectable position and character, members of the family, the very witnesses whose evidence in like cases is looked for by a Court, and the absence of which weakens every case where such absence is found; confirmed, moreover, by the treatment by the zemindar of his children as legitimate, which, in the opinion of their Lordships, the marriage of his daughter, Tangu Nauchear, sufficiently proves. This treatment alone, unless answered, would, after the death of the parents, suffice to establish a claim to a direct lineal succession against a reversioner, and must receive its due weight here.

Upon the question of recognition of his children as legitimate, their Lordships are compelled to express their dissent from the conclusions of the High Court. The marriage of the daughter of the Rajah, as legitimate, is a fact sufficiently proved. The husband and his father have both been examined. The evidence of the husband leads directly to the conclusion that he married his wife as legitimate, concluding her to be so. He says that he would not have married her had she been the daughter of a dancing-girl. This statement is such as might be expected from him. The father confirms him, and presumption from experience confirms both. The witness himself is unimpeached; on what ground, then, should his statement be set aside? The Judges of the High Court say, in effect, that as he was marrying the daughter of a powerful man, his scruples might therefore give way; but what is this but opposing a conjecture of the Court itself to positive testimony against its truth; the conjecture itself seems to derive no support from the wealth or power of the zemindar, for, relatively to the husband and his family, the zemindar was not a man high above them in fortune or rank, nor does the alliance seem to have been above the degree or the reasonable expectations of one of the husband's family.

Again, the High Court observes that the marriage was not like that of a legitimate daughter, as it was not celebrated with the ceremony of the Homan, which, however, the husband says did accompany it. He is contradicted, indeed, on this point; but though this conflict of testimony might induce doubt in the minds of the Judges, still they were not justified, in this balanced state of the evidence, in reasoning concerning the *status* of the bride, her mother, and brother, on the basis of the absence of this ceremony. Other circumstances which ordinarily attend the marriage of a legitimate daughter, as the existence of an alliance equal and honourable, the presence of near relatives and friends on both sides, were proved; and nothing, even had the ceremony of the Homan been omitted, would have indicated a marriage between unequals in degree.

The other circumstances which have been argued on the side of the appellants as proofs of recognition by the father of his children as legitimate,—*viz.*, the *benamee* transactions,—afford no certain indication of the sense in which the terms son and daughter were used by the father. Their Lordships cannot, however, agree with the Judges of the High Court in thinking that these documents support an inference of illegitimacy. They are obviously *benamee* transactions, so common as to require no explanation why, in a particular instance, they were adopted. In an acknowledged case of legitimate birth they would have excited no attention. They afford no sort of evidence that the zemindar designed them at all to be a provision for children. As these children, even if illegitimate and incapable of inheriting, would have been entitled to maintenance and provision in his life-time, gifts not exceeding such an allowance of maintenance as would have been fair and usual, would have been no material advancement of their interests. It is unnecessary to enter upon any examination in detail of the family co-membership, position, and respectability of those witnesses, members of the family, who depose to their presence at the marriage. The judgment of the High Court gives them due weight abstractedly of the particular ground on which it justifies its rejection of their evidence. The propriety of this rejection of a whole body of evidence otherwise unimpeached must now be considered.

The Advocate-General, who was Counsel for the plaintiff, had admitted that the Agent of the Superior Rajah of Ramnad supplied the necessary funds for carrying on her suit. It was obviously an admission made in a spirit of rectitude, involving, as made, no acknowledgment or sense of any violation of any law or duty whatever. Such an act may be viewed in very different lights; it might bear the character of a generous support, on the part of a powerful head of a house compassionating the helpless state of a child contending for a just inheritance, and acknowledged by its father in his life-time as a legitimate son. It might, on the other hand, be capable of being viewed as a spiteful and vindictive act, an unprincipled maintenance of a wrongful suit. What presumption was there in this case to lead the mind to entertain either view? The manager of the Rajah was not a party to the suit. His conduct was in no other respect before the Court. No ground existed for supposing him capable of what would have been a very criminal conspiracy, liable to severe punishment. His name was inserted in a list of the plaintiff's witnesses, which fact seems to conflict with the statement of the pleadings, that his enmity produced the claim.

The witnesses themselves, whom the hypothesis supposes to be all perjured, the Court below had believed, seeing them, and observing no signs of falsehood in them. The hypothesis of the High Court is, that the Rajah's agents had got up the cause from enmity. One witness for the defendants, it seems, had opposed the Rajah's adoption. This was held evidence enough; and it is assumed that this agent had influence enough to make all these *primâ facie* respectable men come forward to support in Court a notoriously false case by deliberate perjury, for their guilt admitted of no concealment on the hypothesis of mere well-known concubinage and illegitimacy. Let it be conceded that the father of the present plaintiff had wilfully given an untrue account of the first introduction of his daughter into the zemindar's family, yet other grounds might be supposed, if mere supposition could in any case be made for concealment and untruth on the subject of his family connections, which would not be inconsistent with the marriage of his daughter to the zemindar.

But, it may be said, a marriage with a dancing-girl was incredible. The High Court has not found the fact that she was a dancing-girl, and this foundation is wanting to their rejection of this evidence: they should first have been convinced of that. A marriage *de facto* then being established and supported by recognition by the deceased zemindar of these children as legitimate, the very strongest evidence would be required to show that the law denied to these children their presumable legal status, on the ground of their mother's incapacity to contract a marriage. The first point taken in this part of the case was that the incapacity to inherit had been virtually admitted by the acknowledgment of the first defendant's title as heiress. This point was relied on by the Judges of the High Court, and was strongly urged on the argument of this appeal. The certificate of heirship granted to the elder widow under the circumstances and unopposed was declared to be a tacit admission of absence of title in the claimant in this suit. Considerable weight is due *primâ facie*, to such a submission to an adverse title as the objection supposes, but the weight depends on the just belief that the parties whose interests are affected by acquiescence possess knowledge of their right, means to enforce it, and counsels how to set about resisting a step injurious to it, which are ordinarily in the possession or reach of either of two rival claimants. One of the plaintiffs in this case is an infant; the other is a Hindoo female. Against neither is it the practice of the Courts in India to press a presumption by acquiescence in a rival claim, from the mere non-contestation for a limited time of an adverse title, and especially not of such a title as this certificate evidences. The contrary doctrine has been constantly affirmed and acted on, both in Indian Courts and before this Tribunal. In addition to this it must be observed that, if a supposed acquiescence in one place be contemporaneous nearly with a claim not abandoned, it amounts to little or nothing.

This case affords ground for the conclusion that the germ of this litigation existed in the palace at the time of the zemindar's death, and was never afterwards abandoned. The hypothesis that the claim sprung up, first, from the spite of the Rajah's agent, is inconsistent with the occurrences in the family at the time of the Rajah's death. The brother of the first plaintiff was before and at the time of the death in the palace. He sent for his father, who came, and was present at the funeral ceremony. This summons and presence leads to the conclusion that in some mode the lady's own family were acting on a supposed right to be included amongst the family connections. It is most improbable that the daughter's husband would admit her illegitimacy, and his assertion of his wife's legitimacy would be, virtually, that of her infant brother, whose maternal grandfather and uncle were present. The performance of the obsequies, by delegation, by the son-in-law of the deceased zemindar, whilst the second defendant was at hand, who was the elder widow's nephew, and her manager subsequently, leads to the same inference of a then existing claim by the child's friends. And if this claim were then being urged, though not acquiesced in, the hypothesis of its after origin is inadmissible. There is no evidence that it was ever intentionally abandoned; for temporary helplessness and want of funds may very easily be supposed to have been the causes of inaction and delay for a time. The excuses made for the choice of the son-in-law are feeble and unconvincing. One relative might be unpunctual, but why should all be behind their time?

Can this marriage *de facto* be supposed an idle, and, in a Hindoo point of view, profane ceremony? Such, it is conceded on all sides, it would have been if the marriage was with a dancing-girl, in the sense of the statements and issue.

Their Lordships entirely concur with the opinion of the Judge who tried the cause, that the evidence on the part of the defendants to prove the plaintiff a dancing-girl at any time of her life fails. He has given his reasons for thinking her not a dancing-girl, which it is unnecessary to repeat; they are corroborated by others of considerable weight, which at least balance the inference drawn from her name, age, and puberty. The whole brother was a witness. His caste is that of his father. It is not to be presumed that his father, the head of his village, would violate the ordinary feelings of people of his caste, and make a distinction between children of the same womb, leaving the daughter to lead a licentious life, from which, according to the hypothesis, he had withdrawn her mother. The children of this man's acknowledged and admitted marriage prove that the children of both connections were brought up together as one family. This theory, therefore, of her original *status* as a dancing-girl of the temple has a formidable presumption opposed to it at its outset. The Judge has remarked on the conflicting character of the evidence given in support of it on the non-production of the alleged mother of the plaintiff. Mr. Benjamin strengthened very materially the inference which the Judge drew therefrom, by referring to the abstract of the defendant's evidence and the unexplained omissions to produce evidence from the Temple. Their Lordships feel strongly that if a few years only before the suit she had been an avowed public dancing-girl attached to the Temple, clear and abundance evidence of that fact might have been given.

Considerable reliance was placed in the argument before their Lordships on the evidence of Abdool Kadur, which will, therefore, be considered more particularly than that of the other witnesses who depose to the plaintiff having been a dancing-girl. This witness was represented correctly as a Government official, as one who *primâ facie* was entitled to credit as an independent and respectable person. He deposed to the plaintiff having actually appeared and danced before him at Tiruchuly in the years 1847, 1848, and 1849. His story, when subjected to a careful examination, appears to their Lordships to bear a strong resemblance to those admissions which the wants of a case often produce. Being an official, his only connection with Tiruchuly was that he went on circuit there with his master. Nothing is shown to induce the belief that the dancing-girls would more engage his attention or thoughts than would be the case with ordinary official persons before whom such appearances took place to do them honour. It is not represented by the witness that any special cause for distinguishing this particular dancing-girl from the rest existed, that she was eminent above the others in beauty or grace, or that her after fortunes fixed in his memory what otherwise might have been a fleeting impression. Yet after the long interval of eighteen or nineteen years he is deposing to the name, parentage, and appearance of one individual dancing-girl. This is unexplained. It may be that, if his evidence had been obtained in the careful manner in which evidence is ordinarily brought out in an English Court of Justice, these improbabilities might disappear, and his evidence prove to be supportable for the reasons urged to support it before their Lordships; but their Lordships have no assurance that the evidence is capable of being supported by these considerations, that her after fortunes led to the remembrance of her, or that she otherwise possessed any superiority over her comrades. The witness proceeds to give another account of the matter, for he represents that he heard from Shunmuga Pillai that she was his daughter. "He said he kept her mother, and also gave me his daughter's name." No explanation has been given, and none suggests itself to their Lordships' minds to account for a communication so utterly improbable. It is shown that Shunmuga had, from his first intercourse with her, withdrawn the mother from her former life, whatever it was, and had placed her in his house. Such a communication by her Hindoo Headsman to a stranger and a Mussulman is opposed to all experience of native habits: when and how did it occur? what produced it? The witness does not state that Shunmuga was present and pointed her out: or otherwise account for that supposed fulness of description which would identify the particular dancing-girl. He deposes further to another conversation equally improbable and at variance with native usages; and, lastly, represents himself as casually producing this most important evidence, which, if true, would fix on the plaintiff the *status* of a common dancing-girl, in an interview with the vakeel which had reference to another cause, one of his own, with nothing whatever to lead to a discovery of evidence so important to the vakeel, and so little likely to have been then casually disclosed. Such testimony is very common; if it is possible in a given case that it may be true, but it is of so dangerous a nature, and presents so few claims to be believed, that evidence of the kind is little regarded even though the witness deposing to it be in no other way discredited than as one deposing to evidence on which a Court cannot rely.

The presumption against her imputed *status*, which the marriage of the daughter affords, and the whole evidence, lead their Lordships to affirm on this point the conclusion of the Judge below that the plaintiff herself was not a dancing-girl, and was not one incapacitated to contract marriage.

The observations of Mr. Pochin concerning the habits of native families from which the Judges of the High Court dissent, seem not to have been applied by him to the case of a concubine treated with respect and attention little inferior to that of a wife. He was dealing with a case presented to him of a dancing-girl, and was applying his mind to the statements, issue, and evidence before him. Both tribunals may be correct enough with respect to that which each was considering. The High Court, however, is inconsistent with itself in some respects, for whilst it entertained the gravest doubts whether a marriage, if celebrated, would have had any validity, it regards the acts of the plaintiff and her advisers as unaffected by the like uncertainty. The Judges suppose the plaintiff must have known that if a marriage had taken place, her son would be legitimate, a matter which certainly was involved in considerable uncertainty, which their judgment shows them to have shared.

The legal presumption in favor of a child born in his father's house of a mother lodged, and apparently treated, as a wife, treated as a legitimate child by his father, and whose legitimacy is disputed after the father's death, is one safe and proper to be made; and the opposing case should be put to strict proof. The legal presumption as to the *status* of mother and son accords with the actual finding of the Court below, which had before it very strong proof indeed of recognition and actual marriage. This decision was reversed on grounds which impute to many witnesses *primâ facie*, not likely to have committed it, a very serious criminal conspiracy, subjecting all the parties to it to severe punishment. This imputation was one unwarranted by any proofs in the cause, and militated against the ordinary rule that crime is not to be presumed.

Their Lordships will humbly advise Her Majesty that the decision of the High Court be reversed, and that in lieu thereof an order be made dismissing the appeal to that Court from the decree of the Zillah Judge with costs, and that the appellant have the costs of this appeal.

The 21st November 1871.

Present :

Sir James W. Colvile, Sir Joseph Napier. Sir Montague Smith, and Sir Lawrence Peel.

Recovery of possession — Enam — Mortgage— Long enjoyment—Evidence.

On Appeal from the High Court at Bombay.

Ramrudeegowda

versus

Dessai Saheb.

This was a dispute, which arose in 1828, between two branches of a family respecting a Mahratta village. The plaintiffs (appellants) claimed the property on the allegation that the respondents held it as mortgagees, and that they (appellants) were entitled to redeem. The respondents claimed to have held the village in question as an *enam* free from the payment of Government revenue; and as they had held it on this title since 1824 up to the commencement of the suit, the Privy Council refused to disturb their title, thus fortified by long enjoyment, without clear and unmistakable proof of the alleged mortgage.

THE suit in this case was brought by the appellants to recover a village called Amravuttee, which appears to have been part of a larger estate or *wuttun*, and also certain allowances, of which very little has been said in argument, and very little explanation given, but which may be assumed to be certain profits incident to the right of the manager of one of these Mahratta villages. Mr. Doyne in his reply has dwelt principally upon the fact, which may perhaps be taken to be admitted upon these proceedings, that the respondent who has held this village so long does not pay the Government revenue in respect of it, that being paid by the owner of the whole *wuttun*. He has also dwelt, more slightly, upon the suggestion made in the Courts below, that by reason of some adoption the respondent's ancestor was taken out of the family of the original owners of the *wuttun*, and transferred to another family. There has been no finding with respect to the last point in any of the three Courts below, and it may therefore be left out of consideration.

We have not had much explanation of the nature of these tenures; but certainly it has not been supposed in any of those Courts that the first point dwelt upon by Mr. Doyne,—namely, that relating to the payment of the Government revenue,—was at all inconsistent with the respondent's case; and it appears to their Lordships to be quite conceivable that, if such a transaction as that on which the respondent relies really took place, the village may have been transferred to the respondent's family as an *enam* held, as far as the general owners of the *wuttun* are concerned, free from any contribution to the Government revenue, although upon the whole *wuttun* Government revenue may have been assessed either before or after the acquisition of these territories by the East India Company. Therefore it seems to their Lordships that the determination of this appeal depends upon the question whether any evidence has been given to prove the mortgage title upon which the appellant relies.

It appears that in 1828 the present contention first arose between the two branches of this family. Those whom the respondent represents then held this village; and it appears by Mr. Thackeray's order that they then claimed to have held it for nearly 16 years upon the title set forth at page 3 in the recital of Mr. Munroe's order. On the other hand, the persons whom the appellant represents then came forward, asserting that the other party held it as mortgagee, and that he was entitled to redeem. In that state of things Mr. Munroe made the order, which in point of form was certainly an irregular order,—namely, that the other party should give up possession of the village alleged to have been pledged or mortgaged,—upon an undertaking of the plaintiff to pay what might ultimately be found due.

That order went by appeal from Mr. Munroe, who was the Deputy Collector, to the Collector, Mr. Thackeray; and if the question raised were a question of jurisdiction there could be no doubt in their Lordships' minds that according to the known and ordinary course in these non-regulation provinces, in fact, it may be said throughout the territories of the East India Company, where there is jurisdiction in a Deputy Collector there would be an appeal to the next superior officer in the Revenue Department,—namely, to the Collector, and so on, as it appears in this case there was, from the Collector to the Commissioner.

A question is then raised touching the prosecution of this appeal to Mr. Thackeray and the regularity of this order. But the presumption is *omnia rite acta fuisse ;* and the evidence shows that both parties were heard, and that everything was done as regularly as things are done in a country governed as that country then was.

The papers went up to Mr. Thackeray. It is admitted in three documents that his decision was passed in the presence of both parties, that the respondent before him had an opportunity of being heard; and the result was the reversal of Mr. Munroe's order, and a direction that restitution of the village should be made to the appellant, which was done.

Whether that was a conclusive determination upon the title or not, it seems to their Lordships hardly necessary to decide. It was a clear adjudication of the right of possession at that time; and whether title could have been tried, as in regulation provinces, afterwards by a regular suit, it is not necessary to determine. But there was a clear adjudication that the possession upon the asserted title was in the respondents, the possession taken from them was restored, and there was (which is the essential thing to be considered) a clear reversal of whatever was found by the order of Mr. Munroe in favor of the alleged mortgage which is the foundation of the appellant's title.

It appears then that since the year 1824 up to the commencement of the suit the estate had been held by the respondent's branch of the family on the title on which they rely. The only way in which their title thus fortified by long enjoyment can be disturbed is by clear and unmistakable proof of the alleged mortgage.

There is really, when Mr. Munroe's order is out of the case, not the slightest evidence that the village was held upon a mortgage title.

Under these circumstances, their Lordships think that the attempt to disturb the concurrent judgments of the Courts below wholly fails, and they must humbly recommend Her Majesty to dismiss the appeal, with costs.

The 24th November 1871.

Present:

Sir James W. Colvile, Sir Joseph Napier, Sir Montague Smith, and Sir Lawrence Peel.

Mortgage—Proof of Bona fides.

On Appeal from the High Court of Bengal.*

Woomesh Chunder Roy

versus

Gooroodoss Roy and others.

Suit by mortgagee (respondent) after foreclosure of mortgage against mortgagors, incumbrancers, and present appellant who was in possession of part of the mortgaged property as purchaser at an execution sale. Mortgagors admitted plaintiff's title. Appellant pleaded that the mortgage was a collusive transaction between mortgagors and mortgagee in fraud of creditors. The Principal Sudder Ameen found that the mortgage was not a *bonâ fide* transaction, but the High Court reversed his decision; and the Privy Council, upon a consideration of the evidence, came to the conclusion that the Principal Sudder Ameen was right, because it was not only necessary for, but also in the power of, the respondent to adduce better evidence than he had given in this case in order to make out the reality and *bona fides* of the transaction on which he relied.

THE respondent in this case brought his suit to recover possession of the property included in his mortgage deed, having perfected his title under that deed by the usual proceedings in foreclosure. He brought the suit against the mortgagors, against some other incumbrancers whose case it is unnecessary now to consider, and against the present appellant, who was in possession of part of the mortgaged property as purchaser at an execution sale. The mortgagors admitted the title of the plaintiff the respondent. The appellant, however, defended his possession by insisting that the mortgage was from the first a collusive transaction, an arrangement between the mortgagors' and the mortgagee designed to protect the property of the mortgagors from the claims of their creditors. One of the issues framed in the suit is whether that proposition is correct or whether the mortgage transaction was *bonâ fide*? The Principal Sudder Ameen, the Judge of First Instance, found that issue in favor of the appellant, but a division bench of the High Court reversed his decision. It does not appear to their Lordships to be necessary to consider upon whom the burden of proof in such a case must fall, because they think that in the present case the facts are suffi-

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* On appeal from the judgment of Loch and Seton-Karr, J.J., in Regular Appeal No. 271 of 1864, decided 5th December 1864,—1. W. R., *Civ. Rul.*, 272.

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clearly [illegible] them to give a judgment upon them, and that there were sufficient circumstances proved and apparent in the case to render it necessary for the respondent to give better evidence of the *bona fides* of the transaction on which he relied than he has given in this case. Their Lordships observe, among other things, that by the petition filed by one of the mortgagors at page 70, the transaction, though spoken of as a real transaction, is spoken of as one of those arrangements under which the parties had every hope and probability of getting back the lands in future from the Baboo "in case we can pay the amount due to him."

Their Lordships also find that the respondent did so far undertake to prove what the consideration really was that he examined one or two witnesses upon that point. Those witnesses prove no more than that a colorable consideration passed in the shape of certain notes at Sreedhurpore, a payment which may easily be explained by the admitted relation between the parties, and is one of those payments which would be ostensibly made before witnesses of that character in order to give color to the transaction. But part of the alleged consideration for the original mortgage was a balance found upon a settlement of account, and no evidence whatever is produced as to the fact of the settlement of that account or to show in respect of what transactions it was settled, or that a balance was really struck and found due to the respondent upon that occasion.

Then again, the High Court, in its judgment reversing the decision of the Principal Sudder Ameen, relies upon the sum of money which was paid into Court, whether Rs. 15,000 or Rs. 16,000 does not very clearly appear, in order to stay the first execution of Punchanon Bose and another; but that payment throws no light upon the original transaction, certainly does not go to establish that that original transaction in its inception was a *boná fide* transaction, or the ordinary transaction of mortgagor and mortgagee, in which the parties would be dealing at arm's length with each other. On the contrary, if any thing, it tends the other way, because if the respondent had then completed his title by foreclosure, if he was in a position to claim this land against all persons by virtue of a *boná fide* mortgage title made absolute by foreclosure, what possible motive was there for advancing a very much larger sum than the sum originally secured by the mortgage?

Their Lordships, considering the whole of the evidence, are obliged to come to the conclusion that the Principal Sudder Ameen was right in finding that, as against the appellant, this was not a *boná fide* mortgage, but one of those transactions into which a friendly party might have been induced to enter in order to protect the young men, the mortgagors, from the demands with which they seem to have been pressed. The case is not presented, perhaps, in quite so satisfactory a way as it might have been in respect to the amount and nature of these demands. The Principal Sudder Ameen speaks of them in terms which the evidence, as sent over on this record, hardly supports; but there is, even upon the face of the plaint, an admission of outstanding demands sufficient to show that there may have been a motive that the property should be protected in the way in which it has been attempted to protect it.

Their Lordships think that, had the transaction been what it purported to be, the respondent, who might have given his own testimony, who might have called the person spoken of as his Moonshee and as having taken a principal part in the original transaction, and who might have examined the mortgagors and others, had it in his power to adduce far better testimony than has been given in this case, in order to make out the reality and *bona fides* of the transaction.

Their Lordships therefore are of opinion that the decree of the High Court cannot stand, and that it ought to be reversed. All that the present appellant asks is, that the decree of the Principal Sudder Ameen should be affirmed. Against that decree, so far as it was favorable to the respondent, the plaintiff in the case, there was no appeal to the High Court; and therefore nothing which their Lordships do here will in any degree disturb that decree, or alter or affect whatever relations may under it exist between the mortgagee and the mortgagors or anybody who may hereafter claim under them.

Their Lordships therefore will humbly advise Her Majesty to allow the appeal, to reverse the judgment of the High Court, and to affirm the judgment of the Court below, the Principal Sudder Ameen, with the costs of the appeal to the High Court. The appellant must also have the costs of this appeal.

The reservation at the end of the Principal Sudder Ameen's decree concerning the right to four annas of the property asserted in another suit seems to be unnecessary, because whether the appellant held three-fourths by virtue of his execution sale, and one-fourth by virtue of the decree in that other suit, or whether he holds the whole as purchaser at the execution sale, seems to be, for the purposes of this suit, an immaterial consideration.

The 30th November 1871.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Right of Way.

Case No. 758 of 1871.

Special Appeal from a decision passed by the Judge of Chittagong, dated the 13th April 1871, *reversing a decision of the Moonsiff of Hathazaree, dated the 21st July* 1870.

Futteh Ali (one of the Defendants) *Appellant,*

versus

Asgur Ali and another (Plaintiffs) *Respondents.*

Baboo Grish Chunder Ghose for Appellant.
Mr. G. A. Twidale for Respondents.

To constitute a right of way, there must have been an uninterrupted user as of right, and not one exercised at the mere will and favor of the other party.

Glover, J.—THIS was a suit for a declaration of plaintiff's right of way over a waste piece of land belonging to defendant, and for an order to pull down a house which defendant had erected across the pathway. The defence was that the path was not a public road, and that there was no right of way to the plaintiffs.

The first Court found that there was no right of way over this land, but that plaintiff along with other villagers used to pass over the land to the public road by consent of the defendants. The Judge, however, although he found that so much of the plaintiff's statement that the road was used for marriage and burial processions was false, still considered that the plaintiff's suit should not be altogether dismissed, because the plaintiffs had actually been in the habit of using the path as a means of proceeding directly to the high road. At the same time, the Judge appears to admit the existence of another way by which processions and cattle, &c., were wont to pass.

It appears to us that the Judge's decision is not maintainable. It is admitted that the waste land, through which the path in dispute runs, is the defendant's land; and there is nothing whatever to disprove the allegation of the defendant, that plaintiff used the land for some years by his sufferance and permission. To constitute a right of way, there must have been an uninterrupted user as of right, and not one exercised at the mere will and favor of the other party.

In this case, it is clear from the finding of the Lower Appellate Court that the plaintiff has another way to the public road when going with cattle, procession, &c., but that he has been in the habit of making use of this pathway by the sufferance of the defendant. This creates no right of way.

The Judge's decision is therefore reversed with costs.

The [illegible] December 1871.

Present:

The Hon'ble G. Loch and W. Ainslie, *Judges.*

Separate Estate—Possession—Adverse Possession—Limitation—Fraud of Life-tenant—Suit by Reversioners.

Case No. 752 of 1871.

Special Appeal from a decision passed by the Judge of Sarun, dated the 18th April 1871, *reversing a decision of the Subordinate Judge of that District, dated the 30th June* 1870.

Gunesh Dutt and another (two of the defendants) *Appellants,*

versus

Mussamut Lall Muttee Kooer (Plaintiff) and another (Defendant) *Respondents.*

LP2459

Baboos Mohesh Chunder Chowdhry and *Gopal Lall Mitter* for Appellants.

Baboo Chunder Madhub Ghose for Respondents.

Suit by a Hindoo daughter, for herself and as guardian for her minor son, to recover possession of her deceased father's separate estate. The legal representatives of the estate were, first, the deceased's widow, and after her the plaintiff and, her son. The widow not only failed to occupy and manage the estate, but, in collusion with the other defendants claiming under a hostile title, abandoned her rights, alleging that her husband was not separate but a member of a joint family, and left the hostile holders undisturbed. To preserve the separate estate from becoming extinguished by the operation of the law of limitation, it was necessary to remove the adverse occupants and to place the estate in the possession of some person to be appointed to represent it; and as the widow (the legal representative) never was in possession, and did not ask for it, but repudiated all claim to it, it was held that no one had a better right to the possession than the plaintiff, and possession was accordingly decreed to her as manager during the widow's life-time.

Ainslie, J.—Shitab Roy left two sons, Mohadeb Narain and Huruck Narain. The former had a son Chedee Lall, who died leaving a childless widow Mussamut Dowlut Kooer, one of the defendants, and a daughter Lall Muttee Kooer who sues for herself and as guardian of her minor son, Mohabeer Pershad. The other defendants are the sons of Huruck Narain.

After the death of Chedee Lall, separate applications were made to the Judge under Act XXVII of 1860 by the widow and the sons of Huruck Narain, the former claiming as widow a life-interest in the estate of the deceased, on the ground of separation of the family, and the latter claiming the property on the ground of union.

The widow abandoned her claim and admitted that the sons of Huruck Narain were entitled to and were holding the estate of Chedee Lall as part of the joint property of an undivided family, and that her own right was limited to a claim to maintenance for which she had made her arrangements with the adverse claimants of the estate.

In consequence of this, the plaintiff who is the next heir to the estate of Chedee Lall, if as she asserts the family was a divided one, has instituted this suit to recover possession of the estate from the hands of the sons of Huruck Narain making the widow a co-defendant on the ground that she had collusively admitted the claims of the principal defendants.

The points taken before the Judge were two,—firstly, was Chedee Lall a member of an undivided family, or not. Secondly, can the plaintiff succeed in this suit during the life-time of the widow.

The Judge found that Chedee Lall had separated from the family, and was holding his various properties to his own exclusive use and benefit; and he also found that the suit was not affected by the fact of the widow being alive, resting his judgment on a Full Bench Ruling reported in IX Weekly Reporter, page 505.

In special appeal, the latter ground has been pressed, sub-divided into two branches,—namely, 1st, generally whether the plaintiff, whose right is only in reversion after the widow's death, can sue before her death; and 2nd, whether he can get the decree for possession which he seeks.

On the first point, I entertain no doubt whatever. It seems to me that the view taken by the Judge of the nature of the possession by the appellants is quite correct, and that it is not a permissive possession derived from the widow, but an adverse possession adverse to her and to every one claiming as the heir of Chedee Lall's separate estate. It has been said that the compromise entered into by the widow in the Act XXVII suits, places the appellants in the position of parties holding with her consent; but it is not admitted that they derive title from her and that their rights are limited by and co-extensive with hers. Looking to the proceedings under Act XXVII, it is quite clear that the defendants have never admitted in the slightest degree that they hold under the widow. They alleged, and still allege, a title entirely hostile to her and possession based on that title, and the fact that she, for reasons which we need not consider, chooses to abandon her own claim, which, under the finding of the Judge in this suit, was a good one, and to admit a claim which has no foundation in right, does not alter the nature of their possession from an adverse to a derived possession. The compromise may be perfectly binding on her, but there is nothing in the terms of it to show that the appellants admitted and acquired her rights. On the contrary, this is studiously avoided, and the appellants carefully maintained their position as heirs to the undivided share of the joint estate,—a position adverse to every one interested in the separate estate. They bought the widow's silence, but did not attempt to acquire her rights as heiress. In fact, the appellant's case rests upon ignoring the distinction between the nature and extent of the rights in a joint and in a separate estate, and looking only to the subject-matter to which those rights apply; but this cannot be permitted. In considering whether the possession is adverse, we must see whether it is based on a title derived from the widow as representative of the separate estate, or on one which leaves no separate estate to be represented, and as it clearly appears that the appellant's claim rests and has always rested solely on the non-existence of the separate estate, it is impossible to hold otherwise than that it is a claim by virtue of a hostile title. This being so, it follows from the Full Bench Ruling relied on by the Judge that limitation would run against all persons interested in the separate estate of Chedee Lall from the date on which possession was taken of it by the appellants as part of the joint family property. In the judgment referred to, the late Chief Justice, Sir Barnes Peacock said: "It has been contended that, as the widow cannot absolutely "convey away her husband's estate without "sufficient cause so as to be binding upon "the reversionary heirs, they ought not to "be barred by limitation against the widow; "otherwise she will be able, if she lived a "sufficient time, to do indirectly, by allowing "adverse possession to be held against her, "that which she could not do directly, by a "sale without sufficient cause. But rever-"sionary heirs presumptive have a right, "although they may never succeed to the "estate, to prevent the widow from commit-"ting waste: and I have no doubt that if a "proper case were made out, reversionary "heirs would have a sufficient interest, as "well as creditors of the ancestor, by suit "against the widow and the adverse holder "to have the estate reduced into possession, "so as to prevent their rights from becom-"ing barred by limitation."

It seems to me quite clear that the fact that the widow being still alive is no bar to this suit being brought.

The appellants rely on the Full Bench decision in XII Weekly Reporter, page 14, F. B.; but that case is clearly distinguishable, inasmuch as the possession which it was sought to extinguish was derived from the act of the widow herself, and, as remarked by Mr. Justice Macpherson, "*it being admitted* "*that the property was originally inherited* "*by the widow*, until it is ascertained whe-"ther she in giving possession to her alleged "adopted son acted in a manner warranted by "Hindoo law, it cannot be ascertained whe-"ther that possession was adverse to the re-"versioner." Here we have no such admission, but the very contrary.

The other cases cited by the pleader for the appellants all refer to possession acquired from the life-tenant and pre-suppose an undoubted right and possession in her.

I am further of opinion that the Judge was right in making the decree for possession. In the passage above quoted from the judgment of Sir Barnes Peacock, that learned Judge distinctly indicates that cases may arise in which by a suit brought by a reversioner against the widow and adverse holder the estate may be reduced into possession. This seems to me to be such a case. Here is the separate estate of Chedee Lal wanting a representative—the legal representatives are first the widow for life, and after her the plaintiff and her son. The widow has not only failed to occupy and manage the estate, but has allowed some one else claiming under a different title to come in and take possession, and has, after a feeble show of opposition, abandoned her rights and left the hostile holders undisturbed. Indeed, she has done more, for, so far as lay in her power, she has worked to support their hostile title and to defeat the reversioner's rights. To preserve this separate estate of Chedee Loll from becoming extinguished by the operation of the Law of Limitation, it is necessary that it should be placed in the possession of some person who may be appointed to represent that estate, and that the adverse occupants should be removed. It is a case of waste of the widest kind. It is not mere deterioration of the property that is threatened, but a total destruction of all benefit derivable from the right of succession. There has been an attempt so to deal with the property that the rightful heir may possibly never be able to lay hands on it. The widow, who at present is the legal representative of Chedee Lall, never has been in possession, and does not ask for possession, but on the contrary repudiates all claim, and there is no one with a better right to the possession than the present plaintiff. I would, therefore, confirm the decree of the Court below and dismiss this special appeal. It is admitted by Baboo Chunder Madhub Ghose for the respondent that the respondent is not entitled to enter as absolute owner, but merely as manager during the life of the widow, and therefore I would add to the decree of the Judge a declaration to this effect, and an order that the plaintiff, after entering into possession as manager, shall annually, on or before a given date (the end of Bhadoon or other more convenient day) to be determined by the Judge, file his accounts in the Court of the Judge of Sarun and deposit all the profits of the estate during the preceding year for the joint use and benefit of the defendants in this suit, so long as the widow Mussamut Dowlut Kooer shall remain alive, or until further orders of the Court.

Loch, J.—I have no doubt as to the necessity and propriety of this suit, for it is clear from the facts put before us that Dowlut Kooer, widow of Chedee Lall, has, in collusion with the other defendants to the manifest injury of the plaintiff and her son, given up her rights to her husband's property, alleging that her husband was not separate but a member of a joint family. The only doubt that existed in my mind was as to the form and extent of relief which we should give the plaintiff, whether it would be sufficient to declare that the property of Chedee Lall was held by him separately, and that on the death of the widow notwithstanding her acquiescence in the possession of the other defendants, the legal heirs might take it from their hands, or whether the plaintiff is entitled to get possession as prayed for. It is clear that the other defendants cannot be permitted to hold possession because they have no legal right to do so. The widow cannot have possession, for she does not ask for it, and has colluded with the other defendant to the injury of the heirs of her husband. Under these circumstances, I think the plaintiff should, as proposed by my colleague, be allowed to hold possession in the capacity of manager during the life of the widow, and a decree will be made accordingly. The special appeal is dismissed with costs.

The 8th December 1871.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. A. Glover, *Judge.*

Execution (Suit to recover money received in)—Collectors' Courts—Section 11 *Act XXIII of* 1861.

Case No. 796 of 1871.

Special Appeal from a decision passed by the Additional Subordinate Judge of Chittagong, dated the 26*th April* 1871, *reversing a decision of the Moonsiff of Cox's Bazaar, dated the* 23*rd September* 1870.

Kristo Chunder Goopto and others (Plaintiffs) *Appellants,*

versus

Ramsoonder Sein (Defendant) *Respondent.*

Baboo Chunder Madhub Ghose for Appellants.

Baboo Nuleet Chunder Sein for Respondent.

Before bringing suit to recover money which defendant had received in execution of decree, and which he was no longer entitled to retain, plaintiff is not bound to make application to him for the money. There is no express provision of law with regard to the Collectors' Courts as there is in Section 11 Act XXIII of 1861 with regard to the Civil Courts.

Couch, C. J.—I am not at all prepared, nor is it necessary for me, to decide whether the Collector had or had not jurisdiction to order the return of this money. But whether he had or had not jurisdiction, it was not incumbent upon the plaintiff to make any application to him before bringing this suit, which he was entitled to bring, in order to recover back the money which the defendant had received in execution of the decree, and which he was no longer entitled to retain.

There is no express provision of law with regard to the Collectors' Courts as there is in Section 11 Act XXIII of 1861 with regard to the Civil Courts.

I think the decree of the Lower Appellate Court must be set aside, and that of the first Court restored with costs.

Glover, J.—I concur.

The 8th December 1861.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. A. Glover, *Judge.*

Rent Suit—Question as to Agency.

Case No. 729 of 1871 under Act X of 1859.

Special Appeal from a decision passed by the Additional Judge of Jessore, dated the 22*nd March* 1871, *affirming a decision of the Deputy Collector of that district, dated the* 30*th October* 1869.

Ramgutty Mundul and others (Defendants) *Appellants,*

versus

Gourish Chunder Pauray and others (Plaintiffs) *Respondents.*

Moulvee Murhumut Hossein for Appellants.

Baboo Bipro Doss Mookerjee for Respondents.

The question was, for which party M had received rent. The High Court, on the former occasion, said it was not sufficient for M to say that he was plaintiff's agent, and directed the question to be determined upon the issue whether plaintiff was the landlord or not. HELD that what the Court meant was not to order the Revenue Court to go into the question of title between the parties and determine it, which the Revenue Court would have no power to do, but to find whether M had been acting as plaintiff's agent and receiving rent for him or not; and that as the Judge found that M was plaintiff's agent and received rent for him from defendant, this was sufficient to determine defendant's liability to pay his rent to plaintiff.

Couch, C. J.—THIS was a suit for rent brought in the Revenue Court, and there was no question but that the defendant paid rent to Mohadeb Mundul; the only question was whether Mohadeb Mundul had received the rent as the agent of the one party or the other, and for which party he had received it.

The High Court, when the case was before them on the former occasion, said, and very justly, that it was not sufficient for Mohadeb Mundul to say that he was the agent of Gour Chunder, and they directed the question to be determined upon the issue whether Gour Chunder was really the landlord or not. Now we must read this language of the Court with reference to the nature of the suit. What was meant was whether Mohadeb Mundul had been acting as the agent of Gour Chunder and receiving rent for him or not, because the Revenue Court would have no power to go into the question of title between these parties and determine it. We must certainly presume that the High Court meant to order the Revenue Court to do that which it had power to do and not that which it had no power to do: and that question having gone down to the Revenue Court to be tried, there is a very distinct finding of the Judge after a lengthy judgment, some portions of which might very well have been omitted He says "What I now determine upon the "evidence before me is, that Mohadeb Mun-"dul was the plaintiff Gour Chunder's Go-"mastah and collected rents from Moheshpara "and from defendant appellant for him." Therefore, the result is, that the defendant is found to have been paying his rent to the agent of Gour Chunder and for Gour Chunder. That was sufficient to decide the question raised between the parties in this rent suit; and whatever other questions may exist between Gour Chunder and the other parties will have to be determined in some other suit. The defendant was bound as regards this matter to pay his rent to Gour Chunder, to whose agent he was found to have been hitherto paying it.

The decision of the Judge will be affirmed, and this appeal dismissed with costs.

The 13th December 1871.

Present :

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Onus probandi—Ousut Talook—Sale—Boná fide purchaser — Estoppel — Attachment — Execution — Benamee holder--Priority.

Case No. 586 of 1871.

Special Appeal from a decision passed by the Officiating Judge of Backergunge, dated the 6th March 1871, reversing a decision of the Subordinate Judge of that District, dated the 6th August 1870.

Jugobundhoo Sein and others (Plaintiffs) *Appellants,*

versus

Bhugwan Chunder Doss and others (Defendants) *Respondents.*

Baboos *Doorga Mohun Doss* and *Chunder Madhub Ghose* for Appellants.

Baboo *Sreenath Doss* for Respondents.

Defendants having pleaded that the *ousut talook* (the subject-matter of this suit) which they had hitherto claimed as a real *ousut talook* purchased by them for valuable consideration was a mere fiction, the *onus* of proof lay on them, and not on plaintiff.

It being proved that M purchased the rights of the I. defendants not only in the *ousut talook* but also in the two superior *talooks* within which it was situated, if the validity of his purchase of these two *talooks* could not be impugned, it followed as a matter of course that he had succeeded to all the rights which the I. defendants had in the disputed lands, whether as *talookdars* only or as *talookdars* and *ousut talookdars.* M's title to the two *talooks* could not be affected by a former decision in a suit to which he was not a party.

Defendants' alleged purchase was null and void, because made at a time when the properties covered by it were under attachment in execution of M's decree against the I. defendants. Whether M knew or not that the order striking off the execution case contained a provision to the effect that the attachment should continue in force, the mere fact of an execution case being struck off the record does not put an end to the attachment.

The Judge having found that defendants were mere *benamee* holders for the I. defendants, M's purchase must prevail over defendants' pretended purchase, notwithstanding the alleged priority of the latter in point of time. M then being the rightful owner of the superior *talooks*, it was immaterial whether the *ousut talook* claimed by plaintiff as purchaser for valuable consideration from M was real or fictitious.

Mitter, J.—The subject-matter of this suit is an *ousut talook* called by the name of Annund Chunder Goho Oghyran. This *ousut talook*, together with the two superior *talooks* within which it is situated, and which have been designated in these proceedings as *talooks* B. and C., were put up to sale in execution of a decree obtained by one Manick Chunder Doss against the Indu defendants.

The defendants Shumboo Chunder Ghose and Bhugwan Chunder Doss intervened under the provisions of Section 246 of the Code of Civil Procedure, and claimed all the three properties above referred to on the strength of two bills of sale alleged to have been executed in their favor by the Indu defendants, on the 23rd of Aghran and 1st of Pous 1270, respectively.

This claim was rejected by the Court as unfounded, and the properties were ultimately sold by auction to Manick Chunder Doss on the 5th of December 1864.

Manick Chunder Doss subsequently sold his rights and interests in the *ousut talook* to the plaintiff in the present case, and this suit has been brought by the latter to recover possession of that *ousut talook*, on the allegation that he was prevented from taking possession thereof by the Indu defendants, who, in collusion with the defendants Shumboo Chunder Ghose and Bhugwan Chunder Doss, set up the two bills of sale above referred to.

The defendants Shumboo Chunder and Bhugwan Chunder pleaded that the *ousut talook* in question was a mere fictitious tenure, and that although they had nominally purchased it from the Indu defendants on the 1st of Pous 1270, they had done so merely for the purpose of preventing disputes, the two superior *talooks* B. and C. having been previously purchased by them on the 23rd of Aghran of that year.

The Moonsiff, after going carefully into the evidence, gave a decree to the plaintiff, holding that the plea set up by the defendants was false and fraudulent, and that both the purchases relied upon by them were null and void, inasmuch as they were made at a time when the properties covered by them were under attachment in execution of Manick Chunder's decree.

Against this decision, the defendants Shumboo Chunder and Manick Chunder appealed to the Judge, and that officer has dismissed the plaintiff's suit upon the ground that the disputed *ousut talook* was a fictitious tenure fraudulently created by the Indu defendants with a view to defeat the claims of their creditors. The Judge has further found as a fact that the defendants Shumboo Chunder and Bhugwan Chunder are mere *benamdars* for the Indu defendants, who are in actual possession of the lands in question.

We are of opinion that the decision of the Judge must be set aside as erroneous in law.

In the first place, it is clear that the onus of proof has been thrown upon the wrong party. The plaintiff had sufficiently started his case by producing the repeated admissions made by the defendants regarding the existence of the *ousut talook* as well as by the order passed in his favour under Section 246. Under such circumstances, it was clearly incumbent upon the defendants to prove the plea now set up by them, namely, that the *ousut talook* which they had hitherto claimed as a real *ousut talook*, purchased by them for a valuable consideration was a mere fiction. As far as we can judge from the evidence on the record, we think we are fairly entitled to say that this plea ought not to have been accepted so easily as the Judge appears to have done.

But be this as it may, it is clear that Manick Chunder Doss purchased the right, title, and interests of the Indu defendants, not only in the *ousut talook* which forms the subject-matter of this litigation, but also in the two superior *talooks* B. and C. within which it is situated; and if the validity of his purchase of these two *talooks* is not liable to be impugned, it must be held as a matter of course that he has succeeded to all the rights which the Indu defendants had in the disputed lands whether as *talookdars* only or in the double capacity of *talookdars* and *ousut talookdars*. The Judge seems to have thought that Manick Chunder's title to the two superior *talooks* B. and C. have been finally set aside by a decision of his predecessor, Mr. Lounces. But in this he is completely mistaken. Manick Chunder was not a party to the suit in which that decision was passed, and it is therefore beyond all question that his interests cannot be affected by it in any manner whatever.

The only other ground upon which Manick Chunder's title as purchaser of the two superior *talooks* B. and C. can be impugned, is the prior purchase of the 23rd of Aghran 1270, set up by the defendants Shumboo Chunder and Bhugwan Chunder. But here too the defendant's case fails most miserably.

In the first place it is clear that this pretended purchase of the 23rd of Aghrau is absolutely null and void, inasmuch as it was made at a time when the properties covered by it were under attachment in execution of Manick Chunder's decree. This was distinctly found by the Moonsiff, and the defendants Bhugwan Chunder and Shumboo Chunder could not in their memorandum of appeal to the Judge venture to deny the *factum* of the attachment, though they attempted to get rid of it upon a ground to which we shall presently refer. The Judge also admits it in one part of his decision, though in another part he says that it was not necessary for him to enquire into the validity of the defendant's purchase, with reference to that point. It has been urged however that a certain petition of Manick Chunder Doss shows that the attachment had come to an end in consequence of the execution case having been struck off the record. We are of opinion that this plea is of no weight whatever. It has been repeatedly held by this Court, as well as by the Privy Council, that the mere fact of an execution case being struck off the record does not put an end to the atttchment. But without entering into any further discussion on this point, it is sufficient for us to say that the very order by which Manick Chunder's execution case was struck off contains a distinct provision to the effect that the attachment should continue in force. Manick Chunder might have misunderstood this order and asked for a renewal of the attachment, but that circumstance cannot destroy its legal effect in any manner whatever.

In the next place, the Judge has clearly found that the defendants Shumbhoo Chunder and Bhugwan Chunder are mere *benamee* holders for the Indu defendants. It has been said that this finding is not supported by any legal evidence. We have looked into the record, and we find that this plea is altogether unfounded. There is ample evidence to support the finding of the Judge, and we feel no hesitation in saying, after looking into that evidence and the surrounding circumstances of the case, that it is the only reasonable finding which could have been arrived at. This being so, it is clear that Manick Chunder's purchase must prevail over the pretended purchase set up by the defendants Shumbhoo Chunder and Bhugwan Chunder, notwithstanding the alleged priority of the latter in point of date.

But if Manick Chunder is admitted to be the rightful owner of the superior *talooks* B. and C., the question whether the *ousut talook* claimed by the plaintiff was real or fictitious becomes of no importance whatever. The plaintiff is a purchaser from Manick Chunder for a valuable consideration, and if the latter chose to carve out a new *ousut talook* from the two superior *talooks* which undoubtedly belong to him, or to deal with a fictitious *ousut talook* previously set up by his predecessors in title as a real *ousut talook*, and then to sell it to the plaintiff for a proper consideration, the plaintiff's claim for the recovery of that *ousut talook* cannot be possibly resisted upon any ground of law or of justice, either by the Indu defendants who have no rights whatever in the property, or by the pretended purchasers from them, namely, the defendants Shumbhoo Chunder and Bhugwan Chunder.

For the above reasons, we set aside the decision of the Judge and restore that of the Moonsiff. The whole costs of this litigation must be paid by the Indu defendants and the defendants Shumbhoo Chunder and Bhugwan Chunder who are jointly and severally responsible for the same.

The 15th December 1871.

Present:

The Hon'ble H. V. Bayley and W. Markby,
Judges.

Case No. 823 of 1871.

Rent—Sharers—Misdescription—Assignment.

Special Appeal from a decision passed by the Subordinate Judge of Rajshahye, dated the 20th April 1871, *reversing a decision of the Moonsiff of Belmarhia, dated the* 17*th September* 1871.

Bhooban Moye Dossee (Plaintiff) *Appellant*,

versus

Ruffick Mundul and others (Defendants)
Respondents.

Baboo Kaleekishen Sein for Appellant.

Baboos Bhugobutty Churn Ghose and *Shushee Bhoosun Sein* for Respondents.

Plaintiff sued for rent describing herself as holding a *dur mourosee jote*, and the Lower Appellate Court treated that description of her *jote* as a misdescription, because the *jumma-wasil-bakee* papers called her a *mourosee-ijaradar*, and other papers showed her to be a *dur-mourosee-talookdar*. HELD in special appeal that the misdescription, if there was any, was an utterly insufficient ground for throwing out plaintiff's claim.

Where the rents of a share with certain specified boundaries have been assigned by one shareholder absolutely, by no arrangement (*e. g.*, partition) between that shareholder and his co-sharers, without the assent of the assignee, can the right of the assignee to collect rents under his assignment be in way affected?

Bayley, J.—WE think this case must be remanded to the Lower Appellate Court for trial of the single question as to whether the jumma in this case should be Rs. 11-12 annas 12 gundahs, or Rs. 17-11 annas 2 gundahs. This point was decided in favor of the plaintiff by the first Court, and although a distinct objection was taken on the finding by the defendant in his grounds of appeal before the Lower Appellate Court, that Court has come to no proper decision on this point.

The facts of the case are these: The plaintiff sued for the rents of 1274, 1275, and 1276. She described herself as holding a *dur-mourosee jote*, and as entitled to collect rents of 6 annas share in *kismut* Moyna from the defendant's ryots. That 6 annas share, plaintiff alleged, paid rent at Rs. 11-12 annas 12 gundahs before resumption, and was assessed at Rs. 17-11 annas 2 gundahs after resumption.

The zemindar was also made a defendant in this suit.

The ryots' (defendants') answer was that they paid rent at the rate of Rs. 11-12 annas 12 gundahs for 1274; that they never agreed to pay higher rent after resumption; that there had been a partition under which 5 annas went to one Rohinee Kant, 5 annas to one Boydonath, and the remaining 6 annas became the property of Radha Soonderee; that, by the partition thus made, the land was so distributed that only 1¼ cottahs remained to plaintiff for her share, and that those 1¼ cottahs have been relinquished by the defendants.

The first Court raised these general issues: 1stly.—Whether the plaintiff was entitled to get Rs. 5-12 annas 10 gundahs as excessive rent on the land assessed after resumption, and what was the amount of rent paid in 1274 to plaintiff by the ryot defendant.

2ndly.—Whether the *mehal* was partitioned among the zemindars, and whether plaintiff was bound thereby, and,

3rdly.—Whether it was true that under the said partition the ryot defendants had only 1¼ cottahs in the plaintiff's share, and whether they since relinquished the same.

On all these issues, the first Court found against the defendants.

In regard to the question of partition, the first Court held that the plaintiff could not be bound thereby, as she was no party to it, and there was no proof that she admitted the said partition; that the ryot defendants could not rely on it as they were not parties to it, and further because they admitted the relation of landlord and tenant.

On the question of the alleged relinquishment of the 1¼ cottahs, the first Court held that the ryot defendants gave no proof of relinquishment.

On appeal from this decision by the defendants, no objection was raised as to the finding by the first Court on the question of relinquishment. The question of the partition and its validity, and the liability of the ryot-defendants to the plaintiff for the amount of the share that was alleged to fall to her, were the points raised in appeal. It was further disputed whether the plaintiff was a *dur-mourosee jotedar* as stated in the plaint, or only a *mourosee ijaradar* as stated in the written statements of the defendants.

The Lower Appellate Court decided the case really upon two points, mainly upon the point of the want of the title alleged by the plaintiff and the consequent non-liability of the defendants to pay rent to her, and also on the point of partition leaving the plaintiff no share in the land on account of its having been assigned to the other proprietors.

The plaintiff appeals specially, and urges, firstly, that the partition relied upon cannot affect her rights, because in the first place she was no party to it; in the second place, the ryot defendants cannot take advantage of it, as they were also no parties thereto; and, thirdly, because they had already admitted the relation of landlord and tenant.

The second point urged before us is as to the misdescription upon which the Lower Appellate Court has so much relied,—*viz.*, that the plaint described the plaintiff as a *dur-mourosee jotedar*, the *jumma-wassil-bakee* papers called her *mourosee ijaradar*, and other papers showed her to be a *dur-mourosee talookdar;* and it is contended that there is nothing in these descriptions to vitiate her title to collect rents from the defendants.

The tenure was distinctly described in the plaint as a *dur-mourosee jote,* and that the description in the *jumma-wassil-bakee* papers was in terms equivalent to her being a tenant-in-form,—*i. e., dur-mourosee jotedar.* Ordinarily either of these positions may be described by either of these terms. It was therefore an unsubstantial ground on which the Lower Appellate Court threw out the plaintiff's claim.

In regard to the question of partition, the Lower Appellate Court has entirely disregarded the strong point relied on by the first Court,—*viz.,* that the plaintiff was no party thereto, and was therefore not bound by it; and that the ryot defendants also under that partition could not repudiate the relation of landlord and tenant as they too were no parties. On both these points, therefore, we think that the judgment of the Lower Appellate Court must be reversed, and that of the first Court restored.

There still remains another point on which no decision has been pronounced by the Lower Appellate Court,—*viz.,* whether the *jumma* in this case will be Rs. 17-11 annas 2 gundahs, or Rs. 11-12 annas 12 gundahs, and on this point we think the case should be remanded to the Lower Appellate Court for trial.

The plaintiff will be entitled to her costs both of this Court and of the Lower Appellate Court.

Markby, J.—I am of the same opinion. I entirely agree with Mr. Justice Bayley in his view as to the misdescription of the plaintiff's *jote* in this case; and I think that even if there is any misdescription, it is an utterly insufficient ground to dismiss the plaintiff's suit.

The point mainly argued as to the partition seems to me quite clear. Where the rents of a share with certain specified boundaries have been assigned by one shareholder absolutely, by no arrangement between that shareholder and his co-sharers, without the assent of the assignee, can the right of the assignee to collect rents under his assignment be in any way affected.

The respondents must pay the costs of the Court below and of this appeal.

The 19th December 1871.

Present:

The Hon'ble H. V. Bayley and F. B. Kemp, *Judges.*

Execution—Construction—Joint Decree—Aliquot Part—Interest—Jurisdiction—Amendment.

Cases Nos. 296, 303, and 304 of 1871.

Miscellaneous Appeals from an order passed by the Additional Subordinate Judge of Mymensingh, dated the 14th July 1871, reversing an order of the Moonsiff of that district, dated the 28th December 1869.

Nubo Kishore Mojoomdar and others (Judgment-debtors) *Appellants,*

versus

Anund Mohun Mojoomdar and others (Decree-holders) *Respondents.*

Baboo Nuleet Chunder Sein for appellants.

Baboos Doorga Mohun Doss and *Gopal Lall Mitter* for respondents.

In execution, a decree must be construed by its own terms, and not by the plaint. Where a decree is a joint decree, execution cannot proceed upon an application made with a view to execute an aliquot part of the decree.

Where no interest is given in a decree, none can be recovered in execution of that decree.

When an application for execution is contrary to the terms of the decree, the High Court cannot in appeal allow the application to be amended, but the decree-holder must apply to the Lower Court to be allowed to execute it according to its terms.

Kemp, J.—These are appeals on the part of the judgment-debtors from the decision of the Additional Subordinate Judge of Zillah Mymensing, reversing the decision of the Sudder Moonsiff of that district. The decree now sought to be executed was a joint decree.

The first Court very properly held that the application which was made with a view to execute an aliquot part of the decree was contrary to the terms of the decree itself, and therefore execution could not proceed upon such an application. The first Court quoted a decision of this Court to be found in Weekly Reporter, Volume XI, page 241, case of Poorno Chunder and others *vs.* Saroda Churn Roy, dated the 15th March 1869.

The Subordinate Judge observes that the ruling of the High Court referred to by the Moonsiff has no bearing on the present case, and looking to the plaint in the original case, he considered that the intention of the judgment-creditors in bringing the suit was to recover the money due in half shares. In other words, the Subordinate Judge construed the decree by the plaint instead of by its own terms.

We think the ruling of the High Court referred to by the Moonsiff has a distinct bearing on the present case. It is there clearly ruled that execution cannot proceed upon an application made with a view to execute an aliquot part of a decree. We think the Subordinate Judge, in holding that the rule laid down in the case referred to by the Moonsiff had no bearing on the present case, should have given some reasons which led him to that conclusion. The Subordinate Judge is clearly wrong in law in construing the decree by the plaint instead of by its own terms. He has simply to execute the decree according to its own terms. The decree is a joint decree, and therefore no application of the judgment-creditors for execution of an aliquot part of the decree can be entertained.

The second objection is, that the decree-holders are not entitled to interest for the period of the pendency of the suit when the decree sought to be executed did not grant such relief. This objection is also valid. No such interest was given in the decree, and no such interest therefore can be recovered in execution of that decree. If the special respondent wishes to execute the decree according to its terms,—*viz.*, jointly against the judgment-debtors, he should apply to the lower Court to allow him to do so. We cannot, as suggested by the pleader for the special appellant, allow him here to amend the application which in its present form is contrary to the terms of the decree.

The appeal is decreed with costs.

The 19th December 1871.

Present :

The Hon'ble H. V. Bayley and F. B. Kemp, *Judges.*

Hindoo Widow—Sale.

Case No. 297 of 1871.

Miscellaneous Appeal from an order passed by the Officiating Judge of Mymensingh, dated the 6th July 1871, affirming an order of the Subordinate Judge of that district, dated the 9th August 1869.

Gobind Narain Dey (Judgment-debtor) *Appellant,*

versus

Gour Monee Dobia and another (Decree-holders) *Respondents.*

Baboos Sreenath Doss and *Nuleet Chunder Sen* for Appellant.

No one for Respondents.

A and B were two brothers. A's widow sued B's son, but being unable to carry on the litigation sold a portion of her rights and interests in the suit to G and J, and a joint decree was passed in the names of G and J as well as of the widow. The widow soon afterwards died, and B's son became A's heir. HELD that as A's widow had only a life-interest in her husband's property, on her death her rights and interests ceased as well as those of G and J as decree-holders; and that B's son, the judgment-debtor, became in effect, as A's heir, the sole judgment-creditor and entitled to the whole property.

Bayley, J.—No one appears on the part of the respondents. The serving peon's deposition, however, shews that the notice has been duly served.

It appears that one Bindoo Bashinee sued the special appellant, her husband's brother's son. It is stated to us, and no one appears here to contradict the statement that Bindoo Bashinee not having means to carry on the litigation sold a certain portion of her rights and interests in the suit to Gour Monee and Jugdissuree. A joint decree was passed in their names and in that of Bindoo Bashinee. The last named soon after died. By her death the special appellant, as brother's son, became heir to the husband of Bindoo Bashinee, and the question raised in this special appeal is that Bindoo Bashinee had as widow only a life-interest in the property of her husband, that consequently on her death those rights and interests ceased and determined, and that as the rights and interests of Gour Monee and Jugdissuree were derived from Bindoo Bashinee, they also ceased with her death, and the special appellant became entitled to the whole property as next heir, and therefore the present application for execution by those who have no rights or interests as decree-holders cannot proceed against the special appellant.

We think this objection valid. It is to be remembered that Bindoo Bashinee had only a life-interest in her husband's property, and the special appellant who is the judgment-debtor in the case, becomes in effect as heir to her husband, the sole judgment-creditor and entitled to the whole property.

In this view, the judgment of the Lower Appellate Court is reversed, and this appeal decreed with costs.

The 22nd December 1871.

Present:

The Hon'ble G. Loch and W. Ainslie,

Judges.

Sale, of Lands (for Government Demands other than Arrears of Revenue)—Procedure—Partition—Defaulters—Fine—Substantial Injury.

Case No. 144 of 1871.

Regular Appeal from a decision passed by the Judge of Bhaugulpore, dated the 30th May 1871.

Mohun Ram Jha (Defendant) *Appellant,*

versus

Baboo Shib Dutt and others (Plaintiffs) *Respondents.*

Baboos Chunder Madhub Ghose and *Mohinee Mohun Roy* for Appellant.

Baboo Bhowanee Churn Dutt for Respondents.

All sales for the recovery of Government demands, not being actually arrears of revenue, must be preceded by the steps prescribed in Sections 18 to 24 of Act VII of 1868, B. C.; and the Collector cannot proceed to sell under the mere summary course sanctioned by Act XI of 1859. As moreover certificates under the former Act are to have the effect of decrees, and sales in execution thereof are to be governed by the procedure prescribed by Act VIII of 1859, if the proprietor of an estate, in respect of which a certificate has been made for a Government demand, come into Court either before or at the time of sale, and, before the property is actually sold, tender the amount of the demand, the Collector is bound to receive it and to abstain from selling the property.

In this case a partition having been ordered under Regulation XIX of 1814, a fine was levied on the proprietors for non-attendance after due notice, and on non-payment of the fine a sale notification was issued under Sections 5 and 6 Act XI of 1859, fixing the sale for the 7th January. On the 4th January, the proprietors tendered the fine which was refused, and the estate was sold and purchased by defendant, appellant. On the suit of the proprietors, the sale was set aside as illegal, irrespectively of the question of substantial injury.

Loch, J.—THE facts of the case as laid before us are these :—

Mouzah Ramputtee Singhessurpore was directed to be partitioned under the provisions of Regulation XIX of 1814. On the 23rd February 1869, the Deputy Collector required the attendance of the proprietors; on the 15th March 1869, the Deputy Collector warned them that if they did not attend they would be subject to a daily fine. On the 21st April 1869, the Deputy Collector applied to the Collector for the Commissioner's sanction for the imposition of a fine which sanction was duly granted. On the receipt of the Commissioner's sanction, the Deputy Collector issued a fresh notice requiring the proprietors to attend on the 10th May 1869, under a penalty for their non-compliance of a fine of Rs. 10 per day. Up to the 4th September 1869 they did not appear, and on that day the Deputy Collector drew up a proceeding declaring that each of them was liable to a fine of 1,100 rupees, and fixed the 29th September 1869 as the last day upon which payment would be received. On the 17th September 1869, on the Deputy Collector's recommendation, the Commissioner reduced the fine to Rs. 100. But as the fine was not paid, the Collector issued a sale notification under the provisions of Sections 5 and 6 of Act XI of 1859, fixing the sale of the estate belonging to the defaulters for the 7th January 1870. On the 4th January 1870, the proprietors tendered the fine to the Deputy Collector which he refused to accept on the ground that they had wilfully abstained from paying the fine on the day fixed, and the estate was sold and purchased by the defendant, appellant, in this case.

The proprietors of the estate, who are the plaintiffs in this case, sue to set aside the sale on the ground that the Collector's proceedings are illegal, he having held the sale under the provisions of Act XI of 1859, whereas he should have proceeded under the provisions of Act VII of 1868 B. C., Sections 18 to 24; and as that law prescribes that sales of this kind are to be held as sales in execution of decrees of Court, and as the money, the amount of fine, was tendered before the sale was made, no sale should have taken place.

The question to be decided on these facts is, whether the sale should have taken place after the proceedings required by Sections 18, 21, and the following Sections of Act VII of 1868 B. C. had been carried out, or whether the Collector was right in selling the property under the provisions of Act XI of 1859. The determination of this question depends on what is the right construction of the provisions of Act VII of 1868 B. C. as read with the provisions of Act XI of 1869.

Now we find that Act VII of 1868 B. C. is entitled an Act "to amend and extend the law for the recovery of arrears of land revenue and of public demands recoverable as arrears of land revenue." And the last

Section provides that "this Act shall be read with, and taken as part of, Act XI of 1859." Now the procedure laid down by Act XI of 1859 with regard to the realization of demands recoverable as public revenue is as follows :—By Section 3, Act XI of 1859, the Board of Revenue is required to determine the dates upon which all arrears of revenue and all demands which, by the Regulations and Acts in force, are directed to be realized in the same manner as arrears of revenue, should be paid up in each district, in default of which payment the estates in arrear should, except as thereafter provided, be sold at public auction. The Section further provides for the due publication of the notice of the dates so fixed.

The exception referred to in Section 3 relates to arrears and demands mentioned in Section 5. This Section provides that no estate or any share or interest in any estate shall be sold for arrears other than of the current year or of the year immediately preceding, or for arrears due on account of estates other than that to be sold, or for arrears of estates under attachment by order of a judicial authority, or for arrears due on account of *tuccavee*, *poolbundee*, or other demand not being land revenue but recoverable by the same process as arrears of land revenue, otherwise than after a due notification, specifying the nature and amount of the arrear or demand, and the latest date on which payment thereof would be received, shall have been affixed for a period of not less than 15 clear days preceding the date fixed for payment according to Section 3 of the Act, in the office of the Collector, &c.

It is clear, therefore, that previous to the enactment of Act VII of 1868 B. C., this was the Section under which the Collector could proceed in order to bring estates to sale to realize demands recoverable as public revenue.

Act VII of 1868 B. C. commences by giving certain definitions of the words "proprietor," "revenue," "estate," "tenure," "jurisdiction," "Collector," "demand," and under the heading of the word "demand" is entered sums of money due from any person for his proportion of the authorized expenses of making a division of any estate under Regulation XIX of 1814, or in respect of any fine imposed under Sections 20 and 21 of the same Regulation.

Section 5 Act XI of 1859 is not rescinded nor expressly modified by the provisions of Act VII of 1868 B. C., but the procedure therein prescribed has been actually modified though its provisions have not in terms been superseded by the latter Act in regard to the realization of demands recoverable as arrears of revenue. The procedure prescribed by Act VII of 1868 B. C. is less summary than that prescribed by the former Act. By Section 5 Act XI of 1859, the estate of a party from whom a demand of this nature is due is liable to sale after the publication of a notification affixed in the office of the Collector and other officers for a period of not less than fifteen clear days preceding the date fixed by the Board of Revenue for payment of arrears of revenue or demands realizable as such arrears.

But by the provisions of Section 18, Act VII of 1868 B. C., it is enacted that "Whenever any arrears of any demand shall "be unpaid by any person liable to pay such "demand to a Collector for one month after "he shall have been required to pay the same "by a notice in writing under the hand of "such Collector, the Collector of the district "shall make under his hand a certificate of "the amount of such arrears so remaining "unpaid, in the form in Schedule A to this "Act annexed, and shall cause the same to "be filed in his office."

The effect of a certificate made under Section 18 is set forth in Section 20, which enacts that "every such certificate * * * "shall, as regards the remedies for enforcing "the same and subject to the provisions "hereinafter contained, and so far only, have "the force and effect of a decree of a Civil "Court, and the Government shall be deemed to be the plaintiff, and the person named "as debtor therein shall be deemed to be "the defendant."

Section 21 provides that after the Collector has filed the certificate in his office, he shall issue to the defendant a notice in the form of the Schedule C. which shall have the effect of binding the immoveable property of the defaulter, or if a prohibitory order had issued and an attachment been made against such property under Act VIII of 1859.

By Section 22, the party regarding whom such certificate has been made, may, within a month after the service of the notice, if he feel aggrieved, apply by petition in the form in Schedule D. to the Collector by whom the certificate was issued; and the Collector after fixing a day for the hearing of such application, shall proceed to hear and determine the application, and may set aside, modify, or vary such certificate; and the Collector, for the purposes of hearing and determining such application, shall have all the powers conferred by Act VIII of 1859 upon the Civil Court for hearing and determining claims to attached property.

Section 24 enacts that every certificate made in pursuance of Section 18 of the Act may be enforced by all or any of the ways and means mentioned and provided by Act VIII of 1859 for the enforcement of decrees for money, and all the practice and procedure prescribed by Act VIII of 1859 or by any other Act for the time being in force in respect of sales in execution of decrees shall apply to every execution issued for the levying of monies expressed in such certificate.

Now it is clear from these Sections that, though the Legislature has not expressly modified the provisions of Section 5 Act XI of 1859, they are in fact superseded by the procedure prescribed in Act VII of 1868 B. C. which provides a new and a less summary mode of realizing demands recoverable as arrears of revenue. It clearly appears to have been the object of Government to adopt a more lenient course in realizing demands which were not really arrears of revenue. I think, therefore, that all sales for the recovery of such demands must be preceded by the steps prescribed in Section 18 and following Sections in Act VII of 1868 B. C., and that the Collector cannot proceed to sell under the more summary course sanctioned by Act XI of 1859. It is clear also from the provisions of Act VII of 1868 B. C. that the certificate is to have the effect of decrees, and that for sales in execution thereof the whole of the procedure prescribed by Act VIII of 1859 must be adopted. Therefore as in the case of execution of decrees, if a party, before the sale takes place, comes into Court and pays the amount of the debt due or tender the amount of the debt due, the Court is bound to receive the money and to abstain from selling the property attached; so in the case of the property which has been under the certificate for a Government demand, if the proprietor, either before or at the time of sale, come into Court, and, before the property is actually sold, tender the amount of the demand, the Collector is bound to hold his hand and to abstain from selling the property.

In the present case, we find that the procedure followed was that prescribed by Act XI of 1859, and not that prescribed by the later Act VII of 1868 B. C.; and we find further that before the sale took place, the defaulter did actually tender the amount of the fine, which under the circumstances should have been received, and all proceedings for the sale of the property should have at once been stopped. In this view of the case, I think the proceedings of the Collector were erroneous, and that the sale was not a legal one, not having been conducted under the provisions of Act VII of 1868, B. C.; and therefore the judgment of the Lower Court must be affirmed, and the appeal dismissed with costs.

It is urged by the appellant in the 4th ground of appeal that the Court should not have cancelled the sale except upon proof that the plaintiff had sustained substantial injury by reason of the irregularity complained of. The question of substantial injury, however, is not one which we can entertain. The whole proceedings of the Collector were, according to the view taken of them above, irregular and illegal, and, as such, must be set aside.

The fifth ground taken by the appellant is that the sale should not be reversed without an order directing the refund of the purchase-money with interest; and the sixth ground objects to the payment of the plaintiff's costs, the appellant urging that he is entitled to his costs either from the plaintiff or Government. As the Government is not before us in this appeal, we can make no order either in respect to the purchase-money or to costs. The plaintiff is clearly entitled to his costs, and the decree of the Lower Court apparently makes both the Government and appellant liable for the plaintiff's costs.

Ainslie, J.—I concur.

The 3rd January 1872.

Present:

The Hon'ble F. B. Kemp and E. Jackson,
Judges.

Attachment—Priority—Publication—Sections 235, 239, and 270 Act VIII of 1859.

Application to file Special Appeal from a decision passed by the Judge of Cuttack, dated the 15th June 1871, affirming a decision of the Subordinate Judge of that district, dated the 23rd September 1870.

Kanhya Lall Pundit (Plaintiff) *Appellant,*

versus

Dinonath Sircar (Defendant) *Respondent.*

Baboos Hem Chunder Banerjee and *Mohendro Lall Mitter* for Appellant.

No one for Respondent.

Plaintiff claimed priority under Section 270 Act VIII of 1859, asserting that the property attached and sold by defendant was the identical property which he had attached prior to defendant's attachment. Held that he was bound to prove the due attachment of the property,—*viz.*, by proof of having obtained a written order under Section 285 prohibiting defendant from alienating the property by sale, gift, &c., and by the publication of the said order in the manner prescribed by Section 289.

Kemp, J.—We think that this application must be rejected. The plaintiff sued for a refund of certain sale proceeds which had been taken out of Court by a rival decree-holder in satisfaction of his decree. It appears that the plaintiff made an application to the Court under Section 270 of Act VIII of 1859, which application was rejected. The present suit was therefore brought as against the defendant in his capacity of decree-holder for refund of the sale proceeds taken out by him in satisfaction of his claim. Both the Lower Courts have put in issue, first, whether the plaintiff had duly attached the property or not; and secondly, whether the property, which the plaintiff alleged he had attached, was identical with the property which the defendant had attached and the sale proceeds of which the defendant had drawn out. The first Court found that the plaintiff had failed to prove due attachment,—that is to say, he had failed to prove that the written order which he obtained under Section 285 of Act VIII of 1859 had been published in the manner prescribed in Section 289 of the Act. On appeal, the Judge upheld the decision of the first Court.

The first ground taken by the pleader for the special appellant is, that as the defendant did not raise the question whether the property was duly attached by the plaintiff or not, but a simple question of identity, therefore the proper and only issue in the case for trial was the question of identity; and as the Lower Courts have tried the question of attachment which did not arise in the pleadings of the case, the decision of the Judge is wrong in law.

We think there can be no question on this point. The plaintiff coming into Court and claiming priority under Section 270 was bound to prove that he had duly attached the property, before he could claim any priority as entitling him to be paid first out of the proceeds of the sale. The issue was clearly raised, and the plaintiff was bound to furnish evidence to prove the due attachment of the property according to the provisions of Section 289. Then it is said that there is the Nazir's report and the written order to attach the property under the provisions of Section 285. Section 285 enacts, that "where the property shall consist of "lands, houses or other immoveable property, "the attachment shall be made by a written "order prohibiting the defendant from "alienating the property by sale, gift, or any "other way," and so on. Section 289 enacts, "that in the case of lands, houses, or other "immoveable property, the written order,"—namely, the written order referred to in Section 285,—"shall be read aloud at some place "on or adjacent to such lands, houses or other "property, and shall be fixed up in some con-"spicuous part of the Court-house."

Now it has been ruled by this Court that the report of the Nazir alone *per se* is no evidence, and we hold that the written order contemplated in Section 285 must be duly intimated and made known in the manner prescribed in Section 289. It is contended by the pleader for the appellant that, in Section 270, under which he claims priority, the words are that "the person on whose application such property was attached, shall be entitled to be first paid out of the proceeds thereof;" and that there is nothing in that Section which contemplates an attachment in the form and mode laid down in Section 289. But we think that Section 270 must be read with the preceding Sections. It is clear that, if such were not the case, a party might obtain a simple written order of attachment and take no steps whatever either in the case of moveable property by actual seizure, or in the case of immoveable property by following the process laid down in Section 289; he might, as we have already observed, get this written order and do nothing for a long time, and when a diligent creditor has carried out the provisions of Section 289, and has established his claim of priority under Section 270, he might be defeated by a contention, such as has been raised in this case; that the written order obtained by the other party, although followed by no steps at all, is to neutralize all the diligent exertion made by the other creditor.

We think, therefore, that the decision of the first Court, which has been upheld by the Judge, is a proper decision, and this application for the admission of special appeal must be rejected.

Jackson, J.—I concur in rejecting this application and in the reasons given by my learned colleague. I wish to say that in trying the question, which was the only question at issue in this case,—namely, whether the property which was attached and sold by the defendant was the identical property which the plaintiff asserted that he had attached prior to the attachment of the defendant,—it was for the plaintiff to prove that he had duly attached that particular property; he was bound to prove that the written order for attachment, which he obtained under Section 235, had been, under Section 239, published on that particular property which the defendant had subsequently attached and sold. In order to do so, the plaintiff was bound to give evidence of the publication of that order in the proper place as required by Section 239. It has been argued that it is sufficient for the plaintiff to prove that he had obtained a written order. It appears to me that if merely a written order is obtained, and no attempt is made to carry it out, such written order would not itself amount to an attachment; if so, any person might obtain a written order and might sleep over his right for any length of time, and then claim priority when some other creditor appears, who not only obtains a written order but publishes it and carries it out by the sale of the property. It was for the plaintiff in this case to prove that he had duly attached the property; but as he has given no evidence whatever, the Courts below were obliged to dismiss his suit.

The 18th September 1871.

Present:

The Hon'ble J. B. Phear and Dwarkanath Mitter, *Judges.*

Money Decree—Execution—Sale—Rights of Purchaser—Prior Title.

Case No. 117 of 1871.

Regular Appeal from a decision passed by the Subordinate Judge of Tipperah, dated the 13th March 1869.

Ram Soonder Shaha (Defendant) *Appellant,*

versus

J. P. DeLanney (Plaintiff) *Respondent.*

Baboos *Kalee Mohun Doss* and *Kashee Kant Sen* for Appellant.

Baboos *Unnoda Pershad Banerjee* and *Chunder Madhub Ghose* for Respondent.

Suit by plaintiff as purchaser at a sale in execution of a money decree, against defendants who claimed on the allegation of a prior title. Plaintiff having only purchased the right, title, and interest of the judgment-debtor, stood in no better position towards the defendants than the judgment-debtors. Defendants proved that the *shikmee* pottah which they alleged to have been given them by plaintiff's mortgagor was executed four years before plaintiff's purchase, and was duly registered; and, moreover, adduced the testimony of witnesses who had collected the rent due on the pottah and paid it to the grantor, *i. e.*, plaintiff's mortgagor, thus establishing the *bona fides* of the transaction, against which the plaintiff, it was held, had failed to bring forward evidence of a rebutting character.

Phear, J.—THIS suit was filed so far back as September 1868, and we must say that it has been with some pain that we have seen the Lower Courts so little able, as they appear to us to have shown themselves, to deal correctly with the very simple issue on which the matter between the litigant parties depends in this case.

In June 1861, the plaintiff lent to Bhyrub Chunder Chuckerbutty and others, the then owners of the property in suit, a sum of Rs. 15,000, and obtained from them a mortgage bond by way of security, a bond which covered this property and a good deal more. Afterwards, he brought a suit on the bond, and obtained a money decree against the Chuckerbutties. In execution of this decree, he seized and sold the mortgaged premises, becoming himself the purchaser of a portion of them, including the land which is the subject of the present suit, and the present suit is brought by him to obtain possession on the footing of the title afforded by that purchase of the particular property which was sold to him, and which the defendants claim on the allegation of a prior title.

The defendants say that, on the 11th Assin 1268, a few months after the plaintiff's mortgage, they obtained a *shikmee* pottah of this portion of the land from the plaintiff's mortgagor. If this be so, they have a good defence to the plaintiff's action, because at the sale in execution of the money decree the plaintiff only purchased the right, title, and interest of the judgment-debtor, and consequently he cannot stand in any better position towards the present defendants than that in which the judgment-debtors Bhyrub Chunder Chuckerbutty and his brother stood. So that the plaintiff's case turns entirely on the question whether or not in Assin 1268 the plaintiff's mortgagor did make and give to the defendants the *shikmee* pottah on which the defendants rest their defence; and at the settlement of issues, so far back as November 1868, an issue, very little differing from the very words which we have just now uttered, was laid down as the issue on which the case had to be tried. Unfortunately, however, such difference of wording as exists introduced an element of ambiguity into that issue, and the consequence has been that not only the first Court, but the Lower Court of Appeal, have both been entirely led astray in the determination of the case.

For the reason mentioned in the former judgment delivered by this Bench, we have felt ourselves obliged, after the lapse of three years from the date of the institution of the suit, to have the case up before ourselves for the determination of this exceedingly simple question of fact.

How then does the evidence on the record stand? The defendants produce a *shikmee* pottah; there is ample evidence of its execution given by persons who were present at the time; it is a document several years old, and duly registered; and thus it appears to be about as good evidence of the *bona fides* of the transaction as can well be, although of course a different character may be shown to belong to it by sufficient evidence of a rebutting character. But more than this, there is the testimony of witnesses who say that they have collected the rent due on the pottah and have paid it to persons who represent the grantor, that is, who represent the plaintiff's mortgagor. Against this very substantial case, on the one side, there really is hardly anything to be put on the other. The plaintiff does not attempt to impeach the truth of the alleged *factum* of the execution of the pottah he does nothing, whether in the shape of cross-examination or otherwise, to throw doubt on the veracity of the defendant's witnesses. He simply produces one witness, who says, that he, at one period during the pendency of the *shikmee* pottah, collected the rent of the ryots who occupied the land covered by the pottah on behalf of the mortgagor, *i. e.*, the grantor of the pottah, not the grantee. The testimony of this single witness is relied upon to show that the giving of the *shikmee* pottah was a *benamee* transaction and was never intended to pass a real interest. And this view is in some degree attempted to be supported by an argument something in the nature of an appeal to *a priori* probability.

The plaintiff proves that, on the same day that he took his mortgage bond, the mortgagors granted to a third person an *ijarah* lease of the mortgaged properties, reserving a rent, out of which the *ijaradar* was to pay some 2,100 and odd rupees directly to the mortgagee, *i. e.*, the plaintiff, and that the duration of this lease was to be for a period of sixteen years, so calculated that in that time his (the plaintiff's) mortgage debt would be just paid off.

The argument to which we refer was in substance this: It is impossible to conceive that the defendants in the presence of facts like these, with the knowledge as it is assumed of the mortgage and also of the pendency of this *ijarah* lease, should have accepted the *shikmee* pottah in question, paying *bonâ fide* a substantial *salamee* to the mortgagor for it.

We really don't know how far the consideration of these particular facts, if established completely, ought materially to influence our judgment, because it appears to us to be possible to conceive that, notwithstanding this condition of things, it might be worth while to the defendants to take the *shikmee* pottah which they say they did take on the terms of paying a *bonus* to the plaintiff. But however this may be, as we remarked in the course of the hearing, the argument is at least capable of being turned the other way. The very existence of the *ijarah* lease, as it seems to us, was calculated to give the defendants some confidence that the mortgage debt would be paid off, without leaving the mortgagee an opening to enforce the remedies under his bond. So that, we think, notwithstanding the ingenuity of this argument, the matter really rests on the testimony of the witnesses in the case, coupled with the registered *shikmee* pottah itself, and the other documents of title.

The result is, that, in our opinion, the defendants have established a very strong case. They have all the *indicia* of title on their side, and the evidence to which the plaintiff has drawn our attention only leads us to think that that title is not of a fraudulent character or *collusive*, but *bonâ fide*. It dates so far back as four years before the purchase of the plaintiff, and it was public so far as registration could make it so.

Under these circumstances, we ought not to hesitate to say that the plaintiff's suit has failed, and that he is not entitled to recover on his cause of action. His suit will be dismissed with costs in all the Courts.

The 19th September 1871.

Present:

The Hon'ble J. B. Phear and Dwarkanath Mitter, *Judges.*

Butwarra—Adjoining Lands—Unascertained Boundary.

Case No. 315 of 1871.

Special Appeal from a decision passed by the Judge of Sylhet, dated the 4th January 1871, *affirming a decision of the Subordinate Judge of that district, dated the 25th June* 1870.

Brijo Mohun Doss (Defendant) *Appellant,*

versus

Shamanund Surmah and others (Plaintiffs) *Respondents.*

Mr. M. M. Ghose and *Baboos Mohinee Mohun Roy* and *Grish Chunder Ghose* for Appellant.

Baboos Unnoda Pershad Banerjee and *Anund Gopal Paleet* for Respondents.

Plaintiff and defendant are proprietors of two adjoining but unascertained parcels of land, the common boundary between which was never definitely marked and cannot now be recovered. Defendant is in possession of all the lands, including the *halabadee* parcel to which plaintiff is entitled. Plaintiff and defendant being in one sense purchasers from the same vendor, although as a matter of fact the sales under which they acquired their titles were effected by the Collector, the Court, upon the special facts of the case, held plaintiff entitled to treat defendant as his vendor, and to demand as against him an adjudication of a line of boundary. A *butwarra* was accordingly ordered to be made by the Collector.

Phear, J.—THE additional evidence which has been taken on remand (apparently without objection made to its admissibility) discloses a right to relief on the side of the plaintiff, which was not put forward by him at first, and has not been recognized by either of the Courts below.

From the petition of Kurban Reza, the person with whom the original talook was decennially settled, and from whom it therefore took its name, it appears that in 1806 he was served with a notice from the Collector to the effect that other lands held by him not assessed (*i. e.* as part of his talook) would be assessed. The petitioner says that, inasmuch as his zemindaree was under attachment at the time when the *hustobood* measurement was made, none of his people were present thereat, and consequently he is unable to state precisely what the land was which was assessed to the talook and what was not assessed. He estimates, however, that the *halabadee* lands not assessed to the talook measured 885 *hals* odd, and he expressed his readiness to pay an annual *jumma,* which he specified in respect of that land for a term of three years, adding that he would, in Agrahan following, get a Court Ameen to measure the *halabadee* land, and asking that a *sunnud* for the same might afterwards be granted to him. From this petition, we think that nothing can be clearer than that the *halabadee* lands which the Collector proposed to measure and assess were perfectly distinct from the lands of the original decennially settled *talook,* though both were in the hands of the same proprietor, the *halabadee* being, so to speak, annexed to the old.

Mr. Bidwell, the Collector of Sylhet, in 1842 reported to the Commissioner with regard to this and similarly situated *talooks.* Ameens were ordered by the Collector to go to the spot and define the *halabadee* lands in question, but they reported that they were unable to execute their orders from the non-attendance of the *patwaries* and other parties on the ground. Afterwards, the zemindars again attended and represented that the lands could not be identified or defined in consequence of their being mixed up with the permanently settled lands of their talook. *Halabadee* grants were then given to them of all the newly cultivated lands in their *pergunnah* not included in any former settlement. The term for which the grants were made was not specified, but the term of the *pottah* is that of a permanent settlement. The grants show the amount of *jumma* to be paid by each estate, but no specification of the quantity of land granted, nor is any identification of it attempted.

And later still in 1861 we have the Commissioner of the Division writing even more specifically to the Board of Revenue. The decennial talook was settled in 1205, and the *halabadee talook* in 1212, the former on a *jumma* of 1,261 rupees no annas and three pie, and the latter on a *jumma* of 48 rupees, and they have been borne on the District Rent Roll as separate estates ever since.

The proprietor of the decennial talook engaged for the *halabadee talook,* and consequently no definition of the lands was necessary.

And the history of these two mehals is closed by the Collector selling them at different times for different defaults, the one to the defendant and the other to the plaintiff's predecessor.

On this state of facts, the situation of the plaintiff and defendant towards each other appears to us to be very plain indeed; they are respectively the proprietors of two adjoining but unascertained parcels of land, the common boundary between which was never definitely marked out, and cannot now be recovered.

The defendant, however, is in possession of *all* the land, *i. e.*, the land of the original talook, together with the ***kalabadee mehal.*** The plaintiff is clearly entitled to obtain from him the ***kalabadee*** parcel, and we think that he is, under the circumstances which we have detailed, entitled also to have the assistance of the Civil Court in getting a line of demarcation made between the two mehals. The plaintiff and defendant are in a sense purchasers from the same vendor, although, as a matter of fact, the sales under which they acquired their titles have been effected by the Collector; and as between the defendant who is in possession of the *whole*, and the plaintiff who is seeking to get his portion of the land, we think, on the special facts of the case, the plaintiff is entitled to treat the defendant as if he were himself the vendor, and to demand as against him an adjudication of a line of boundary.

It seems to us that we ought therefore to vary the judgment of the Lower Appellate Court, and to declare that the plaintiff is entitled to a portion of the land held by the defendant, such as will fairly represent the ***kalabadee mehal,*** and to order that a partition by metes and bounds be made dividing this ***kalabadee*** portion from the remainder which will answer to the original ***mehal.*** And we think that we can under the Regulations make a direction to the Collector to carry this order into effect.

The only question which remains is the question of costs. It is obvious that the claim put forward by the plaintiff—a claim which both the Courts below held to be substantiated—is very materially different from the right which, we think, the evidence makes out. In truth, until the case came up to this Court, and the remand order was made, the issue had not been raised between the parties, which was necessary to be determined, before the plaintiff's right could really be ascertained. And even at the present time the Lower Appellate Court entertains a view of the facts of the case which is entirely different from that established by the evidence as we read it. The Subordinate Judge had, in the first instance, stated that, "at the time "of the decennial settlement, much land being "uncultivated and waste a small quantity of "land was assessed. Afterwards, when the "Government began to enquire into and make "settlement of the ***kalabadee*** lands, the holders "of the decennial settlement lands agreed to "pay a separate ***jumma*** to the Government for "the said land, and made a separate settlement "designating it '***kalabadee talook***' in their "former number of the talook; and at that "time no distinction or division of land was "made, only a separate ***jumma*** was fixed; "***the land was the same*** as the decennially "settled lands." In our remand order we remarked, with reference to this passage in the Subordinate Judge's judgment, that this amounted to a statement that "the Government having at first settled the ***jumma*** of "the talook by assessment of a part of the "lands only which lay within the talook, "saw reason to increase that ***jumma*** by "assessing the remaining lands; and, in order "to evade the permanency of the decennial "settlement, they gave the designation of a "separate talook to this additional ***jumma,*** "thus creating a second ***kalabadee talook*** out "of the original talook which had been permanently settled by them." We went on to say that "not only is there no evidence "on the record to support such a conclusion, "but that there is nothing elsewhere to "show that the Government ever pursued "such a faithless course of conduct." The Judge of the Lower Appellate Court now says, that "reading the words quoted by the "High Court from the judgment of the "Subordinate Judge by the light of these "documents, which documents only show "a state of facts so notorious to all here, that "the appellant's Counsel did not think it worth "while to raise the point before me, I fail to "see that the Subordinate Judge charged the "Government with evading the permanency "of the decennial settlement, and with pursuing "a faithless course of conduct in so doing." It is an advantage to us to know that the learned Judge does not consider the course which the Subordinate Judge attributed to Government to indicate faithless conduct; but we think it is quite certain that, even in this passage, the Judge of the Lower Appellate Court has exhibited a complete misapprehension of the effect of the documents of which he is speaking. We have already explained what in our opinion that effect is, and the view which we take of the facts disclosed by those documents. We need hardly say now that these facts are entirely different from that which the Subordinate Judge in his judgment, upon no foundation of evidence before him, represented to be the actual case. Having regard, then, to the course which this trial has from the commencement taken, and to the persistent misapprehension by the Court below of the real state of the plaintiff's true cause of action, and having regard to the nature of the defence made out by the defendant, we think that each party ought to pay his own costs of the suit, and that they should share the costs of the *butwarra* equally between them.

We have omitted to say that we think the demarcation should be so effected as to leave the two parts, *usl* and *kalabadee*, as measured by their proceeds in the proportion of their *jummas*. There appear to be no other data by which we can be guided in directing the partition.

The 30th November 1871.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges*.

Ijara Lease—Digging a Tank—Breach of Covenant—Suit—Resumption—Cancellation of Lease—Recovery of portion of land—Damages.

Cases Nos. 767 and 768 of 1871.

Special Appeals from a decision passed by the Judge of Tipperah, dated the 29th April 1871, *affirming a decision of the Moonsiff of Comillah, dated the 6th August* 1870,

Maharajah Beer Chunder Manick Bahadoor (Plaintiff) *Appellant,*

versus

Shaikh Hossein and others (Defendants) *Respondents.*

Baboo Romesh Chunder Mitter for Appellant.

Moulvie Syud Murhumut Hossein for Respondents.

For breach of a covenant by an ijaradar not to excavate a tank in the lands leased to him, or, if so, to be liable to eviction by the zemindar and to pay the cost of filling up the tank, no suit will lie at the instance of the zemindar for the recovery of a fractional portion of the lands covered by the lease, but the zemindar may declare the lease cancelled and resume the whole of the lands, or he may sue for cancellation of the lease, and he may also sue for damages occasioned by the excavation of the tank.

Glover, J.—One decision will govern both these appeals.

The plaintiff is the zemindar; the principal defendants took from him a lease of certain property for a term of years, covenanting, amongst other things, not to excavate a tank, or cause one to be excavated therein, and agreeing, if they did so, to be liable to eviction and to pay the cost of filling the tank up. Notwithstanding the prohibition, the defendants dug a tank, and the plaintiff now sues to have that portion of the land on which the tank is dug filled in at the expense of the defendants, and likewise to have the land when filled in restored to his khas possession.

The defence was—(1) that the land in suit did not belong to the plaintiff, and (2) that, if it did, inasmuch as it was now the subject of an unexpired farming lease, the plaintiff's claim for damages was premature.

Both the Courts below decided the case on the question, whether or not the suit of the plaintiff was maintainable, notwithstanding the existence of the *ijarâ* lease. They found that there were still some years of the farm to run, and that the plaintiff was not entitled to bring this suit until the expiration of the lease. The Judge cited a precedent in support of his finding, (reported in Volume V., Wyman's Reporter, page 32,) which says, "where a plaintiff has let his lands on lease, he cannot sue during the currency of the lease to compel the lessee's under-tenants to pull down houses built by them, where *there is no allegation of waste or damage* caused thereby." We may dispose of this part of the case by remarking that the precedent cited by the Judge is in no way applicable, inasmuch as in this case very considerable damage has been undoubtedly caused by the act of the defendants. But, although we do not think that the Judge's decision is a correct one as to the action being premature, we think that the plaintiff could not have succeeded, at least in one part of his prayer, in the form in which he brought his suit, for he sued to recover possession of that piece of ground only on which the tank had been excavated, and which he desired to fill up at the expense of the defendants. Now the terms of his contract with the defendants gave him power to cancel the lease on breach of any one of its conditions, and one of those conditions was that no tank should be dug. He might, therefore, have declared the lease cancelled and have resumed the whole of the lands covered by the lease, leaving it to the defendants to sue for recovery of possession on the ground that they had been illegally ejected. But the contract between the plaintiff and defendant was for the lands as a whole, and could not be split up; if voidable it must have been voided altogether, and not in part, and therefore no suit for the recovery of a fractional portion of the land covered by the lease would in our opinion lie.

Then, as to the allegation of waste, a farmer who has a terminable interest in land only can have no right to excavate and thereby injure the whole or a portion of the land leased to him; and, if he does so, the landlord would no doubt be entitled to apply for an injunction or otherwise to take steps to prevent such acts of waste on the part of his tenant. And if it were proved that the tenant in this case had dug a tank, as stated by the plaintiff, and had thereby committed waste by throwing a considerable plot of land out of cultivation, we do not think that the landlord would be bound to wait till the termination of the farming lease, in order to proceed against his tenant and have the waste restored.

We think, therefore, that this case should go back to the Judge, in order that he may enquire, first, as to what were the terms of the *ijara* lease, and whether there was any such stipulation as prevented the defendants from excavating a tank; and if it be proved that a tank was excavated in defiance of a stipulation to the contrary, the tenant will have to make good to the landlord the damage incurred. The landlord does not seem to us to have, under the circumstances of the case, the right to exact any further penalty.

Costs to follow the result.

Mitter, J.—I am of the same opinion. The claim for possession is clearly untenable, for no possession can be awarded to the plaintiff so long as the *ijara* lease is subsisting. The plaintiff might have, if he liked, sued for the cancellation of the entire *ijara* lease, upon the ground that the *ijaradar* had violated its conditions; but he cannot be permitted to claim *khas* possession of a small fractional portion of the lands covered by that lease.

The other claim, namely, the one for damages, appears to have been entirely overlooked by the lower Courts. The plaintiff is still the owner of the lands in question; and if the defendants have committed an act of waste by which those lands have been permanently injured, there can be no doubt whatever that a cause of action has accrued to him upon which this claim for damages can be maintained. He is not bound to wait for the expiration of the *ijara* lease, in order to sue upon such a cause of action; and this distinction is expressly recognized in the very case relied upon by the Judge. The case must, therefore, go back to the Court of first instance, but the enquiry should be restricted to the claim for damages.

The 1st December 1871.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Arbitration—Appeal—No Provision for Difference of Opinion.

Case No. 798 of 1871.

Special Appeal from a decision passed by the Judge of Tipperah, dated the 14th April 1871, *affirming a decision of the Moonsiff of Nasirnugger, dated the 24th August* 1870.

Gour Chunder Bhuttacharjee (Plaintiff) *Appellant,*

versus

Sodoy Chunder Nundee and others (Defendants) *Respondents.*

Baboo Boykunt Nath Doss for Appellant.

Baboo Nullit Chunder Sein for Respondents.

Where the parties to a suit come into Court and agree to a reference to arbitration, the case, when so settled, is not subject to appeal.

The mere absence of a clause in the order of reference providing for a difference of opinion between the arbitrators cannot vitiate the award where there is no such difference of opinion.

Glover, J.—THIS was a suit to have the plaintiff's right declared to make use of a certain water channel (dry in the hot and cold seasons, but filled with water in the rains) situated on the defendant's land. The plaintiff's allegation is, that the defendants have prevented the passage of boats by making a road across the channel, and so deprived the plaintiffs of a privilege which they have enjoyed for a great number of years.

It appears that the matter was, with the consent of both parties, referred by the Moonsiff to arbitration; and being so referred, the arbitrators gave an award in favor of the plaintiffs, and judgment was passed according to the award. Thereupon, an appeal was made to the Subordinate Judge, Mr. Hutchinson, who remanded the case on the ground that the Moonsiff, when referring the case to arbitration, did not act according to the provisions of the Civil Procedure Code, inasmuch as he did not lay down the points upon which the decision of the arbitrators was required. He says, "at the request of the "litigants the Moonsiff submitted the case "bodily to the decision of the arbitrators "selected by them. This was wrong according to the intents and purposes of Sections

"315 and 323; inasmuch as the Court "ought to have settled the issues or matters "in difference in the suit which he or the "arbitrator or arbitrators may be required to "determine. Since this is a fatal omission "in law, the appeal must be decreed and the "case remanded." The Moonsiff then tried the case himself, and passed a fresh decision in the case, and on appeal the District Judge upheld the order of the Moonsiff and dismissed the plaintiff's suit.

In special appeal, the principal point which has been argued before us is that the proceedings of the Subordinate Judge and District Judge, and the Moonsiff's finding after remand, were illegal, and therefore null and void.

This contention appears to us to be sound. As the parties to this suit had agreed amongst themselves, and had come into Court with a view to the matter in dispute being settled by arbitration, the case, when so settled, was not subject to appeal, and the Subordinate Judge had no right either to entertain the appeal or dispose of the case. It has been argued, however, by the vakeel for the special respondent before us that the reference to arbitration was not good in law, inasmuch as there was no provision made in case of a difference between the arbitrators, nor is it shown that the whole of the parties interested consented to arbitration.

With regard to the first point, we observe that, whatever difference of opinion there may have been between the arbitrators, the award, if any, made by them could not on that account be considered null and void, or be set aside, unless corruption or misconduct were satisfactorily proved against any one of them. The Moonsiff was doubtless wrong in not making a provision for a difference of opinion between the arbitrators by appointing an umpire; but since the matter was with the consent of parties re-submitted to arbitration, and the arbitrators agreed on all points in the award made by them, the want of such a provision would be altogether unimportant. The first objection therefore falls to the ground.

Then, as to the other, *viz.*, that the whole of the parties interested did not consent to the arbitration, we find nothing on the record to show that the defendants, or any of them, objected to the arbitration in any manner whatsoever, and at this late stage of the case we should require the fact to be clearly shown to us. There is no reason for supposing that the defendants Gooroo Churn and Sudoy Chunder ever objected in any way to the arbitration. The award cannot, therefore, be set aside, unless it is shown to be incapable of execution, and this has not been alleged.

It appears to us, on the whole, that all the proceedings in this case, subsequent to the decision of the Moonsiff on the arbitration award, were altogether illegal and defective, and the judgment of the Lower Appellate Court must be set aside, and the decision of the Moonsiff passed on the award in favor of the plaintiff restored with costs.

Mitter, J.—I am of the same opinion. The first objection taken by the respondent to the validity of the award is of no force in this particular case. There was no difference of opinion between the arbitrators, and the mere absence of a clause in the order of reference providing for such difference cannot in my opinion vitiate the award.

The second objection has not been made out to our satisfaction. There is nothing to show that all the parties substantially interested in the case did not give their consent to the arbitration. The award was in every respect legal, and Mr. Hutchinson had therefore no power to set it aside.

The 1st December 1871.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Arbitration—Jurisdiction—Appellate Court—Delay in making Award.

Case No. 827 of 1871.

Special Appeal from a decision passed by the Judge of Chittagong, dated the 27th May 1871, *reversing a decision of the Moonsiff of Futtickcheree, dated the 22nd March* 1870.

Russool Bibee (Plaintiff) *Appellant,*

versus

Shaikh Jan Ali Chowdhry (Defendant) *Respondent.*

Baboo Debendro Narain Bose for Appellant.

Mr. R. E. Twidale for Respondent.

An Appellate Court is competent to refer cases to arbitration.

Where a party contests the validity of an arbitration award, on the ground that it was not completed within the time fixed by the Court, he must show that the delay arose from corruption or misconduct on the part of the arbitrator, or that the award was made after the issue of an order of Court superseding the arbitration and recalling the suit.

Mitter, J.—This suit was instituted by the plaintiff, now special appellant before us, for the declaration of his title to a piece of land, setting aside a certain *kobalah* set up by the defendant, special respondent.

The Moonsiff, after going into the evidence produced by the parties, gave a decree to the plaintiff, holding that the bill of sale in question was a forged and fabricated document. Against this decision, an appeal was preferred to the Additional Judge, Mr. Simson, by the defendant; and while the case was pending in appeal, both parties agreed to have the matter in dispute settled by arbitration. An arbitrator was accordingly appointed by Court with the consent of both parties; and an award was made by the arbitrator who came to the same conclusion as the Moonsiff had done. The defendant then raised certain objections to the award. But those objections were overruled by the Additional Judge, Mr. Simson, on the 6th May 1871.

Somehow or other, the case was subsequently transferred to the Judge of the district; and that officer being of opinion that an Appellate Court is not competent under the Code of Civil Procedure to refer a case pending in appeal to arbitration, set aside the award; and, after hearing the appeal on the merits, came to the conclusion that the decision arrived at by the Moonsiff was erroneous.

We are of opinion that the District Judge had no power to set aside the award, and that the reasons assigned by him in support of his opinion that an Appellate Court is not competent to refer cases to arbitration are not sound in law. We see no reason whatever why an Appellate Court should not exercise in this respect the same powers as those possessed by the Courts of Original Jurisdiction. The law, Section 37 of Act XXIII of 1861, distinctly lays down that Appellate Courts are competent to exercise the same powers in cases of appeal as those conferred upon the Courts of Original Jurisdiction. In the face of such an express declaration by the Legislature, we are at a loss to make out how the Judge came to the conclusion that the reference to arbitration made by the Additional Judge was not unwarranted by law, and that the award was therefore null and void. The argument based upon the use of the word "*suit*" in Section 312 of the Code of Civil Procedure is of no force whatever. An appeal is nothing more than a continuation of the original suit, and even if the word "*suit,*" as used in the section above referred to, be understood in the restricted signification put upon it by the learned Judge, the provisions of Section 37 of Act XXIII of 1861 would be quite sufficient to justify an Appellate Court, in referring cases to arbitration, provided of course that the parties are willing to adopt that mode of settling their differences.

An objection is raised by the respondent against the validity of the award, upon the ground that it was not completed within the time fixed by the Court. We find, however, that this objection was raised before the Additional Judge and rejected by that officer. Moreover, the respondent has not made any attempt to show that the delay "arose from corruption or misconduct on the part of the arbitrator" or "that the award was made after the issue of an order of Court superseding the arbitration and recalling the suit." The provision contained in the latter part of Section 318 of the Civil Procedure Code is quite conclusive on the point; and in the absence of any proof of the facts above referred to, we do not see how the respondent can maintain this objection.

For the above reasons, we set aside the decision of the District Judge, and order the case to be decreed according to the award of the arbitrator. We have no doubt in our minds that the conclusion upon which that award is based is perfectly just and proper.

We think that, under the circumstances of this case, the defendant, respondent, ought to pay the whole costs of this special appeal.

The 1st December 1871.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Enhancement—Notice—Informality.

Case No. 780 of 1871 under Act X of 1859.

Special Appeal from a decision passed by the Additional Judge of Jessore, dated the 20th March 1871, *affirming a decision of the Deputy Collector of Baghattee, dated the 4th June* 1870.

Wooma Churn Dutt (Defendant) *Appellant,*

versus

Grish Chunder Bose (Plaintiff) *Respondent.*

Mr. J. S. Rochfort for Appellant.

Baboo Unnoda Pershad Banerjee for Respondent.

Informality in a notice for enhancement of rent was not allowed to prevail in this case where the defect was held to have been made good by the evidence on the record, and where there could be no doubt that the tenant knew exactly the nature of the demand he had to meet, and where also the objection was a mere afterthought and not put forward until after the order of remand by the High Court.

Glover, J.—THIS was a suit for enhancement of rent after notice. It has been dragging its slow length along for a considerable term of years in various Courts; has been remanded several times; and has been the subject of appeal to the High Court.

The only question for the Lower Court to determine was whether the notice was sufficiently formal and good in law, and the Judge decided that it was a sufficient notice. The special appeal is on this point. We have had the notice read; and although it is not worded exactly in the terms of the law, that defect has been made good by the evidence on the record; and there can be no doubt that the tenant knew exactly the nature of the demand he had to meet. This objection therefore fails.

The other objections of the defendants have not been pressed before us; and the Judge says that they were waived in his Court, and it is clear that they were not made even in the Court of first instance until the time of actual trial. The objection as to the informality of the notice also is a mere after thought, and was not put forward until after the order of remand by the High Court.

We see no reason to interfere with the decision of the Lower Appellate Court, and dismiss the appeal with costs.

The 8th December 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Agents—Service of Summons—Section 49 *Act VIII of* 1859.

No. 255 of 1871.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Mymensingh, dated the 26th May 1871.

Ram Soonduree Dassia (Petitioner) *Appellant,*

versus

Ranee Surut Soonduree Debia (Opposite party) *Respondent.*

Baboo Anund Chunder Ghosal for Appellant.

Baboo Gopal Lall Mitter for Respondent.

Persons merely looking after the affairs of a defendant are not *agents* on whom service of summons will be sufficient under Section 49 Act VIII of 1859.

Bayley, J.—WE think in this case the Lower Court has come to a wrong decision. It is admitted that the residence of the female defendant was in Zillah Rajshahye, whereas notice was served in a Joint-Cutcherry in Gopalpore in Pergunnah Pookhoria, Zillah Mymensingh.

It is pressed on us, and has so been decided by the Lower Court, that because there had been correspondence between certain agents in regard to the settlement of the claim, and because there had been a deposit of the amount covered by the decree, it is to be assumed, that there was a sufficient service of notice; but in the first place the agents referred to were *gomastahs* and *am-mookhtiars* of the male defendants, and not of the lady, and although being *am-mooktiars* of the male defendants, they looked after the affairs of the female defendant, yet there was no such agency created as would bring the case within the purview of Section 49 Act VIII of 1859.

On the whole, we think, the *ex parte* decree of the Lower Court should be set aside and the Lower Court directed to proceed with the suit as regards the lady defendant, the petitioner Ram Soonduree Dassia.

The costs will abide the result.

Mitter, J.—I am of the same opinion. Assuming that the summons were served in the manner stated by the Lower Court, the service must be considered as illegal under the provisions of Sections 49 and 52 (*sic*) of the Code of Civil Procedure, and as there is nothing to show that the petitioner had any *de facto* knowledge of the institution of the suit, the *ex parte* decree passed against her must be set aside, and the case tried *de novo.*

The 8th December 1871.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble F. A. Glover, *Judge.*

Enhancement—Section 17 *Act X of* 1859—*Re-measurement.*

Case No. 819 of 1871.

Special Appeal from a decision passed by the Officiating Judge of Moorshedabad, dated the 29th April 1871, *reversing a decision of the Moonsiff of Gowas, dated the 30th January* 1871.

Prankissen Bagchee (Plaintiff) *Appellant*,

versus

Monmohinee Dassee (Defendant) *Respondent.*

Baboo Sreenath Doss for Appellant.

Baboo Mohesh Chunder Chowdhry for Respondent.

Section 17 Act X of 1859 is applicable to cases where the land was undoubtedly included in the original tenure, but it has been found upon a fresh measurement that there was some mistake in the former measurement, and that a greater amount of rent ought to be paid not in respect of any fresh land but in respect of land which was included in the original tenure.

Couch, C. J.—With regard to the first question raised, namely, whether the plaintiff can maintain a suit for enhancement in respect of the 54 beeghas mentioned in the judgment of the Lower Appellate Court, what the Judge states is this—"for 8 beeghas, he," that is, the defendant, "states that he pays "rent to another person Ram Bhuttacharjee, a "*debutter* holder; of the remaining 11 beeghas "he can give no account, but he states that "they are no part of the holding, and the "respondent so far bears him out that he "does not express any doubts as to the "accuracy of the former measurement and "regards the appellant as a trespasser, who "has encroached upon his ground;" and the Judge, after noticing the judgment of the Privy Council in the case reported in XII Moore's Indian Appeals, page 274,* says,—"With regard to the encroachments, it is "quite clear that these, whatever they are, do "not form any part of the original tenure on "which enhancement is sought."

Now, we think, that the judgment of the Privy Council, which has been followed by the late Chief Justice in the case reported in VI Weekly Reporter (Act X Rulings) page 57, is to be reconciled with the provisions of Section 17 Act X of 1859, Clause 3, by considering that that Clause is applicable to cases where the land was undoubtedly included in the original tenure, but upon a fresh measurement it has been found that there was some mistake in the former measurement, and that a greater amount of rent ought to be paid in respect not of any fresh land, but in respect of land which was included in the original tenure. The principle which was laid down by their Lordships in the Privy Council is so in accordance with all principles of law that, unless we can see very clearly that the Indian Legislature intended to overrule it and introduce a different law on the subject, we ought not to give such a construction to the provisions in Section 17 Act X of 1859.

This case, upon the finding of the Judge, comes clearly within the language of the Judicial Committee of the Privy Council. They say—"a suit for enhancement implies "such a privity of title or tenure existing "between the parties that a claim for some "rent is legally inferable from it, and there is "here proof that that relation is denied to "have existed in respect of these two parcels "of land. As to the latter portion, where "the respondent's title is denied and the claim "of another zemindar set up, the proper "remedy seems to be by a suit in the nature "of an ejectment." Here it was denied that in respect of this land, the relation had existed, because the defendant denied that it was part of his holding, and the respondent is said not to have expressed any doubts as to its not having been included in that holding, because the former measurement was not disputed by him to be accurate, and then it could have been included in that holding.

Sir Barnes Peacock says in the case in VI Weekly Reporter (Act X Rulings) page 157, that if the party has not been paying anything for the excess, he may be a trespasser as to the excess, but he is not a tenant liable to assessment. This case before Sir Barnes Peacock is more strictly applicable to the present case than the judgment in the Privy Council, because their Lordships there seem to contemplate the case not of an encroachment simply but the case where a defendant alleged that the title to the portion of land which was in question was in some other person and that he had some other landlord; but Sir Barnes Peacock speaks of a case where there is an encroachment, because he says, in the former part of his judgment: "If the land "in excess of 5 khadahs were not included "in the *mokururee pottah* and the defendant "encroached upon them, he was a trespasser "and not a tenant as to that part of the "land, and the landowner could not enhance

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* Reported in XI W. R. (Privy Council Rulings,) p. 11.

"the rent of that portion of the land which "the defendant did not hold." That language expressly applies to the present case, and, as we said, we think that these judgments are to be reconciled with the provisions in Section 17 Act X of 1859, by our holding that the provisions apply only to cases where there is no question as to what land was included in the original tenure, but there has been some mistake with regard to the measurement, and when the land has been remeasured, it has been found that the tenant had to pay a higher rent than he had been supposed to be liable for. The judgment of the Lower Appellate Court with regard to this part of the case is right.

But then comes the other question with regard to the rate of enhancement. On this point, the Judge has refused to confirm the decree of the Lower Court, because, as he says, "the respondent ought to prove that "the lands were *ryotee* held at less than the "amount paid for similar lands by the same "class of ryots or that they have been in-"creased in value independently of the ex-"pense or labour of the occupant;" and then he says—"the respondent has not brought "any similar class of ryots, that is, middle-"men, letting out his tenure to sub-ryots, "and, as such, not to be charged the full "rental of the land but with a deduction of "profit for himself; and the rates proposed "do not seem to me to differ from the rates "paid more than such margin of profit would "account for." There does not seem to be a ground in the proceedings for this assumption of the Judge that the defendant was to be treated as a middleman. He appears to have taken the 54 beegahs not as a middleman at all but as a ryot. The Judge, without any authority apparent in the case, and without a proper foundation in the case for his doing so, has discarded or refused to adopt the rate which was adopted by the Lower Court. We think that he was wrong in that, and that the decree which ought to have been made was that the rent of the original holding should be enhanced according to the rates fixed by the first Court. That was correct so far as it was applicable to that quantity of land; and with respect to that portion of it, therefore, the decree must be amended by fixing the rates of enhancement for the 54 beegahs at the rates fixed by the first Court.

As the appellant has only partially succeeded in this appeal, the costs must be apportioned accordingly.

The 9th December 1871.

Present:

Sir James W. Colvile, Sir Joseph Napier, Sir Montague Smith, and Sir Lawrence Peel.

Barrister (Suspension of)—Powers of High Court—Marriage—Legitimacy—Scotch Domicil—Indian Domicil.

On Appeal from the High Court at Allahabad.

In re THOMAS NEWTON, a Barrister.

Appeal from orders of the High Court suspending appellant from practising as an Advocate of the Court upon a report by a District Judge imputing improper conduct to appellant in the matter of an application made by him on behalf of a client for letters of administration to the estate of her deceased son.

Admitting that the District Judge was competent to report and complain to the High court of the supposed *mala praxis* of a practitioner over whom he had no direct power, and that the High Court was justified in taking action on that report and complaint by calling upon appellant to explain his conduct,—and allowing that the omission of the High Court to place the conduct of the further proceedings against appellant in the hands of a third person was, for the reason stated by the Judges, (namely, that they had not the means of doing so), not a fatal objection to the subsequent proceedings,—THE PRIVY COUNCIL disapproved of the course taken by the Court in acting upon letters which came to their knowledge in the course of the first inquiry and framing new charges against appellant and thus assuming the functions of accuser and Judge.

Upon the merits, THE PRIVY COUNCIL were of opinion that, although appellant had been guilty of an irregularity in advising his client to make indorsements upon promissory notes as administratrix before she had obtained letters of administration, yet as he had been acquitted by the High Court of having acted with *malus animus*, which was a necessary ingredient in every fraudulent act, his conduct, though censurable, did not bear the character which the heavy sentence passed upon him would stamp upon it; at the same time, THEIR LORDSHIPS expressed their unwillingness to weaken the hands of the Courts of India in repressing professional misconduct, and maintaining the high standard of honor amongst those who were admitted to practise before them.

Quære.—Whether a person, if his domicil of origin were Scotch, does not lose that domicil and acquire an Indian domicil by settling as an indigo-planter in India and there dying: also, whether a son of a Scotchman retaining his domicil though resident in India, can, if born out of wedlock, become legitimate *per subsequens matrimonium.*

THIS appeal is brought by Mr. Thomas Newton, a Barrister-at-Law and an Advocate of the High Court of Judicature for the North-Western Provinces, against two orders of that Court dated, respectively, the 18th and the 27th of August 1870.

The particular terms of these orders will be afterwards considered. It is sufficient for the present to state that they were made in the exercise of the power vested in the Court by the 8th section of the Letters Patent constituting it; and that by the latest of them

Mr. Newton was suspended from practising as an Advocate of the Court until the further order of the Court. Liberty was at the same time given to him, at the expiration of five years from the date of the order, to apply for permission to resume practice, which, on the production of satisfactory proof of good conduct in the meantime (it was said), would be conceded to him. The effect, therefore, of the order was to suspend Mr. Newton from practising as an Advocate of the Court, certainly for five years, and possibly for a longer and indefinite period.

The following are the proceedings which resulted in this suspension:—

On the 19th of July 1870, Mr. Bramly, the officiating Judge of Allyghur, forwarded to the High Court a report of the proceedings in his Court on an application made by Mr. Newton on behalf of one Mr. Saunders for letters of administration to the estate of her deceased son, Paterson Tandy Saunders, imputing improper conduct to Mr. Newton in that matter, and submitting to the Court whether such conduct was becoming a barrister. The precise nature of the charges against Mr. Newton will appear from the next proceeding.

On the receipt of this communication, the High Court passed an order, dated the 30th of July 1870, calling upon Mr. Newton, on the 10th of August following, to answer the matters stated in Mr. Bramly's letter, and report "whereby it had been brought to the notice of the Court that he, Thomas Newton, had been guilty of grossly improper conduct in that, whilst acting as Counsel for Mrs. Saunders, on application to Mr. Bramly for letters of administration of the estate of her deceased son to be granted to her, he, well knowing the said Mrs. Saunders not to be the administratrix of the deceased Paterson Tandy Saunders' estate, obtained from the said Mrs. Saunders, and endorsed and put in circulation, a Government loan Note for the sum of 3,000 rupees belonging to the estate of the said Paterson Tandy Saunders, and also certain other Government loan Notes, the property of the said estate, the said Government Notes having been endorsed by Mrs. Saunders as administratrix, although the said Thomas Newton was aware that administration of the estate and effects of the said Paterson Tandy Saunders had not been granted to the said Mrs. Saunders; whereby also it had been brought to the notice of the Court that Mr. Thomas Newton had been guilty of grossly improper conduct in the discharge of his professional conduct as an Advocate in having wilfully deceived the said Mr. Bramly in the course of the hearing of the said application for letters of administration, by informing him, on or about the 9th of July 1870, that he was greatly surprised to hear that the said Paterson Tandy Saunders was illegitimate, whereas he, the said Thomas Newton, was well aware of the illegitimacy of the said Paterson Tandy Saunders, with some circumstances of aggravation concerning this latter charge which it is unnecessary to state."

Mr. Newton appeared before the Court under this order, and made a verbal statement in explanation of both charges; evidence was taken, and a number of letters were produced in the course of the inquiry. On its termination the Court acquitted Mr. Newton of the second charge, but pronounced his explanation in respect of the first to be unsatisfactory, in terms which will be afterwards considered; and, having commented on his conduct in respect of various new matters which had come out in the course of the inquiry, and on the perusal of the letters produced, determined to take further proceedings against him. The result was that, on the 13th of August 1870, an order, being the first of those under appeal, was drawn up in the following terms (Order, p. 2):—

"IN THE MATTER OF THOMAS NEWTON, AN ADVOCATE OF THE COURT.

"It appearing to the Court that the abovementioned Thomas Newton, an Advocate thereof, has been guilty of grossly improper conduct in the discharge of his professional duty as an Advocate in procuring his client, Catherine Saunders, to endorse as 'administratrix to Paterson Tandy Saunders' estate' three Government Promissory Notes, of the aggregate value of 14,000 rupees, or thereabouts, *viz.*, No. °°[illegible] of 1864-1865, for 1,000 rupees; No. °°[illegible] of 1856-1857, for 10,000 rupees, both bearing interest at 5 per cent., and No. °°[illegible] of 1859-1860, for 3,000 rupees, bearing interest at (5½) five and-a-half per cent., and belonging to the estate of Paterson Tandy Saunders deceased, he, the said Thomas Newton, well knowing that the said Catherine Saunders was not the administratrix of such said estate, and in endorsing and putting in circulation one of the said notes, to wit, the Government Promissory Note No. °°[illegible] of 1859-60, for the sum of 3,000 rupees, bearing interest at 5½ per cent. And also in drafting a certain letter, dated on or about the 14th day of April 1870, and in procuring the same to be copied by one Maria Hill, and signed and sent by the said Catherine Saunders to the firm of Gillanders, Arbuthnot and Co., of Calcutta, which said letter contained a statement or introduction in the words following, to wit:—'With reference to your kind offer to advance money for the coming indigo season,' which statement or introduction was known to the said Thomas Newton to be false, and inserted with the intention of inducing the said firm of Gillanders, Arbuthnot and Co. to advance for the manufacture of indigo certain moneys, and with the intention of procuring the said Catherine Saunders to pay to him, the said Thomas Newton, out of the moneys if and when so advanced a sum or sums of money on account of his fees as an Advocate, and also in procuring employment as an Advocate by means of a threat contained in a certain letter written and sent by the said Thomas Newton to the said Catherine Saunders, and dated on or about the 27th day of January 1870, in the words following, to wit:—'If I do not appear for you, I fear the result, as I know all the particulars; and recollect, if the answer is not properly put, you may lose all you have.' And generally in his behaviour and conduct in connection with his employment as an Advocate by the said Catherine Saunders at divers times in the months of January, February, March, April, May, June, and July 1870. Now the said Thomas Newton is hereby ordered to attend at the sitting of this Court to be held at the Court House, Allahabad, on Saturday, the 27th day of August instant, at eleven of the clock in the forenoon, to show cause why he the said Thomas Newton should not be suspended from the practice of his profession as an Advocate of this Court within the jurisdiction of this Court."

Mr. Newton duly appeared to show cause against this Rule; and, on the 27th of August 1870, the Court gave final judgment. It acquitted Mr. Newton on all but the two first charges, *viz.*, the imputed misconduct in inducing Mrs. Saunders to indorse the Governments Notes; and the imputed misconduct in causing her to write the letter to Gillanders, Arbuthnot and Co.; and finding that these two charges had been wholly or in part established against him, passed the order of suspension, which is the second of those under appeal.

Exception was taken at their Lordships' Bar to this course of procedure. It was argued first, that the order of the 30th of July 1870 was objectionable, inasmuch as it prejudged the appellant's case, by assuming that he "had been guilty of grossly improper conduct." Their Lordships, however, are of opinion that, although this order may not have been very happily worded, the true construction of it is, that Mr. Newton was thereby merely called upon to answer the matters stated in Mr. Bramly's letter and report; such matters being, for the sake of convenience, reduced into the two formal charges of professional misconduct set forth in the order; and that there was no intention on the part of the Court to prejudge the case, or to prevent Mr. Newton from having the full benefit of any explanation of the matters charged, which he might be able to offer. That this was so, is shown, their Lordships think, by the subsequent proceedings.

It was next objected that the Judges improperly placed themselves in the anomalous position of being at once accusers and Judges; and that they ought to have committed the conduct of the proceedings against Mr. Newton to some third person. And in support of this latter proposition, the case of Emerson *v.* The Judges of Newfoundland, 8 Moore, P. C., was cited. In that case, whilst litigation between an attorney and his former client was still in some sort pending, though after payment under protest of the sum claimed, the Court, of its own mere motion, and not the application of the opposite party, and without previously calling upon the attorney to explain his conduct, served him with a notice to show cause, within four days, why he should not be struck off the Rolls; refused to enlarge the Rule, and give him further time to prepare his defence; and on his failing to show cause within the four days, made the Rule absolute. It is obvious that several of the circumstances which induced this Committee to reverse that order do not exist in the present case. It is, however, undoubtedly true that, in delivering their Lordships' judgment, Lord Kingsdown said that an explanation should have been required; and that upon that explanation proving insufficient, "the proper course would have been that some person should have been instructed on behalf of the Crown to apply to the Court for a Rule to show cause why further proceedings should not be taken."

Looking to the substance of the objection as applicable to this case, their Lordships think that there is a broad distinction between the charges originally brought by Mr. Bramly, and those made for the first time by the order of the 18th of August 1870.

The High Courts in India exercise peculiar powers of superintendence and control over the subordinate Courts, and the proceedings therein. It was, their Lordships apprehend, in the regular course of practice that Mr. Bramly should make the report which he did make of proceedings in his own Court; and that he should complain, if he had ground of complaint, to the High Court of the supposed *mala praxis* of a practitioner over whom he had no direct power; but who, by virtue of being an advocate on the rolls of the High Court, had the right of appearing in the Lower Court; and their Lordships are of opinion that the High Court was perfectly justified in taking action on that report and complaint, by calling upon Mr. Newton to explain his conduct.

Whether it would not have acted more regularly if it had placed the conduct of the further proceedings against Mr. Newton in the hands of a third party is another question. But the Judges have stated that they had not the means of doing so, and their Lordships must accept that statement; and they are disposed to think that even on the authority of the case cited, the omission to do this is not a fatal objection to the subsequent proceedings.

Their Lordships, however, cannot but regret that the learned Judges of the High Court, acting on letters which came to their knowledge in the cours of the first inquiry, should have thought fit, on the instant and without further inquiry, to frame new charges against Mr. Newton, and thus assume the functions of accuser and Judge. A very strong and clear case may arise, in which such a course would be justified. But the inconvenience of it is great; and the more manifest in the present case, inasmuch as the learned Judges found themselves obliged, in all but one instance, to abandon the charges which they themselves had on the first impression suggested and framed.

Their Lordships have deemed it right to make these observations on the questions of form which have been raised before them. To decide, however, such a case as this upon a question of form, would be far from satisfactory; and they therefore proceed to consider it upon its merits.

They are relieved from the necessity of considering any but the two charges upon which Mr. Newton was finally suspended. Of the second of the original charges he was acquitted on the first proceeding against him. Of all but two of the charges embraced in the order of the 18th of August 1870 he was also acquitted, the Court being of opinion that though the conduct imputed to Mr. Newton by those charges may have been inconsistent with the rules and traditions which regulate the conduct of barristers in this country, and may not have been altogether unobjectionable even in India, it did not amount to that *mala praxis* on which the Court, having regard to the position and functions of an Advocate in the North-West Provinces, could fairly found any proceeding of a penal character.

Their Lordships propose to deal first with the last of the two charges which the High Court thought were established against Mr. Newton, *viz.*, that of having counselled Mrs. Saunders to write to Messrs. Gillanders, Arbuthnot and Co. the letter of the 14th April 1870.

The facts admitted or proved concerning this letter are as follows:—

Mrs. Saunders was a native woman who, after cohabiting for several years with Mr. George Saunders, an indigo-planter, in the Allyghur District, had been married by him some time before his death. The date of this marriage is now ascertained to have been the 17th October 1856. Under the will of her deceased husband she seems to have been tenant for life of his indigo factory and other property. She had several children by him, born either before or after the marriage. One of them was a son, Paterson Tandy Saunders, who, under his father's will or otherwise, was possessed of several Government Notes aggregating 14,000 rupees. Another was a daughter who had been married first to a person of the name of Nichterlein, and afterwards, after having been sued by him for breach of promise of marriage, to a Mr. Kelly. George Saunders had been indebted to Mr. Nichterlein's estate, which was in the hands of the Administrator-General. Mrs. Nichterlein before her second marriage, had made a gift of her share of this debt to her mother, or to her father's estate; but this gift was disputed by her second husband; and the original debt, and the effect of Mrs. Nichterlein's gift appear to have been at the beginning of 1870, subjects of pending or contemplated litigation. Mr. Saunders had likewise a cross claim against Nichterlein's estate for the proceeds of indigo of a former season.

On the 15th December 1869, Paterson Tandy Saunders died, under age and unmarried. Shortly after his death, and on the 10th January 1870, Mr. Newton, who had acted in at least one law-suit on behalf of Mr. George Saunders, and appears to have kept up friendly relations with the family, wrote to Mrs. Saunders condoling with her on the death of her son, and volunteering, if he were not then retained to act for her in that matter, some advice concerning the litigation between her and the Administrator-General.

It further appears that she was then pressed for money, and that she required funds both for the purposes of the indigo factory, and for carrying on the suit pending or about to be commenced, and that in respect to the latter Mr. Newton was to receive certain fees. In these circumstances she, under the advice of Mr. Newton, wrote and sent to Messrs. Gillanders, Arbuthnot, and Co., merchants of Calcutta, the following letter:—"Coel Factory, Allyghur, 14th April 1870. Dear Sirs,—With reference to your kind offer to advance money for the coming indigo season, I write to inquire whether you would place at my disposal 30,000 rupees. On hearing from you I will commence my indigo advances."

On the first inquiry, that of July 1870, it came out on the evidence of Miss Hills, the governess and amanuensis of Mr. Saunders, that if any money had been received from Gillanders, Arbuthnot, and Co., Mr. Newton's fees would have been paid.

Messrs. Gillanders, Arbuthnot, and Co., however, declined to make any advance, and nothing came of the application to them.

The Judges of the High Court, nevertheless, saw fit to make this transaction matter of charge against Mr. Newton. The view of it which they took when they framed the charge in respect of it, which is contained in the Order of the 13th of August 1870 was thus stated by the acting Chief Justice:—"Again you induced an uneducated woman whom you were advising—whether wisely or unwisely matters not—to carry on certain litigation whereby you hoped to secure to yourself what I must call under the circumstances the exorbitant fee of 3,800 rupees, to write to a Calcutta firm a letter drafted by you, containing a false assertion, whereby that firm was to be induced to advance to Mrs. Saunders, for the purpose of her Indigo Factory, certain moneys, and which moneys that firm would naturally consider was to be employed for the legitimate purposes of the Factory, whereas a large portion was to be paid to you for the purposes of carrying on litigation. It is abundantly clear that Gillanders, Arbuthnot and Co. had never promised to advance moneys to Mrs. Saunders. That lady, from her manner to-day, we cannot doubt, had never heard their names before. The Court cannot but come to the conclusion that the statement made in the letter to Gillanders, Arbuthnot and Co., as to their previous offer of assistance, was to your knowledge false, and that it was made for the purpose of obtaining money to pay your fees."

When, however, cause was shown against the rule, it came out that Mrs. Saunders, so far from having never heard the names of Messrs. Gillanders, Arbuthnot, and Co., had been in correspondence with them at various times between 1866 and 1870, and had had various business transactions with them. It was further urged that the assumption that Gillanders, Arbuthnot and Co. had offered to advance money to Mrs. Saunders if erroneous, had deceived, and could deceive nobody. And the High Court in its final judgment expressed its willingness to assume "that it was from information given him by Mrs. Saunders that he (Mr. Newton) introduced the passage relating to a former offer of advances." The gist therefore of the offence imputed to Mr. Newton in respect of this transaction is reduced to this, *viz.*, that he, knowing that a portion of the moneys to be received from Gillanders, Arbuthnot, and Co., was to be employed in payment of his fees, drafted for his client a letter calculated to induce that firm to believe that this advance was sought for a different purpose. It appears to their Lordships, after carefully considering all that is said of this matter in the final judgment of the High Court, that the harsh view of the transaction there taken is not borne out by the facts, and that the drafting of the letter cannot be taken to constitute such grave professional misconduct as would justify any part of the severe sentence passed on Mr. Newton. The letter is an application in the most general terms from an indigo-planter for an advance of money for the coming season. It is clear that Mrs. Saunders did want moneys for the purposes of her factory. Their Lordships are not aware that such an application implies any undertaking that the money, if advanced, is to be earmarked; is not to be mixed with the general funds of the planter; and that no part of it is to be withdrawn, even temporarily, and applied to a purpose other than the cultivation or manufacture of indigo. If the lender chooses, he can of course take any security or guarantee he may think necessary, in order to have the money set apart and applied entirely to the purpose of producing the crop on the security of which he makes the advance. But here the loan was declined. All that is established is that Mrs. Saunders pressed for money to provide both for carrying on her factory, and for the prosecution of a suit in which she may well have hoped to recover further funds, wrote this letter under Mr. Newton's dictation, meaning to apply part of the money in the first instance to the payment of his fees in the suit. Looking to all that is established in respect of this letter, and to the absence of any complaint on the part of any person concerning it, their Lordships are of opinion that the order against Mr. Newton cannot be maintained on this charge.

They next proceed to consider the graver charge against him of having induced or advised his client to indorse the Government Notes as Administratrix of Paterson Tandy Saunders, when she was not entitled to assume that character. The facts proved which particularly relate to this transaction are as follows :—

On the 5th of April 1870 Mrs. Saunders wrote to Mr. Newton inclosing one of the Notes belonging to the estate of Paterson Tandy Saunders, and standing in his name, being a Note for 10,000 rupees, and asking him to get the Note renewed in her name, and broken up into ten Notes for 1,000 rupees each. On the 9th of April 1870 Mr. Newton wrote to Mrs. Saunders to the effect that he had spoken to Mr. Clarke, the Treasury Officer at Allyghur, who had informed him that the Note could not be renewed, nor interest paid upon it, until she had taken out administration to her son's estate. Thereupon Mr. Newton was instructed to make and did make, as Counsel for Mrs. Saunders in Mr. Bramly's Court, the application for letters of administration to the estate of her deceased son, describing him as a British subject who had died a minor and intestate. The date of this application was the 2nd of May. On the 6th of May, the day before the usual citations were issued by the Judge, Mr. Newton, who had advanced some small sums to Mrs. Saunders, received from her the security for 10,000 rupees, and two other Government Notes standing in Paterson Tandy Saunders' name and part of his estate, all being indorsed by her as administratrix of that estate. At the same time she executed to him a receipt admitting the loan of 200 rupees, and he executed to her a receipt for the Notes; being the two receipts at page 8 of the Appendix; and Miss Hills, in her account of the transaction, has deposed as follows: "Mr. Newton wrote the indorsements in pencil on the Notes, and told me to write it small on the pencil marks; and I said at the time, 'Mrs. Saunders has not got the administratrixship, how can I write that?' and he said, 'Whatever blame there is will fall on me.' I said nothing more. I then wrote the indorsements. Mrs. Saunders signed them."

The indorsements were special to Mr. Newton. One of these Notes, being one for 3,000 rupees, he afterwards specially indorsed to the Delhi Bank, and that Bank having demanded in Calcutta a renewal of it, inquiry was made concerning the fact of the grant of administration to Mrs. Saunders, and so the transaction was brought to the notice of Mr. Bramly.

In the meantime a question had arisen in Mr. Bramly's Court touching the legitimacy of Paterson Tandy Saunders, and whether administration of his estate ought to be granted to Mrs. Saunders as his mother and next of kin, or to the Administrator-General as representing the Crown. It appears to be now certain that Paterson Tandy Saunders was born out of wedlock; but it is suggested on behalf of Mr. Newton that he might, nevertheless, as the son of a Scotchman retaining his domicil though resident in India, have been made legitimate ***per subsequens matrimonium.***

Their Lordships think that it is fortunate for Mr. Newton that the determination of this case does not depend upon this point. If it appeared that Mr. Newton, knowing that Paterson Tandy Saunders was born out of wedlock, had applied for letters of administration as if the deceased had been born in wedlock, and pending that application had caused Mrs. Saunders to indorse those bills in the character of administratrix when she did not possess that character, and had attempted to raise money on them for Mrs. Saunders, in the expectation that he might ultimately succeed in showing that the ***status*** of Paterson Tandy Saunders was to be regulated by Scotch law, and that under that law, though born out of wedlock, he was legitimate, their Lordships are of opinion that his conduct would have been almost without excuse. For the proof of legitimacy and of the right of Mrs. Saunders to administration, and to a beneficial interest in any part of her son's estate, would in that case have depended on the determination of a disputable, and, possibly, very nice question, ***viz.***:—Whether Mr. George Saunders, if his domicil of origin were Scotch, had not lost that domicil, and acquired an Indian domicil by settling as an indigo-planter in India and there dying. In the cases of Campbell *v.* Campbell (1), and Munro *v.* Munro (2), one of the principal issues was, whether the father of the person whose legitimacy was in question had retained his Scotch domicil. And in both cases the facts on which the issue was determined were very different from those on which the like issue would have been tried in the case of Mr. Saunders.

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(1) L. R. 1 Eq., 383.

(2) 7 Cl. and Fin., 842.

But, in truth, this was not the defence of Mr. Newton in the High Court, nor need it be his defence here. The case which he made there was that when he first made the application for letters of administration, and when he caused Mrs. Saunders to indorse the Notes, he did not know or believe that Paterson Tandy Saunders was born out of wedlock; and, therefore, had good reason to believe that in a few days she would possess the character which the indorsement attributed to her. And this fact has been found in his favor by the High Court. On the occasion of the first hearing the Acting Chief Justice says:—"When you procured your client to sign the Promissory Notes as administratrix, you doubtless were under the belief that she would at once get administration granted to her, and we, therefore, do not regard the act as so gravely criminal as it would otherwise have been. The opinion which we have formed on the second charge, which is made against you in the Judge's report, that you possibly were not aware that any impediment existed to the obtaining of the administration by your client, enables us to assume in your favor that, when you procured your client's signature as administratrix, you believed that in a very short time she would be in a position legally to assume that character and make a good title to her son's property."

If the High Court had found upon sufficient evidence that Mr. Newton had advised Mrs. Saunders to make the indorsements as administratrix, knowing that she had no title, or a doubtful title, to obtain the grant of letters of administration, their Lordships would have felt that the sentence upon Mr. Newton ought to be confirmed. But the finding of the High Court negatives this knowledge; and upon this finding of the High Court, their Lordships feel that, although in this matter Mr. Newton has been guilty of a grave irregularity which, in their opinion, is well deserving of censure, he has been acquitted of having acted with the *malus animus* which is a necessary ingredient in every fraudulent act, and therefore that his conduct, though censurable, does not bear the character which the heavy sentence passed upon him would stamp upon it. Their Lordships, therefore, however unwilling to weaken the hands of the Courts of India in repressing professional misconduct and maintaining a high standard of honor amongst those who are admitted to practise before them, have come to the conclusion that in this case it is their duty humbly to advise Her Majesty to allow the Appeal, and to reverse the last of the orders against which it is brought, and that in lieu thereof to order that the rule to show cause of the 18th August 1870 be discharged. They do not propose to recommend the reversal of that order, inasmuch as such reversal would imply that no rule to show cause ought to have been made. They make no order or recommendation as to costs.

The 9th December 1871.

Present:

Sir James W. Colvile, Sir Robert J. Phillimore, Sir Montague Smith, and Sir Lawrence Peel.

Religious Trust—Partition—Hindoo Law—Revocation—Joint Family Property—Insolvent Sebait—Bonâ fide Purchaser—Registry—Mutation of names—Revenue Settlement—Possession—Proprietary Right—Revenue Sales.

On Appeal from the High Court at Calcutta.

Juggutmohinee Dossee

versus

Sookhemony Dossee and others.

Plaintiff (appellant) sued to establish a religious trust created and confirmed by two deeds of dedication. HELD that a family trust of this nature had never, in modern times at least, been ruled to require the assent of the State; and that as the trust in this case appeared to be established as to the lands dedicated, it lay on respondent to show some subsequent legal conversion of the lands to the ordinary uses of property, by better evidence than a second deed of partition operating as a revocation of a former one, which second deed was not only not proved but discredited on every judicial examination of it. A partition being favorably viewed by the Hindoo religion and law, and wanting no extrinsic support, THEIR LORDSHIPS were of opinion that the alleged presumption against the first deed of partition, that it was a mere device because one member of the family was indebted, might more reasonably be removed than maintained by due attention to that fact; whereas, the second deed did afford grounds for suspicion, inasmuch as it made no reference to the first deed, and, professing to be the ordinary partition of a joint family property, appointed an insolvent as the *sebait*.

As to respondent's contention, that he was a *bonâ fide* purchaser for value without notice, THE PRIVY COUNCIL considered that the very origin of his title, as well as the contention on the mutation of names in the Collector's Registry, proved that the respondent must have had notice of the original trust, and that as he was not shown to have made any enquiries as to his grounds for supposing that the trust was legally at an end, he could not exonerate the property from the trust which attached to it.

HELD also that a settlement with Government for revenue did not establish proprietary right in the land; that the settlement and possession under it being evidence of a right to possession, were also so far evidence of proprietary right, but did not necessarily constitute it, much less could they divest and destroy trusts to which the settlor was subject; and that antecedent trusts had been impressed by judicial decisions on estates acquired even under revenue sales, notwithstanding that such sales had the effect of clearing away preceding titles.

A former abuse of trust in another instance (THEIR LORDSHIPS observed) could not be pleaded against a trustee who sought to prevent a repetition of abuse, even if he were formerly implicated in the same indefensible courses against which he was seeking to protect the property, though it would be a reason for excluding him from the administration of the property as *sebait.*

THIS is an appeal from a decree passed by Mr. Justice Kemp and Mr. Justice Campbell, forming a Division Bench of the High Court of Calcutta, affirming a decree of the Judge of East Burdwan, by which the suit of the plaintiff, now represented by the appellant, was dismissed.

The Judges of the High Court differed in opinion on the effect of the evidence. Mr. Kemp expressed his to be in favor of the plaintiff as to part of the relief which he prayed against Kallidoss, the only respondent who appears on this appeal; but as the Judges were not unanimous the decision given in the Court of first instance stands unreversed.

The plaintiff's suit was for possession, but not for possession in the ordinary character of proprietor of lands; he made title to the possession of these lands, for which he sued on this special ground, that they had been dedicated to the religious service of the family idol, by virtue of two instruments of dedication in the Christian years 1818 and 1820, which still, at the time of the suit, impressed on the lands a trust, which by his suit he sought to have declared. This was the foundation and main character of his claim, though somewhat inconsistently with the nature of the dedication he sued for a certain proportion only, as though the suit had been one in respect of private interest. The Court could not have so dealt with the possession under these instruments of dedication.

He asked also to be appointed *sebait.* His plaint embraced other charges of breach of trust relating to other properties, which are no longer insisted on. The properties which this appeal relates to are one called Lot Pilkhundee, to which respondent makes title as a purchaser *boná fide* for value without notice, and certain other lands enumerated in a schedule to the plaint, which were once claimed to be held as *lakeraj,* were resumed by the Government as held under an invalid *lakeraj* title, and were permanently settled for with Government by Sookhemony Dossee. The appeal against her was heard *ex parte.* All these properties were comprised in, and dedicated by, the two instruments of dedication beforementioned.

The first *sebait* was the husband of Sookhemony, and after his death she held a portion at least of the dedicated lands by the title of *sebait* in succession to her husband. Notice of the trust, if it be valid, is clearly established against her.

Her claim as to the lands resumed is advanced under her settlement with the Government, the nature and effect of which will be subsequently considered.

The title of Kallidoss to Lot Pilkhundee is derived through successive alleged alienations under a deed, which will be described as a second deed of partition, by which, as he contends, a valid partition of the family property was first constituted.

He admits that a deed, purporting to be one of partition between the five brothers who constituted the joint family, had been executed some years before, and that the dedication insisted on by the plaintiff had been in fact made under those instruments of dedication beforementioned, but he seeks to avoid the effect of all upon the same grounds which were unsuccessfully advanced in the case lately decided by their Lordships on appeal, when the earlier deed was established as the valid deed of partition of the family property. The decision, which is partly stated in the appellant's case, and which was read in full on the argument, need not be further referred to, except to state that the facts there decided cannot be considered to have been established against Kallidoss, who was not a party to that suit. Their Lordships, therefore, will proceed to consider the facts of the case solely upon the evidence which this case presents.

The nature of the suit must be borne in mind, in considering certain questions which arise in the cause as to the burthen of proof, the general Law of Limitation, the special Law of Limitation under Act XIII of 1848, the claim to possession, and the limitation of that claim to a portion or share of the whole property dedicated.

The suit, although it seeks to set aside the mutation of names, and to have possession decreed to the plaintiff, seeks that relief as incident to the establishment of the trust. Although that relief cannot in the present state of litigation, as the proceedings have been instituted and conducted, be allowed, still it must be considered that the suit is brought to establish a religious trust. The trust is created by the instrument of 1818, confirmed by that of 1820. It is not constituted by the first partition deed. If any vice existed to defeat this partition deed, that vice would not affect the dedication of the property under the antecedent instruments to the religious trust, if they show a real and not merely a colourable dedication.

The two deeds which create and confirm the dedication are *primâ facie* valid. Nothing is proved to lead to the belief that they are at variance with the usages of the country or family, or that regard being had to the value of the property dedicated, and to the property at that time of the family, there is any excess in the appropriation to the religious services of the family, of the portion of the family property thus set apart, such as to generate distrust of its reality.

It was argued that such dedications of property without the assent of the State should be regarded as merely revocable appropriations of which the founders might vary the use. No authority whatever was adduced in support of this position, which strikes at the root of most modern endowments of the like nature.

A family trust of this nature has never, in modern times at least, been held to require such an assent. The cases supporting such trusts are too numerous for citation. They are collected in Norton's Leading Cases on Hindu Law, Part ii, p. 406.

The argument of Mr. Leith, founded on the non-registration of these instruments of dedication at the time or shortly after the time of their execution, and on the subsequent registration of them at the time of the registration of the first deed of partition, *viz.*, that they constituted in effect one instrument, and rested on the sole foundation of the first deed of partition, was not urged in the Courts below, and appears to have no foundation of fact to support it, since the mere contemporaneous registration of the three furnishes no ground for presuming such union. There is abundant evidence that all were acted on.

The trust declared on appears then to be established as to the lands dedicated by these two prior instruments; and it lies on the respondents to show some subsequent legal conversion of the lands to the ordinary uses of property.

The second deed is said to work this conversion, and the question arises which of the two deeds of partition is to prevail.

The first deed of partition is an instrument which, but for the existence of the second, would have been exposed to no suspicion.

The partition is favorably viewed by the Hindoo religion and law. It wants no extrinsic support.

An alleged presumption against the first deed that it may have been a mere device because one member of the family was indebted may more reasonably be removed than maintained by due attention to that fact. Such a state of things often leads to partitions, but to fair and honest ones. It would be a prudent course in the members of a joint family to prevent, by a partition, the interference of strangers in their family arrangements, and an inquiry into the state, condition, extent, and uses of their joint property; and no suggestion has been made that the partition under the first deed was unequal.

The second deed, however, does afford ground for suspicion. It makes no reference whatever to the first deed; it professes to be the ordinary partition of a, till then, joint family property; it appoints as a *sebait* one whom no prudent person would appoint a trustee, one an actual insolvent. Such an appointment, independently of its obvious impropriety, would be little likely to be made by a Hindoo family having several and more competent members, from the fear of the scrutiny to which it might lead if the creditors of the *sebait* traced the property to his possession. Again, as a dedication, in fact, was to be defeated by it, some difficulty on this ground alone would present itself to the minds of those who might meditate on the change which this deed seeks to effect. All comparison, therefore, supports the deed prior in time, which priority alone, in a balanced state, would establish the first instrument.

It was urged with great force in the argument that every Judge and Court that has hitherto dealt with this second deed has either actually declared it invalid or stated it to be subject to grave suspicion. A decision against the plaintiff generally in this suit would be, in substance, deciding against a trust, *primâ facie*, well established, on evidence of a subsequent deed of revocation not only not proved but on every judicial examination of it, discredited. Their Lordships, therefore, think that a trust was created by the deeds of dedication of the Pikhundee property.

It remains to be considered whether the respondent can support the decree in his favor upon the ground that he is a purchaser for value without notice. Now the very origin of his title, as well as the contention on the mutation of names, prove that he must have had notice of the original trust. The devolution of the title to him from Gobroochurn under the second deed is, until the conveyance to himself, accompanied with very suspicious circumstances at every stage of it, such as ordinarily accompany an attempt in a Hindoo family to put property out of the reach of an apprehended claim. He is not shown to have made any inquiries as to the grounds for supposing that the trust was legally at an end; and, therefore, he cannot exonerate the property from the trust which attached to it.

The principal claim of Sookhemony to hold the resumed lands free from this trust on the grounds advanced by her, is destitute entirely of legal foundation. She did not rest her title so much on the operation of the second deed of partition as a revocation of the first, as on the effect of the resumption proceedings and the settlement for revenue with her. Such a settlement does not establish proprietary right in the land, but is made with Government as to their claim to their *kheraj* or revenue. The settlement and the possession under it being evidence of a right to possession, are also so far evidence of proprietary right, but do not necessarily constitute it. *A fortiori*, they could not divest and destroy trusts to which the settlor was subject. The claim supposes a mere settlement for revenue to have the same effect in clearing away preceding titles which a sale under the Revenue Laws works; but antecedent trusts have, in certain cases, been impressed by the decisions of Courts of Justice, including this tribunal, on estates acquired even under these revenue sales. (See the cases referred to in Mr. Justice Macpherson's work on Mortgages, p. 86, 5th edition). Sookhemony could not get rid of her *sebait* title and possession by the machinery of this settlement, though it was in terms made with her as a private person. Therefore the claims of the plaintiff, so far as he seeks to have the trust established as to the property, receives no answer whatever from the laws as to limitation of suits, or from the terms of the settlement for revenue with her.

It remains to consider one argument which was addressed to their Lordships on one part of the evidence, which seems not to have been formerly distinctly advanced.

It was urged that the evidence shows that the family had, in several instances under the first deed, dealt with other portions of the property included in the dedication instruments as though they were private property. This argument was thus met, that there was no proof that the properties so dealt with were dedicated properties, since the identity of the name was perfectly consistent with properties held separately under *malguzari* and under *lakeraj* titles, which might both bear the same description; that a disposition of part might not be to the prejudice of the trust necessarily; and that changes of property not designed otherwise than for the benefit of the endowment would not be questioned in a Court of Justice. The correctness of each position cannot be gainsayed, and the argument for the respondent on this point, which is conjectural, is conjecturally answered. How the real facts may be, it is not possible for their Lordships, on the evidence, to decide; but this is to be observed, that a former abuse of trust, in another instance, cannot be pleaded against a trustee who seeks to prevent a repetition of abuse, even if he were formerly implicated in the same indefensible courses against which he is seeking to protect the property, though it would be a reason for excluding him from the administration of the property as *sebait*. The Court could not with any propriety say, we will decline to protect the property and leave it further exposed to loss, and decline to make a declaration that it is trust property, merely because they would not trust the plaintiff with its administration.

The title being one founded on trust, and the contention of the holders being that it is not now in their hands subject to the trusts, *primâ facie* at least, attaching to it, the *onus* of the proof was on them. They did not discharge themselves by proving a deed as to which Mr. Justice Campbell declares that he probably would not have made it the foundation of a decree in their favor. The learned Judge appears further to have mistaken the nature of the change of possession, which he considered to have prejudiced the plaintiff's case. The old *sebait* title was recorded in the Collector's Registry. A mutation of names—in itself a change—was applied for on the part of Kallidoss, and resisted on the part of the plaintiff claiming as trustee. The plaintiff was, in effect, referred to a civil suit, and the very reason of such a reference, *viz.*, that the matter is not in the jurisdiction of the revenue officer, cannot, either in reason or law, invert the ordinary course of proof and presumption in a civil suit to establish a trust. Their Lordships' think the judgment of Mr. Justice Kemp, on the facts of the case, correct, and the decree which, but for the supposed Law of Limitation, Mr. Justice Kemp would have given as to the resumed lands, as well as to Pilkhundee, is that which their Lordships will humbly advise Her Majesty to make.

Their Lordships will, therefore, humbly advise Her Majesty that the appeal be allowed ; that the decrees of the High Court and of the Court below be reversed, so far only as they dismiss the claim of the plaintiff to set aside the alienation of Lot Pilkhundee, and to have the trusts of the dedication instruments declared, and that it be declared that the lands specified in the schedule to the plaint, and the said Philkhundee were and continue dedicated under the instruments of dedication of 1818 and 1820 to the religious uses specified in those instruments of endowment ; and now add a declaration that this decree is to be without prejudice to any further suit or proceedings for the enforcement of the religious trusts declared on the appointment of a proper *sebait.*

Their Lordships think that the costs in the Courts below should be allowed to the respective parties, according to the usual course of proceeding in those Courts when a plaintiff recovers part of his demand, and that the appellant should have the costs of this appeal.

The 21st December 1871.

Present :

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Jurisdiction—Transfer of Execution Cases.
Case No. 217 of 1871.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Moorshedabad, dated the 21*st April* 1871.

Kedarnath Mahata (Decree-holder) *Appellant,*

versus

Bungshee Dhur Roy and others (Judgment-debtors) *Respondents.*

Baboo Unnoda Pershad Banerjee for Appellant.

Baboo Grija Sunkur Mojoomdar for Respondents.

Neither Section 8 Act XXV of 1887 nor the Code of Civil Procedure authorises a District Judge to transfer execution cases from his own Court to the Court of the Subordinate Judge.

Glover, J.—The decree-holder is the appellant before us. The decree was passed on the 12th May 1886 in the Court of the District Judge. In 1862 the execution proceedings were transferred to the Subordinate Judge, and from that time various sums of money have been realized on account. On the last occasion when execution was sought, the Subordinate Judge refused to proceed on the ground that the decree could only be executed by the Court which passed it. Against this order the present appeal is made.

We think that the Subordinate Judge's order was right. Section 8 Act XXV of 1837 has been relied on by the pleader for the appellant. But this refers simply to the authority of the Sudder Court to direct the transfer of cases from one Court to another ; it gives no authority to the District Judge to transfer execution cases from his own Court to the Court of the Subordinate Judge; and this view of the law has been upheld in the case of Rajeeb Ram Dass reported in the 6th Weekly Reporter, page 51, Miscellaneous Rulings. We may also observe that the Code of Civil Procedure gives no authority for any such transfer.

We have been asked to take into consideration the fact that, notwithstanding the erroneous transfer in 1862, several proceedings in execution have been taken out and money recovered under the decree in the Court of the Subordinate Judge, and likewise to direct the Judge to re-place the execution case in his own file and to proceed to execute the decree. Under ordinary conditions, we should not grant this indulgence ; but looking to all the circumstances of this case, we think that, whilst we uphold the decision of the Subordinate Judge, we ought to direct the Judge to re-place the execution proceedings in his own file, allowing the judgment-debtor to make any objection he can to the execution of the decree.

The appeal must be dismissed with costs.

The 21st December 1871.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Set-off—Section 209 *Act VIII of* 1859*—Decrees in same Court.*

No. 315 of 1871.

Miscellaneous Appeal from an order passed by the first Subordinate Judge of 24-Pergunnahs, dated the 15th September 1871.

Hadoo Sirdar (Decree-holder) *Appellant,*

versus

Jadoo Monee Dossee (Judgment-debtor) *Respondent.*

Baboo Kamala Kant Sein for Appellant.
No one for Respondent.

Section 209 Act VIII of 1859 (allowing a set-off) refers not only to cases of decrees *of* the same Court, but also to decrees *in* the same Court.

Glover, J.—The only question in this appeal is, whether the judgment-debtor, Jadoo Monee Dossee, is entitled to a set-off against the decree-holder who purchased the rights and interests of Nobin Chunder in a decree which he had obtained against Jadoo Monee. Nobin Chunder got a decree, it appears, on the 23rd January 1869, against Jadoo Monee Dossee, and she got a decree against Nobin Chunder for 8,000 rupees on the 8th July 1870. The purchaser bought at auction the rights and interests of Nobin Chunder, and now wishes to execute that decree against Jadoo Monee Dossee. She on her part requires that her decree against Nobin should be set-off. The Subordinate Judge allows the set-off, and we think he is right. It is contended by the vakeel for the appellant that these decrees not being decrees of the same Court, one cannot be set-off against the other, that the decree of Nobin Chunder against Jadoo Monee was passed by the Principal Sudder Ameen, and the decree of Jadoo Monee against Nobin was the decree of the High Court, and therefore these decrees not being decrees of the same Court no set-off can be allowed. But we observe that Section 209 Act VIII of 1859 refers not only to cases of decrees *of* the same Court, but also to decrees *in* the same Court. So that, if, as contended by the appellant, the decree of Jadoo Monee was not sent to the Court of the Principal Sudder Ameen, the words of the second part of the Clause would apply, inasmuch as this decree as well as Nobin's decree against Jadoo Monee were *in* the Court of the Principal Sudder Ameen at the time the set-off was applied for. It has been argued that the words "*in*" and "*of*" ought both to be considered as meaning the "*decrees of the same Court;*" and that whereas these are not both of them decrees of the Principal Sudder Ameen's Court, one decree cannot be set-off against the other. It seems clear to us, looking at the words of the Section, that the legislature made a special difference between the words "*in*" and "*of;*" and that whilst the word "*of*" applies properly to decrees passed by the same Court, the word "*in*" applies to decrees which have got into that Court and are waiting there for execution. It appears to us that the Legislature intended to make a distinction between the two classes of cases and laid down rules with reference both to decrees of the same Court and also to decrees transferred to the same Court or which for some reason or other had got into the same Court and were waiting there for execution. In this particular case, there is no reason why we should come to any other conclusion; because the judgment of the High Court merely put right the judgment of the Court below and passed a decision which the Court below ought to have passed.

We are, therefore, of opinion that the Subordinate Judge is right in allowing the set-off in this case. The appeal is dismissed, but without costs, no one appearing for the respondent.

Mitter, J.—I am of the same opinion. Both the decrees were being executed in the same Court, and the words of the Act seem to me to be large enough to cover a case of this kind.

The 22nd December 1871.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge.*

Jurisdiction—Small Cause Court—Personal property—Share under an intestacy.

In the matter of
Grish Chunder Singh *Petitioner,*

versus

Anna Dossee and another *Opposite Party,*
Mr. H. E. Mendies for Petitioner.

Baboo Grish Chunder Mookerjee for Opposite Party.

The decree of a Small Cause Court was annulled as made without jurisdiction in a suit to recover money as personal property in respect of a share under an intestacy.

Couch, C. J.—This case seems to be clear. It is not a suit for money due on any contract, because there is no contract between the plaintiff and the defendant. This is a suit to recover money as personal property, and it is to recover it in respect of a right to a share under an intestacy, and therefore comes within the exception that the Small Cause Court is not to have jurisdiction where the suit is for a share or part of a share under an intestacy. The Small Cause Court had no jurisdiction to entertain such a suit, and therefore the decree of the Small Cause Court in this case must be annulled as being made without jurisdiction.

The 4th January 1871.

Present:

The Hon'ble G. Loch and W. Ainslie,
Judges.

Jurisdiction — Appellate Court — Admission of Additional Evidence—Special Appeal—Review of Judgment.

Application for Special Appeal from a decision passed by the Judge of Sarun, dated the 29th June 1871, affirming a decision of the Moonsiff of that district, dated the 22nd February 1871.

Ram Lall (Plaintiff) *Appellant,*

versus

Rung Lall (Defendant) *Respondent.*

Baboo Bama Churn Banerjee for Appellant.

No one for Respondent.

An Appellate Court may, under Section 355 Act VIII of 1859, admit additional evidence.

In this case the Judge in appeal declined to do so, on the ground that application for the admission of additional evidence should have been made to the lower Court. HELD that, instead of applying for the admission of a special appeal, the proper course would have been to apply to the Judge for a review of his order.

Lock, J.—IN this case when the appeal was pending before the Judge, the petitioner wished to file some fresh documentary evidence which the Judge refused to receive, on the ground that application for the admission of that evidence should have been made to the Moonsiff. It appears, however, that the Moonsiff decided the case in the month of February 1871, and that this evidence which consists of the deposition of the defendant and certain accounts which he attested when examined by the High Court in another case, was not in existence till April 1871, and therefore the application for its admission could not, as the Judge supposes, have been made to the Moonsiff. By the law (Section 355 Act VIII of 1859) the petitioner is not entitled in an Appellate Court to produce additional evidence, but the Appellate Court may, if it thinks proper, admit it. In the present case, we think that the proper course would have been to have applied to the Judge for a review of his order, pointing out to him the mistake which he clearly made in the reasons he gave for rejecting the additional evidence, and that the application for the admission of special appeal should not have been made. We reject this application.

The 4th January 1872.

Present:

The Hon'ble F. B. Kemp and E. Jackson,
Judges.

Recovery of Possession—Dispossession of Widow and Minor Son—Mokururee Pottah—Abandonment.

Application for Special Appeal from a decision passed by the Subordinate Judge of Hooghly, dated the 21st August 1871, affirming a decision of the Moonsiff of that district, dated the 27th April 1871.

Kalee Coomar Puttur and others (Defendants) *Appellants,*

versus

Khettur Nath Baug (Plaintiff) *Respondent.*

Baboos Anund Chunder Ghossal and *Rash Beharee Ghose* for Appellants.

No one for Respondent.

Plaintiff sued for possession of a tenure, on the allegation that his father had held it on a *mokururee pottah* of 1257 till his death in 1264 when plaintiff, a minor, and his mother, a widow, were ousted by defendant, the present lessee of the zemindar, both of whom put forward a common defence to the effect that, on plaintiff's father's death, and plaintiff's inability to pay rent, plaintiff abandoned the tenure. Though plaintiff's *mokurruree pottah* was found to be inadmissible and invalid, yet plaintiff was held entitled to possession of the tenure which admittedly was his father's, and which it had not been proved the son ever abandoned.

Kemp, J.—This was a suit for possession of a tenure from which the plaintiff alleged that he had been dispossessed in 1265 by the defendant. The plaintiff alleged that his father held the tenure on a ***mokururee pottah*** of the year 1257; that the plaintiff's father held the tenure up to 1264 when he died, and the plaintiff being then a minor, and his mother a helpless widow, they were ousted by the defendant, and the present suit is brought for recovery of possession.

The defendant pleaded, first, that the suit was barred; and, second, that the plaintiff's father never obtained a ***mokururee pottah;*** that he was an ordinary tenant; that he held the tenure up to the time of his death; and that the plaintiff having then fallen into arrears and absconded, the zemindar resumed the tenure, and let it out to the defendant in 1267.

Both Courts have decreed the plaintiff's claim. The ***mokururee pottah*** not being on stamp paper, it was considered by both the Courts below to be inadmissible, and they further held that, as it was signed by the ***karpurdaux*** of the zemindar, it was not a valid document, but both Courts have found that the plaintiff's father was a ***khodkasht chupperbund*** ryot, and that he had built a house on the land; and here we may observe, with reference to the point raised in special appeal, that the fact of the plaintiff's father having built a hut upon the land as a ***khodkasht chupperbund*** ryot would not give him a right of occupancy to the land, as it was not taken for agricultural purposes; that the area of the land is 5¼ beegahs, and could not very well have been taken for the sole purpose of erecting a house thereon; moreover, on discovery of that fact, the pleader for the applicant abandoned that contention.

In special appeal, it is contended that the plaintiff ought to have proved his title; and that not having done so, and his ***mokururee pottah*** having been found to be inadmissible and invalid, the suit ought to have been altogether dismissed.

In this case, it is very clear that both the defendant (the present lessee of the zemindar) and the zemindar put forward a common defence to the effect that the lands in dispute were the lands tenanted by the father of the plaintiff; but that on the death of his father, the plaintiff not having been able to pay the rent, he abandoned the tenure. Both Courts have found that that plea was not proved; that the plaintiff's father had held the land up to the time of his death, which occurred in 1264; that a house had been built on a portion of the land, and that the plea of abandonment by the plaintiff was false. We think, therefore, that the plaintiff was clearly entitled to the relief which he obtained in the Court below, namely, to possession of the tenure which admittedly was his father's tenure, and which it has not been proved that the son ever abandoned.

The application is rejected.

The 4th January 1872.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

New Trial—Confession of Judgment—Fraud—False Personation.

In the mater of
Huro Monee Dossee, *Petitioner.*

Baboo Sham Lall Mitter for petitioner.

A Subordinate Judge may, on the ground of fraud and false personation, grant a new trial where judgment has been passed on confession of judgment.

Kemp, J.—This is a motion on the part of one Huro Monee Dossee, widow of Nutobur Doss, deceased, and guardian of her minor son, Gobind Chunder Doss. It appears that the plaintiff's husband sued one Puteet Mohinee Dossee, the widow of Khettro Mohun Halder, in the Small Cause Court. It is alleged that the latter admitted the debt, and applied to the Court to be permitted to pay the amount due by instalments, and the Small Cause Court Judge passed an order on the terms of this application on the 18th November 1870. The judgment of the Small Cause Court is to this effect:—"Defendant enters judgment by confession, "agreeing to pay 104 rupees at 8 rupees "per month, from Kartick 1277 to Kartick "1278. In default of two ***kists,*** all instal-"ments will lapse, and interest will run at "half anna per rupee per mensem. Plaintiff "affirms these terms: Verdict for plaintiff, "defendant to pay 104 rupees as agreed "on." Subsequently, it is alleged, the plaintiff's husband executed this decree of the Small Cause Court under a certificate in the Moonsiff's Court of Sulkea, and attached the dwelling-house of the judgment-debtor, who deposited the amount of the decree into Court on the 21st of June 1871. Then, on the 1st July 1871, the opposite party applied to the Small Cause Court Judge for a new trial. Upon this the present Judge of the Small Cause Court of Sealdah took the evidence of the defendant, the judgment-debtor in the case, and he deposed that he was not acquainted with the plaintiff, he denied having filed a confession of judgment, or having employed a pleader in the case; that no summons was served upon him; that the case was a false case, and that he had been falsely personated. On this, the present Judge of the Small Cause Court, Mr. Towers, set aside the order of the former Judge, Mr. Bell, and granted a new trial. It is admitted that no appeal lies against this order, but the applicant comes in and invokes the assistance of the Court, on the ground that the Small Cause Court Judge has acted without jurisdiction in granting a new trial under the provisions of Section 21 Act XI of 1865, inasmuch as that Section does not admit of the admission of a new trial in cases where judgment has been passed on confession of judgment; and, secondly, on the ground that no notice of the intention of the opposite party to move for a new trial has been given to the petitioner.

We think, on both these grounds, that the application must fail. We think that there can be no doubt that, in a case like this where the Subordinate Judge has granted a new trial on the ground that fraud and false personation have been alleged, and to a certain extent proved by the deposition of the judgment-debtor, he was quite right to grant a new trial independent of the fact of the former judgment having been passed on confession of judgment.

With reference to the second point, we may observe that the application for a new trial was made on the 1st July 1871, and nothing was done to oppose the application in the Small Cause Court; and although the application was granted so far back as the 9th of September 1871, no steps were taken to move this Court until in December 1871.

We reject the application.

The 15th December 1871.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble A. G. Macpherson, *Judge*.

Shipping—Charter-party—Freight—Assignment of Bills of Lading—Lien—Construction—Guarantee—Short Delivery.

Appeal from the judgment of the Hon'ble J. B. Phear, exercising the Ordinary Original Civil Jurisdiction of the High Court.

John Sheriff Dods and others (Defendants) *Appellants,*

versus

Charles Edward Stewart (Plaintiff) *Respondent.*

Mr. Lowe and *Mr. Cowell* for the Appellants.

Mr. Evans and *Mr. Fergusson* for the Respondent.

HELD by the terms of the charter-party in this case that the owner of the vessel had an undoubted right to keep possession of the cargo until the freight according to the charter-party was paid; and as the bills of lading referred to the terms of the charter-party, that he had, as against the holders of the bills of lading, the same right, *i. e.* not to part with the goods without being first paid the freight.

HELD also that the master's allowing a portion of the cargo to be delivered would not prevent the owner of the vessel from insisting upon his lien on the remainder until the freight due to him had been paid; and that the fair construction of the letter of guarantee given by the holders of the bills of lading to the agents of the vessel for "the payment of the balance of freight due under the charter-party less any claim for short delivery, &c.," was that it was to be a guarantee for the payment of the balance of the freight due under the charter less any claim which the charterer might have against the owner, and that it did not extend to a claim arising out of the master signing bills of lading for more goods than were put on board the vessel.

THIS was an appeal from a judgment of Mr. Justice Phear in an action brought by the master of the ship *Charmian*, against Messrs. Ker, Dods & Co., for the recovery of Rs. 10,087-12-5, alleged to be due by the defendants to the plaintiff under a guarantee, dated the 14th June 1871.

The plaintiff in his written statement alleged as follows:—

On the 19th January 1871, the plaintiff, who is the master of the British barque *Charmian*, which was then lying in Hobson's Bay, Melbourne, in Australia, entered into a charter-party for the charter of the said barque for the voyage from Geographi Bay, in the Western Australia, and or Koomanah Bay, and or Freemantle to Calcutta.

The charter-party was as follows:—

"CHARTER-PARTY.

"*Melbourne*, 19*th January* 1871.

"It is this day mutually agreed between Captain C. E. Stewart, master and agent for owners, of the first-class ship or vessel called the *Charmian*, of the measurement of 559 tons register, or thereabouts, now in Hobson's Bay, whereof he is master, of the one part, and Messrs. Charles H. Compton & Co., of Calcutta, merchants, the charterers, of the other part. That the said ship being tight, staunch, and strong, and every way fitted for the voyage, shall, with all convenient speed, sail and proceed to Geographi Bay (Vasse), and or Koomanah Bay (Bunbury), and or Freemantle, or so near thereunto as she may safely get, and there load from charterers' agents a full and complete cargo of legal merchandize, consisting principally of timber (railway sleepers), Swan timber, horses, and other livestock (their provender), and or other legal merchandize which the said charterers bind themselves to ship, not exceeding what she can reasonably stow and carry over her tackle, apparel, provisions, and furniture, and being so loaded shall therewith proceed to Calcutta, or so near thereunto as she may safely get, and deliver the same unto any vessel, or at any wharf or pier, or railway jetty, where the ship can safely lay afloat, as directed by the charterers, on being paid freight at and after the lump sum of eleven hundred and fifty pounds sterling (£1,150) for the full reach of the ship.

"The ship to carry one cabin passenger only (and one groom for every ten horses), free of charge, and the charterers to provide all requirements for said livestock.

"The ship to convey hence to the port of loading water tanks or any other cargo on charterers' account free of charge (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever during the said voyage always excepted). The said freight to be paid on unloading and right delivery of the cargo as customary in net cash, at an exchange of the day at 6 months' sight Bank drafts on London, less any advances that may have been made.

"Thirty running days (Sundays and holidays excepted) are to be allowed the said charterers (if the ship is not sooner despatched) for loading in the said ports, and time occupied in shifting the ports not to count as lay days, and to be discharged with all despatch.

"Lay days not to commence until twenty-four hours after written notice has been given by the master that the ship is ready to receive cargo. Cargo to be brought to and taken from alongside at the expense and risk of the freighter. And twenty working days on demurrage over the said lying days at fifteen pounds per day; money for the ship's ordinary disbursements to be advanced by the charterers or their agents at Western Australia not exceeding two hundred pounds sterling (£200), and at Melbourne, if required, one hundred pounds sterling (£100), on customary terms, *viz.*, seven per cent., for cost of insurance, commission, and exchange.

"The captain to sign bills of lading at any rate of freight the charterers or their agents may require without prejudice to this charter-party, but the aggregate amount not below the chartered amount. The ship to be consigned to charterers' agent at port of loading, and discharge free of commission.

"Penalty for non-performance of this agreement, estimated amount of freight.

"Five per cent. commission on the gross amount of freight is due by the ship to S. De Beer, ship broker, on signing this charter-party."

Pursuant to such charter-party, the *Charmian* proceeded successively to Geographi Bay, Koomanah Bay, and Freemantle, and took in a cargo of timber consisting of railway sleepers, jarrah timber of various sizes, sandal wood, and a Zurat log, and 40 horses, and 2 bulls shipped under the superintendence of George Compton, a brother and agent of Charles H. Compton, and on account of the latter. On the arrival of the *Charmian*, delivery of the cargo to Charles H. Compton commenced; and on the 12th June 1871, plaintiff's agents applied to him for payment of the freight due in respect of the said ship, and wrote as follows:—

"The chartered inward of the *Charmian* we make up as follows:—

	£	*s.*	*d.*
"Freight per Charter-party	1,150	0	0
"Less Disbursements ...	178	0	0
	972	0	0
"Demurrage	45	0	0
	£1,017	0	0
"At 1-11 Exchange Rupees	10,612	2	9

"Owing to the way in which the cargo was discharged, the ship has not the usual lien for freight, and suggesting that you should pay us this amount now, and we shall be responsible to you for any claims you may have against the ship for short delivery or otherwise."

This letter was returned by Compton & Co., with a direction to forward it to the defendants; and, accordingly on the same day, the plaintiff's agents wrote to the defendants:—"Please to say whether you will make yourselves responsible for the freight, as we shall be quite satisfied with your assurance to that effect; we do not know Messrs. Compton & Co."

In reply the defendants wrote on the same day to say:—"We have merely, on behalf of Messrs. C. H. Compton & Co., to refer you to the charter-party."

On the 13th June, the plaintiff's agents wrote:—"The freight is to be payable on unloading and right delivery of the cargo as customary, and you are aware that the custom here, when inward freight is payable, is to pay such freight to the ship's agents, and obtain delivery order before the cargo is given up. We think, therefore, in these circumstances, the freight ought now to be paid the vessel, as the quantity of cargo now on board barely amounts in value to the chartered freight. If, however, you will give us your own assurances that the freight will be paid as soon as the cargo is discharged, we shall be quite satisfied."

On the same day, Findlay, Muir & Co., as agents of the *Charmian*, wrote as follows:—"In reply to your letter of date, we would remark that we know of no such custom as you mention, *viz.*, that inward freight under a charter-party, such as that of the *Charmian*, is payable before delivery of the cargo. In fact, if there is any custom at all, it is exactly the reverse of what you state. We are not the charterers of the *Charmian*, but the cargo belongs to us, until our lien on it is paid off, and we therefore do not feel called upon to give any guarantee such as that you require. We do not think, however, that you need be under any apprehension about the freight, as we will see that you are paid before we deliver any balance that may result from the sale of the timber to Messrs. C. H. Compton & Co."

On the 14th June, Findlay, Muir & Co. wrote to the defendants saying:—"We beg to thank you for your favor of yesterday, but we are quite clear that, both by the general bearing of the law on the subject, and also by custom, the *Charmian* is entitled now to be paid the chartered freight. We must therefore refuse to deliver any more cargo till this is done; unless some satisfactory arrangement for the due payment of the inward freight is made to-day, we shall land the balance of the cargo ourselves. Kindly communicate this to Messrs. Compton & Co. They have already received about £600 for the freight on the horses which was under lien to the ship on account of chartered freight. This was paid before the vessel came into our hands."

On the same day the defendants wrote in reply as follows:—"If you look again at the charter-party, you will find that the ship is in the hands of the charterers' agents, until the discharge is completed; you have therefore no *locus standi* in the matter, and we would therefore warn you against delaying the vessel's discharge. If you still think you have a right to interfere, we have no objection to the matter being referred to some independent arbitrator."

To this Findlay, Muir & Co. on the same day rejoined:—"We are favored with your letter of to-day just received; our *locus standi* is that of agents for the owner and captain of the *Charmian*, whose interests in the matter we are bound to protect. We must therefore adhere to the resolution expressed in our letter of this morning. We have no wish to give any unnecessary annoyance in this matter, and shall feel much indebted if you will either give us your own guarantee for payment of freight on delivery, or advise Messrs. Compton to pay the amount at once; we shall of course be responsible for any short delivery or rightful claim the charterer may have on the vessel;" and added by way of postscript:—"We feel that, as agents of the ship, we should fail in our duty by referring this matter, and the fact of the inward consignment being to Messrs. Compton & Co. does not preclude us as the owner's agents from interfering on their behalf."

Thereupon, on the same day (*i. e.* the 14th June), the defendants wrote to Findlay, Muir & Co.:—"As it will be necessary for us, for the protection of our interests, to get delivery of the cargo, and as we do not care about further trouble in the matter, we agree to guarantee payment of the balance of freight due on the charter-party, less any claims for short delivery, &c."

The delivery of the cargo having been completed on the 21st June 1871, the plaintiff's agents on the following day wrote to defendants to say:—"The timber *per Charmian* is now all discharged, and we make out the freight due to the vessel to be as follows:—

	£	s.	d.
Freight per Charter-party ...	1,150	0	0
Less Disbursement ...	178	0	0
	972	0	0
Demurrage at Freemantle...	45	0	0
	1,017	0	0
At 1-11⅛ ... Rs.	10,554	13	0

"In addition, there is a claim on Messrs. C. H. Compton & Co. for the hire of boats which they requested us to send off to the ship to aid in the discharge, and three days' demurrage of the ship here caused by the delay in discharging the cargo."

On the same day the defendants replied:—"We have your letter of date regarding the freight due to the *Charmian;* but as we have not yet heard from our landing agent that all the wood is discharged, we defer further notice on the subject beyond saying that we understand there is a serious deficiency in quantity for which the captain will have to give an account. Your claim on Messrs. C. H. Compton & Co. for demurrage, &c., we have nothing to do with."

And on the 23rd June 1871, the defendants wrote to the plaintiff's agents, stating that there was a deficiency of 3,846 pieces of jarrah scantling, and asking if the captain could give any explanation, as the difference seemed enormous.

On the 26th June 1871, the plaintiff's agents wrote to the defendants as follows:—

"With reference to the inward freight of the *Charmian*, we now beg to say that the bills of lading were signed by the captain from Messrs. Compton & Co.'s agents' invoices without looking at the mate's receipts which were retained by them; they are responsible therefore for any mistake in the quantities mentioned in the bill of lading. The log book shows that the quantities taken on board are the same as those delivered here. In these circumstances, unless the freight is paid at once, we shall have to file a plaint against Messrs. Compton & Co. and yourselves, in order to secure the captain's evidence, as the ship is to leave on Wednesday. Please let us know at once what your decision may be."

The defendants returned the following reply:—"We have your letter of date, and in reply would merely remark that you are of course quite at liberty to file a plaint against Messrs. C. H. Compton & Co. or ourselves whenever you choose for the freight per *Charmian.* Only from what the captain said in our office to-day, you do not seem to represent correctly his views of the matter. We are willing, as we told him, to let the matter remain in abeyance, pending a reference to Western Australia. We in the meantime paying you what balance of freight may remain over and above the claim for short delivery; and if any satisfactory explanation is given of the extraordinary discrepancy, then we shall pay you the amount now claimed by us. As we are not principals in the matter, but merely holders of the bills of lading, you may save yourselves and us the trouble of including our name in your plaint, as it will add to the expense; but of course you can take what steps you like."

The plaintiff's written statement goes on to say that the claim for short delivery arose out of a difference between the quantity of jarrah timber mentioned in a bill of lading signed by the plaintiff at Freemantle, *viz.*, 13,673 pieces, and the quantity actually received on board. The bill of lading was as follows:—

"Shipped in good order and well-conditioned by Mason, Bird & Co. in and upon the good ship called the *Charmian*, whereof is master for this present voyage, C. Stewart, and now riding at anchor in the port of Freemantle, and bound for Calcutta, thirteen thousand six hundred and seventy-three (13,673) pieces of jarrah timber, of various sizes and dimensions, measuring seven thousand and six cubic feet, or one hundred and forty loads, being marked and numbered as in the margin, and are to be delivered in the like good order and well-conditioned at the aforesaid port of Calcutta (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigations of whatever nature or kind soever excepted) unto Chas. H. Compton & Co., or to their assigns; freight for the said goods to be paid in Calcutta, in accordance with the terms and conditions of the charter-party. In witness whereof, the master or purser of the said ship hath affirmed to three bills of lading, all of this tenor and date, the one of which bills being accomplished, the others to stand void.

C. H. C.
& Co.

"Dated in Freemantle, the twenty-fourth day of April 1871.

"Weight and contents unknown to
"CHAS. E. STEWART.
"(On back)
"CHAS. H. COMPTON AND Co.,
"By their Attorney,
GEO. S. COMPTON."

The circumstances under which the plaintiff signed such bill of lading are explained as follows in his written statement :—

Shortly before the vessel's departure from Freemantle, but on the same day on which such departure took place, the plaintiff was on shore at an hotel at which he and the said George Compton were in the habit of transacting their business, when the said George Compton tendered to the plaintiff the bill of lading in question for signature, and which he requested the plaintiff to sign without delay, to enable him to forward the same by the mail which was leaving on the same day, and which he was desirous to do. No mate's receipts for the cargo mentioned in the said bill of lading were presented to the plaintiff; and on his asking for such receipts, George Compton informed him that he had not received the same from the persons who had shipped the cargo for him, and whose place of business where the receipts were, was distant some ten or fifteen miles up the river from Freemantle. George Compton however produced to the plaintiff an invoice which he represented contained an accurate statement of the quantity of timber shipped, and which agreed with the number mentioned in the bill of lading; and on his again pressing the plaintiff to sign such bill of lading, the plaintiff acting in good faith on the representation of the said George Compton, and to oblige him, and there being also no time to allow of his proceeding on board the said barque to inspect the cargo book showing the quantity of goods shipped, signed the said bill of lading.

The plaintiff's written statement went on to allege that the quantity of timber mentioned in all the other bills of lading granted by the plaintiff agreed with that shown by the cargo and log books of the barque to have been put on board, and which had been delivered; and that the plaintiff had delivered all the cargo which was in fact loaded on board the said ship *Charmian* under the said charter-party, and all the cargo which by his log and cargo books appeared to have been so loaded; and he submitted that no just or *bonâ fide* claim could under the circumstances be made against him for short delivery, but that he was entitled to receive the full amount of his freight as per charter-party, less £178 already received.

The defendants in their written statement pleaded that the *Charmian* had proceeded to load cargo in pursuance of the terms of the said charter-party at the several ports of Bussellton, Bunbury, and Freemantle, and that the plaintiff signed and delivered to Messrs. Charles H. Compton & Co., the charterers of the said vessel, bills of lading for an aggregate quantity of 25,094 pieces of timber; and that they, the defendants, were *bonâ fide* holders for valuable consideration of the said bills of lading.

The defendants further stated that they received the said bills of lading, in the belief that the same truly represented the goods shipped on board the *Charmian* by the plaintiff, and in such belief accepted and paid, or accepted and became and remain liable to pay at due date three bills of exchange for £102-10-9, £192-17-6, and £524-6-1, respectively, to the order of the National Bank of Australasia; that the said bills of exchange, bills of lading, and other shipping documents relating to the said cargo were deposited with the said National Bank of Australasia as security for the due payment of the said bills of exchange at the due dates thereof, and the said bills were thereupon discounted by the said Bank in Australia, and the amount less discount was paid to the agent or attorney of the said Messrs. Charles H. Compton & Co., the charterers in Australia; that the defendants have also paid Rs. 800, or thereabouts, on account of charges and expenses incidental to the landing the cargo of the said vessel in respect of which they hold a lien on the said bills of lading; and that the defendants, upon acceptance and payment in manner aforesaid of the said bills of exchange, became entitled to and received the said bills of lading and shipping documents from the Chartered Mercantile Bank of India, London, and China in Calcutta, who have received the same from the said National Bank of Australasia.

The defendants went on to state that the *Charmian* arrived in the port of Calcutta on or about the 29th May 1871, and set out the correspondence above referred to.

The defendants state that, until the receipt of the letter from Findlay, Muir and Co., dated 26th June 1871, they, the defendants, had no knowledge that the plaintiff had signed bills of lading for cargo which he had not taken on board. They submit that the plaintiff is not entitled to freight until such time as he has rightly unloaded and delivered in Calcutta the cargo specified in the bills of lading signed by him in terms of the said charter-party. They are informed that on the 27th June 1871, Messrs. Compton & Co., through their attorneys, Messrs Gray and Sen, wrote to the plaintiff to say:—"We are instructed by Messrs. C. H. Compton Brothers to call upon you for payment of the sum of Rs. 5,794, being the value of 3,846 pieces of jarrah timber short delivered by you under your charter-party of the 19th January last; and unless this amount be paid, or some arrangement made forthwith, our instructions are to adopt proceedings against you;" and that thereafter the following correspondence passed between the said Messrs. Gray and Sen and Messrs. Berners Sanderson, and Upton, the attorneys for the plaintiff.

Calcutta, 28th June 1871.
MESSRS. GRAY AND SEN.

DEAR SIRS,

Captain Stewart of the *Charmian* has handed us your letter of yesterday's date, with instructions to inform you in reply that he has delivered all the timber shipped on board his vessel by your clients' agents under the charter-party, and which he is in a position to prove; he therefore denies any liability to your clients.

We are in receipt of yours of date in reply to ours to your clients' address of yesterday. Captain Stewart will to-day file a plaint against Messrs. Ker, Dods & Co. on their guarantee for the balance of freight due him.

Yours faithfully,
BERNERS, SANDERSON, AND UPTON,
6, *Old Post Office Street.*

Calcutta, 28th June 1871.
MESSRS. BERNERS, SANDERSON, AND UPTON.

DEAR SIRS,

Messrs. Compton & Co. have handed us your letter to them of yesterday's date, with instructions to state that, as Captain Stewart has failed to fulfil his contract to a very great extent, they do not consider themselves liable to pay the amount demanded, and they claim damages against him for breach of his contract.

We shall be prepared to defend any action which you may bring against our clients.

Yours faithfully,
GRAY AND SEN.

Calcutta, 27th June 1871.
MESSRS. C. H. COMPTON & Co.
No. 17, *Camac Street.*

GENTLEMEN,

We are instructed by Captain Stewart of the barque *Charmian* to apply to you for payment of Rs. 10,554-18 due by you for freight and demurrage of that vessel under the charter-party executed by you as per memo. enclosed; and unless the amount is paid to the bearer of this, a plaint will be filed against you and Messrs. Ker, Dods & Co. for recovery of the amount; immediate action being necessary owing to our client being on the eve of leaving port.

Yours faithfully.
BERNERS, SANDERSON, AND UPTON.

Amount of chartered freight from Australia to Calcutta ...	£1,150
Less Disbursements	„ 178
	£972

Demurrage at Freemantle 45·
£1,017, @ 1 11⅛...Rs. 10,554-13.

The defendants say they have been all along ready and willing, and have offered to perform their guarantee to pay the balance of freight due on the charter-party, less any claims for short delivery in terms of their second letter of the 14th June set out above.

The defendants submit that, until the claims for short delivery have been ascertained and allowed by the plaintiff, the plaintiff was not entitled to call upon them for the performance of their said guarantee; and that this suit, if rightly brought at all against them, has been prematurely brought; and that under the circumstances, the plaint ought to be dismissed with costs. The defendants allege that the said bills of lading signed by the plaintiff as aforesaid were for 25,094 pieces of timber, and the plaintiff has delivered 20.248, leaving a deficiency of 3,846 pieces of the value of Rs. 5,794, or thereabouts.

The judgment of the Lower Court from which the defendants appealed was as follows:—

Phear, J.—This case is remarkable for the pertinacity with which it has been fought out by the defendants to the very last straw; but nevertheless it appears to me to be about the plainest that can be well presented to the Court. The cause of action is a letter of guarantee which unquestionably was signed by the defendants, and was given by them intentionally as a guarantee to the plaintiff. The only legitimate point for discussion in this case, as it appears to me, was the construction proper to be placed upon one passage in that guarantee; and that construction being settled in the way that I early indicated, really the facts were such as hardly gave the defendants a possibility of escape.

The charter-party is set out in the plaint. It belongs to a very well-known class, that in which the ship-owner hires out his ship and his servants upon a contract of marine carriage for a lump sum. When that is done, the ship to a certain limited extent becomes the ship of the charterer, and the captain, as regards third persons, is, no doubt, in many respects, the servant or agent of the charterer: but from that moment, as between the ship-owner and the charterer, he is the agent of the ship-owner for the purpose of upholding and securing the rights of the ship-owner to his dues under the charter-party. Now, the ship-owner has a lien on the cargo put on board as against the charterer for the freight which is specified in the charter-party. If authority is needed for this proposition, I will refer to the case of Kern *vs.* Deslandes, reported in the 8th Jurist, N. S., 194. There the charter-party was very similar to the charter-party in this case. There it was mutually agreed between the owners of the ship and a Mr. Fergusson in the ordinary form that the ship would receive and take on board all such goods as the charterers or their agents might send on board, and should take the same to and deliver it at London or so near it as they could get (thus running parallel to this case). "The freight was to be paid for the whole voyage out, and borne for the whole reach and burthen of the vessel's hold" (nearly the same words here). The lump sum was payable on correct delivery (the very same words here). The contest therein made sprung out of the fact that the charterer issued bills of lading at £70 a ton, which was a lower rate than that mentioned in the charter-party proportionally taken. The holders said to the master we want to get our goods out independently of anything which may have taken place between your owner and the charterer (almost exactly the language used by the present defendants). The Court said that "all the cases show that, as against the charterer, there is a lien on his goods for the amount of the chartered freight. From the moment therefore that the goods were put on board, they were, as against Fergusson and those who must stand on his title, bound by that lien under the express terms of the charter-party which he executed." Also there can be no doubt, as I have already said several times in the course of the trial, that the master, under circumstances like those disclosed in the present case in signing the bills of lading, does so as the agent of the charterer, and not of the ship-owner. In the case of Marquand *vs.* Banner, 2 Jurist, N. S., 708, the ship-owners tried to get the freight payable on the bills of lading. The facts in that case were again almost exactly parallel to the facts of the present one. Mr. Justice Wightman, who delivered the judgment in the Court of Queen's Bench, says that the question turned upon whether the contract by the shippers with the master was made with him as the agent of the charterers, or as the agent of the ship-owner; and looking to the terms of the charter-party, he found it difficult to raise any doubt as to the master being the agent for that purpose of the charterers. It was held there that the charterers were to be considered as the owners of the ship, and the master as their agent with the shippers.

Then, moreover, in the present case we have it that the defendants by the very terms of the bills of lading which they held were referred to the charter-party, and became thereby bound to pay the freight as per the charter-party. Thus, they not only take by virtue of bills of lading under Mr. Compton, and not from the present plaintiff (for in this suit the master obviously represents the ship-owners), but they have express notice in the bills of lading that they take subject to the terms of the charter-party. Consequently, quite apart from the letter of guarantee which they afterwards gave, they were from the first bound by the lien under which the charterer, Mr. Compton, lay. That was so held in the case to which I have already referred in the passage which I have just read. But in the case of McLean and Hope *vs.* Fleming,* decided by the House of Lords in the present year, the matter seems, if possible, I think, to be made still more clear, and to be put beyond all possibility of dispute. "The master entered into a charter-party with a broker at Constantinople, acting as freighter on behalf of the appellants, whereby the owner of the ship was to have an absolute lien on the cargo, not only for actual freight, but also for dead freight." The dead freight there referred to was freight for goods not put on board, *i. e.* defect of cargo just as for goods which were put on board, so that, although the actual words of that charter-party differed considerably from those of the charter-party before me, the effect of them was pretty much the same; the charterer was to pay a sum by way of freight which would be the same whatever the actual cargo shipped, and the ship-owner was to have a lien on the cargo shipped for the whole amount. The ship touched at various ports on her way, receiving at each port certain quantities of cattle bones for which the master signed bills of lading, which were duly endorsed to the appellants. These bills of lading represented the total quantity on board as amounting to 701 tons, whereas the actual quantity on board, when the ship arrived ultimately at Aberdeen, the place of her destination, was but 386 tons, being 210 tons short of what she could have carried. The appellants demanded delivery of the quantity specified in the bills of lading of which they were the holders. The captain on the other hand offered to deliver the actual cargo on board which he said was all that he had got, but upon condition of receiving both freight and dead freight. They resisted that, and brought a suit to recover the goods. Inasmuch as they were plaintiffs, instead of defendants, as in the present case, the *onus* lay on them. Both the Courts in Scotland held that the ship-owners had a lien on the goods, and that the plaintiffs could not obtain the goods without paying the full freight. The House of Lords (the present Lord Chancellor, Lord Cholmsford, Lord Westbury, and Lord Colonsay) were unanimously of the like opinion. The present Lord Chancellor said "that the evidence establishes clearly that whatever lien was conferred by the charter-party, must attach to those who availed themselves of it. I apprehend therefore, if you once get at the principle that a lien for dead freight may exist by a specific contract, there never was a case in which it could be clearer that parties who accepted the service of the ship were bound to submit to the conditions of the charter-party." Lord Chelmsford goes into the facts a little more fully, but he maintains the same doctrine precisely. He says:—"It was contended, and properly contended, by the learned Counsel for the appellants that the bills of lading signed by the master were *primâ facie* evidence that the quantities of bones mentioned in them had been received on board the vessel. The master is the agent of the ship-owner in every contract made in the usual course of the employment of the ship; and though he has no authority to sign bills of lading for a greater quantity of goods than is actually put on board, yet, as it is not to be presumed that he has exceeded his duty, his signature to the bills of lading is sufficient evidence of the truth of their contents to throw upon the ship-owner the *onus* of falsifying them, and proving that he received a less quantity of goods to carry than is thus acknowledged by his agent. But it being admitted that it lay upon the ship-owner to rebut the *primâ facie* evidence arising from the bills of lading, he appears to me to have satisfactorily done so. If the evidence of the master is to be believed (and there seems no reason to doubt it), it is impossible that the additional quantity of bones could at any time have been on board the vessel. In the course of his evidence, the master said, 'I brought to Aberdeen the whole of the cargo that was shipped. No part of it was put away, either by myself, or any one else. No part of it was interfered with from the time it was put on board till it landed at Aberdeen.'"

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* L. R. 2 H. of L., Scotch Appeals, 128.

The House of Lords was unanimous in thinking that the evidence was sufficient to show that the whole of the goods had been delivered. It appears to me that the evidence in the present case is much stronger than the evidence there adduced. So that the principles which I ventured at the outset of the case to state (without having at the time any of these cases under my eyes) as those which should govern this case, and would have the effect of limiting it to a very narrow point, seem to be indisputable.

Then it is clear, as matter both of law and of fact, that the master was at the time when the defendants gave their guarantee asserting his owner's rights; and the defendants could not possibly evade them. Indeed, they felt so at the time. There was thus ample consideration for the guarantee. What then was the immediate effect of their giving the guarantee? The master loosed his hold on the goods, and consequently, if the terms of the guarantee are not to be observed by the defendants, the security of lien which the law puts into the hand of the master on behalf of his owners has been lost for nothing. It appears to me under these circumstances that this document, if it must be construed hardly against either the plaintiff or the defendants, ought to be construed most strictly against the defendants. By signing it, they intentionally induced the ship-owner's agent to give up the hold over the goods which he was rightfully maintaining, and which would have amply sufficed for the ship-owner's protection. It would not be equitable after this that they should be permitted to recede from their engagements.

I find no ground for doubt on the face of this document, or in the circumstances which took place at the time as to the meaning of the guarantee itself. The defendants in their letter of guarantee say:—"We agree to guarantee payment of the balance of freight due on the charter-party, less any claims for short delivery, &c." The only possible question for consideration is, whose claims? what claims? Obviously these must either be claims of the charterer against the owner for short delivery, or claims of consignees, holders of bills of lading, against the charterer. By the nature of the case, there can be no other claims for short delivery than these. I pointed out at the outset how improbable it was that the parties to the guarantee should have had in their minds the claims of holders of the bills of lading against the charterer, and Mr. Lowe did not in fact contend that it was these claims of which the document spoke. He admitted that the claims mentioned were claims of the charterer against the owners, but he went on to explain that they were not limited to such claims as might in the end be established; he argued that they extended to the full amount of the allegations of short delivery made by the charterer, irrespective of whether they would ultimately turn out to be well-founded or not; because (Mr. Lowe said) the object of the persons giving the guarantee was to keep themselves clear from all quarrels between the charterer and the ship-owners. Now it appears to me that this is not a natural meaning to give to the word "claim." The primary sense of the word is a claim such as is rightfully made. I think by the nature of the case what the defendants were guaranteeing was necessarily that which the master had a right on behalf of the ship-owners to demand, and was in fact demanding from the charterer. It was to secure that, that he was asserting his lien, and the defendants gave this guarantee to get rid of the lien. It is unreasonable, in the absence of express words, to suppose that the guarantee thus given was not co-extensive in subject with that which the ship-owners had a right to demand, and by their agent were actually demanding; and that this was so is apparent I think from the letter which immediately preceded the guarantee, and by which Mr. Lowe at one time seemed to be embarrassed. That letter ended with this passage:—"We have no wish "to give any unnecessary annoyance in this "matter, and shall feel much indebted to you "if you will either give us your own guarantee for payment of freight on delivery, or "advise Messrs. Compton to pay the amount "at once; we shall of course be responsible for "any short delivery or rightful claim the "charterer may have on the vessel."

Then follows Ker, Dod's own letter of guarantee in which they don't say "we take exception to rightful claims;" but on the contrary, they give the guarantee almost in the terms of the letter which made the offer. I can't say I have any doubt that the claims which the parties had in mind at the time the guarantee was given, were right and proper claims, such claims as it might in the end turn out that the charterer had a right to make in deduction from the freight. No party at that time had any notion that there were any shortcomings; and, indeed, this fact was curiously enough pressed upon me as an argument in favor of the defendants, *i. e.*, as a reason why they should not be bound by the guarantee at all.

I come now to the last part of the case. In the view I have taken, the defendants bound themselves by the guarantee to pay the lump sum of freight, less any sum which the charterer had a right to have deducted from it. Have they, then, in this suit made out that the charterer, Mr. Compton, has a right to make a deduction from the freight due under the charter-party to the ship-owners in respect of any, and if so, for what amount of short delivery?

We are not at this stage embarrassed with any considerations as to what might be the claims of *bonâ fide* holders of bills of lading against the charterer. It must not be lost sight of that the question is simply a question between the charterer and the ship-owners; and inasmuch as no one put anything on board the ship (it was not suggested that any one did so), except the charterer through his agents, the simple form of the question is, did the captain deliver in Calcutta all that the charterer put on board in Australia? I have not a shadow of hesitation in saying, I believe that he did. There is nothing, I think, which has appeared from the beginning to the end of this protracted enquiry, which could reasonably lead me to think that this was not the case. There is a very great difference between the amount specified in the bills of lading and the amount delivered doubtless. There is also a singular discrepancy between the number spoken to by the captain, the chief officer, and the preventive officers respectively; but I fail to see that there is the slightest indication anywhere that the captain did not deliver all that he received. He swears positively that he delivered whatever he received on board. That a man can very well swear to, whether he knows precisely how much he received or not. And I think it perfectly clear, apparent almost to demonstration, that in this matter the captain's evidence is honest. Mr. Compton's version of what took place at his own dinner-table is almost conclusive on that point. I think it certain that the captain at the time he was speaking fully believed that some unaccountable blunder for which he was responsible had been committed. I discover no trace of dishonesty in his behaviour. There has been no suggestion of an opportunity even for his making away the timber any where until he came to Calcutta; and then one thing seems to me quite clear, from the testimony of Mr. Fisher (remarkable as I think that gentleman's testimony was in some particulars), that there was no making away of the timber by the captain at Calcutta. Neither Mr. Fisher, nor Mr. Morrison, nor Mr. Compton, when they were told of the course which the captain was pursuing with regard to the landing of the timber (told as they were of it on the 1st or 2nd day from the commencement of the delivery), ever had a suspicion that he was making away with the timber. From that time till the time the captain was examined, it could not have occurred to them that the captain had made away with the timber in Calcutta, and I feel perfectly confident that he has not. It is perfectly probable, I may say it is now certain, that a few paltry logs, 11 logs, were not completely delivered, but were landed by a ship's sircar in Juddoonauth Sircar's plot, just opposite to and a few yards short of the door of Mr. Compton's own godown. It is easy to understand how that should have happened. But there is not a shadow of ground for alleging, and there has been no allegation that any substantial quantity of timber had been made away with by the captain, or by the owner's agents in Calcutta. I have no doubt that the reason for the absence of such an allegation is because there was no ground on which it could be based. As to those 11 logs, I think the best remark that I can make with regard to them is *de minimis non curat lex*. The cost of completing the delivery of these is certainly insignificant, compared with the amount in question between the parties. They are insufficient to afford any real defence in this case. I have not been furnished with the means of estimating their value, and therefore could not give the defendants any deduction for their price.

At the very outset it appeared to me to be clear beyond all reasonable possibility of contest that, when once the terms of the guarantee are understood (and I saw no difficulty on that point), the case was one which should have come to an end. I feel sure that Messrs. Ker, Dods & Co. do not desire to escape liability for any just demand. Doubtless, it did not enter into their heads, or into the heads of anybody else at the time they gave this letter of guarantee, that there would be any such difficulty with regard to the amount of cargo as has turned out to be the case. Although, as a matter of legal practice, I did not allow the question to be put to Mr. Morrison, whether he would have given the guarantee if he had known that the quantity on board was short, I have no doubt that, if he had known this fact, he would not have given the guarantee precisely in the form of that which he did give. It does not therefore, follow, however, that he is not liable on the guarantee as it stands. There is ample consideration to support it. If the defendants are entire strangers to Mr. Compton, they have an easy remedy against him, and they may also have a like remedy if, instead of being strangers, they are the agents of Mr. Compton, as in one of their letters they say they are. They said in that letter they were in possession of the ship as agents for the charterer. It is not easy, I think (and Mr. Morrison felt it so at the time he was asked the question), to put any such construction on the words there used as will wholly get rid of the assumption of the agency character. Resort was, indeed, had to an excuse with which we are very familiar in this Court, namely, that the expression was used in the letter by mistake. But it was not happy, and I refer to this, although it is not material in the view I have taken of the case, merely in order to say that, if the defendants had stood before the Court avowedly as agents of the charterer, the learned Counsel who appeared for them would hardly have been able to maintain so long continued a contest as they have done.

There will be a decree for the plaintiff for the amount claimed, with costs on scale No. 2, including the costs of the two commissions.

The defendants appealed from this judgment on the following grounds:—

First.—Because the Judge was wrong in holding that, according to the true construction of the letter of guarantee, the defendants are liable to pay to the plaintiff the full balance of freight due on the charter-party without any deduction, nor are they liable to pay such balance only deducting "such claims as it may in the end turn out that the charterer has a right to make in deduction from the freight."

Second.—Because, according to the true construction of the said letter of guarantee, the defendants were entitled to deduct, from the balance of freight due to the plaintiff, "any claims for short delivery, &c.," including the claims for short delivery against the plaintiff which they had a right to make as *bonâ fide* holders of bills of lading for valuable consideration without notice of any discrepancy between the amount of goods mentioned in the said bills and the amount of goods which the plaintiff was ready to deliver.

Third.—Because the Judge at any rate ought not to have given a decree against the defendants for a greater amount than Rs. 4,193-12-4, being the amount of the said decree, less Rs. 5,794 the price and value of 3,846 pieces of timber short delivered by the plaintiff.

Fourth.—Because the judgment of the Judge was erroneous in law, and contrary to the weight of evidence.

Mr. Lowe, for the appellants, contended that the *onus* was on plaintiff to show that the misrepresentation on which he signed the bills of lading was caused without any fault on his part. The plaintiff had admitted that he had acted foolishly, but it could not be shown that he could bring himself within the provision of Section 3 Act IX of 1856, which was as follows :—

"Provided that the master or other person so signing may exonerate himself in respect of such misrepresentation, by showing that it was caused without any default on his part, and wholly by the fraud of the shipper or of the holder, or some person under whom the holder claims."

He (Mr. Lowe) argued that defendants were entitled to deduct the value of the timber which plaintiff had not delivered ; that plaintiff was not entitled to recover as against defendants under this guarantee ; and that, as plaintiff had not delivered the cargo mentioned in the bills of lading, he was not entitled to recover under the charter-party.

Mr. Cowell, on the same side, submitted that the judgment of the Court below was erroneous, inasmuch as it treated the question as one between the owners on the one side, and the charterer on the other; whereas, the parties between whom the case arose were the master on the one side, and a *bonâ fide* indorsee or holder of a bill of lading, on the other. The question was not, as the Judge below assumed, as between the charterer and owner, and the three cases cited by him had reference to questions never raised in the case. The whole correspondence must be looked at to ascertain the meaning of the letter of guarantee. There could be no question that the master was himself liable under the statute. If the goods had been lost pending the voyage, the claim could only have been against the charterer, but not possibly as against the owner, because the captain was not his agent to sign bills of lading for more cargo than he had on board. Everything turned upon the letter of guarantee. The master was asserting a lien upon the cargo for the chartered freight. There was a difficulty first of all started as to the mode of asserting that lien. The dispute terminated with a claim for short delivery. The meaning and policy of the Bills of Lading Act (IX of 1856) had not been considered by the Judge.

Mr. Fergusson, for the respondent, said that both the learned Counsel on the other side had adopted two separate lines of argument. Mr. Lowe had said that his clients had an absolute right for short delivery ; while Mr. Cowell had abandoned that ground, for his contention was that the defendants were the *bonâ fide* holders of a bill of lading. If Mr. Cowell's argument were taken, then the whole question raised by Mr. Lowe was at an end. As to Mr. Lowe's argument regarding right of set-off against the master, the master could not bind his owners for more goods than he had on board. The defendants never came in in any other capacity than as agents for the charterers, until the last moment when the letter of guarantee was given.

Mr. Evans rose to address the Court on the same side.

Mr. Lowe asked whether the senior Counsel could follow the junior.

Couch, C. J.—He might as a matter of indulgence, and not as a matter of right.

Mr. Evans said, he was going to state to the Court that he had been unavoidably absent, and to ask the indulgence of the Court in being allowed to follow his learned junior, when he was interrupted by Mr. Lowe. Of course, he knew very well that he could only expect to be heard as a matter of indulgence, and not one of right.

Couch, C. J. would save Mr. Evans the trouble of addressing the Court, and called upon the appellant's Counsel to reply.

Mr. Lowe in reply said that, according to the evidence, part of the timber had actually been landed and in the possession of his clients. It was not upon the faith of the letter of guarantee that the cargo was delivered; but plaintiff having delivered a portion of the cargo, declined to deliver any more until an arrangement was made. The master contended that he had a lien on the cargo on board. We contended that he had no lien on the cargo. Where there is a charter-party, as in the present case, namely, the demise of the whole ship for a lump sum, and lien is not reserved, there is no right of lien; not having any lien, they could not assert a right to detain the goods on board, but were bound to land them. In support of his position that, where a ship-owner enters into a charter-party, he must reserve his lien under the charter-party, or that right is gone, he cited Chase *vs.* Westmore, Tudor's Leading Mercantile Cases, 575; Kirchner *vs.* Venus, 5 Jurist, N. S., 395; Christie *vs.* Lewis, 2 Broderip & Bingham, 410; and Smalls *vs.* Moates, 9 Bingham, 574.

The judgment of the Appellate Court was delivered as follows by—

Couch, C.J.—The defendants in this case were the holders of bills of lading of goods which were shipped on board the *Charmian*, the bills of lading expressing that freight for the said goods was to be paid in Calcutta in accordance with the terms of the charter-party. The vessel had been chartered by Mr. Compton, to whom, or his assignee, the goods in the bills of lading were made deliverable, and the terms of the charter-party, with reference to the payment of freight, were, that the vessel should proceed with the goods "to Calcutta or so near thereunto as she may safely get, and deliver the same on to any vessel or at any wharf or pier or railway-jetty where the ship can safely lay afloat, as directed by charterers, on being paid freight at and after the lump sum of £1,150 for the full reach of the ship;" and further on it is said:—"The said freight to be paid on unloading and right delivery of the cargo as customary in net cash of the day at six months' sight bank drafts on London less any advances that have been made."

I think that, by the terms of the charter-party, the owner of the vessel had an undoubted right to insist on the freight being paid before he parted with the goods, and he was not bound to land the goods and keep them on shore, but he had a right, if it was more convenient for him to do so, to keep them on board his own vessel. That, however, is not very material in this case, and I think it is enough that, by the terms of the charter-party, he had a right to keep possession of the goods until the freight according to the charter-party was paid; and as the bills of lading referred to the terms of the charter-party, he would have, as against the holders of the bills of lading, the same right, that is, he would not be bound to part with the goods without being first paid the freight.

Then it appears that a portion of the cargo which had been put on board the vessel was delivered, and that the charterer had received from the persons to whom that part of the cargo (which consisted of horses) was consigned the sum of £600 for freight. But his allowing a portion of the cargo to be delivered would not prevent the owner of the ship from insisting upon his lien on the remainder until the freight due to him had been paid. If any authority were needed for that proposition, there is that of Lord Campbell in the case of Möller *vs.* Young, 5 E. & B., 755, where he says:—"Although part has been delivered, the master may decline to deliver the residue till the freight is paid." Therefore, at the time the correspondence between the parties commenced, the state of affairs (and I think it is material to notice this) was that the owners of the vessel had refused to part with that portion of the goods which remained undelivered until they were satisfied as to the payment of the freight under the charter-party, and they were insisting on that right.

Then a letter was written on the 14th June by the agents of the owners and the captain, and I think that this letter was written by them on behalf of the captain acting for the owners, and not as the agents of the captain in his individual capacity, or as representing the charterer. In that letter Messrs. Findlay, Muir & Co. write, addressing the agents of the charterer:—"We are quite clear that, both by the general bearing of the law on the subject, and also by custom, the *Charmian* is entitled now to be paid the chartered freight. We must therefore refuse to deliver any more cargo till this is done. Unless some satisfactory arrangement for the due payment of the inward freight is made to-day, we shall land the balance of the cargo ourselves. Kindly communicate this to Messrs. Compton & Co. They have already received about £600 for the freight on the horses, which was under lien to the ship on account of chartered freight. This was paid before the vessel came into our hands." Then they distinctly insist upon the right which the owners of the vessel had of refusing to deliver any more cargo until the chartered freight was paid. The reply from the defendants to that letter, bearing the same date, is :—"We have your letter of this date ; and since its receipt have again perused the charter-party handed to us by the charterer. We do not want to quarrel about this matter ; but if you will look again at the charter-party, you will find that the ship is in the hands of the charterer's agents until the discharge is completed. You have therefore no *locus standi* in the matter, and we would therefore warn you against delaying the vessel's discharge. If you can still think you have a right to interfere, we have no objection to the matter being referred to some independent arbitrators." On the same day, Messrs. Findlay, Muir, & Co. wrote, dissenting, as they well might, from the position of the parties being as put forward in that letter :—"We have been favored with your letter of to-day just received. Our *locus standi* is that of agents for the owners and captain of the *Charmian*, whose interests in the matter we are bound to protect. We must therefore adhere to the resolution expressed in our letter of this morning."

Then, as I have already remarked, they say they are agents of the owners ; and though they add "and captain," I think that they meant the captain as agent of the owners and representing them. They then go on and give an extract from a book on Shipping, and add :—"We have no wish to give any unnecessary annoyance in this matter, and shall feel much indebted to you if you will either give us your own guarantee for payment of the freight on delivery, or advise Messrs. Compton & Co. to pay the amount at once. We shall, of course, be responsible for any short delivery or rightful claim the charterer may have on the vessel." Now this letter must, I think, be looked at with reference to their previous letter, in which they had indicated to Ker, Dods & Co. that they were insisting on the right of the owners to be paid their freight ; and when they say, "we shall, of course, be responsible for any short delivery or rightful claim the charterer may have on the vessel," the clear meaning is this :—If you will undertake to pay us the freight due to the owners of the vessel, we will, on our part, undertake to pay you what the owner might be responsible to pay to the charterer. I do not understand that they intended to contract, or to be understood as contracting, to be responsible for anything which the master in another capacity might be responsible for, either as representing the charterer, or personally, for (as it turned out) improperly signing the bills of lading. Then there is a postscript:—"We feel that, as agents of the ship" (showing the character in which they were acting), "we should fail in our duty by referring this matter, and the fact of the inward consignment being to Messrs. Compton does not preclude us as the owner's agents from interfering on their behalf." I am obliged to my brother Macpherson for referring to that, because that makes it still clearer that they were acting as agents for the owners, and that the proposal which was made by them was made as such, and not as agents for the captain as representing the charterer. The reply to that is :—"We have your letter of date. We thank you for the extract from Lees on Shipping ; but as we happen to have that work by us, it did not afford us any further enlightenment on the chartered freight per *Charmian*. As, however, it will be necessary for us, for the protection of our own interests, to get delivery of the cargo, and as we do not care about further trouble in the matter, we agree to guarantee payment of the balance of freight due on the charter-party less any claims for short delivery, &c."

Now, this being a reply to the other letter, we must refer to that to see what was meant by the words "less any claim for short delivery," &c. To my mind it is clear that they were alluding to the passage in the letter of Findlay, Muir & Co., to which they were replying :—"Short delivery or rightful claim the charterer may have on the vessel." It appears to me that the learned Judge, in putting the construction he has on the guarantee, has come to a right conclusion. The fair construction is this, that it was to be a guarantee for the payment of the balance of the freight due under the charter-party less any claim which the charterer might have against the owners, and that it does not extend to a claim like the present, arising out of the master signing bills of lading for more goods than were put on board the vessel.

With regard to the 11 logs, I think that the decree cannot be interfered with on that ground. It has not been put forward as a distinct ground of appeal that there ought to be any alteration in the decree in consequence of the non-delivery of the 11 logs. If there has been a substantial delivery of the timber, it would be an extraordinary state of things that, if from any accident it should turn out that 10 or 11 logs only have not been delivered, the guarantee could not be enforced. That, as observed by the learned

Judge, is so small a matter, that it ought not to be taken notice of.

The decree must be confirmed with costs.

Macpherson, J.—I am of the same opinion.

The 21st December 1871.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Execution—Decree on Bond Debts—Sale of Mortgaged Property—Sale of other Property.

Case No. 265 of 1871.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Backergunge, dated the 4th July 1871.

Lalla Mitterjeet Singh (Decree-holder) *Appellant,*

versus

R. W. Scott and another (Judgment-debtors) *Respondents.*

Baboo Doorga Mohun Doss for Appellant.

Baboo Kashee Kant Sein for Respondents.

A decree on bond debts was directed to be satisfied by the sale of the property mortgaged to the decree-holder, and then if the same be insufficient, by the sale of any other property belonging to the judgment-debtor.

Glover, J.—The appellant in this case got a decree on the 8th April 1862 against one Joykishen Doss on three bond debts, and made various attempts at different times to realize the amount thereof. He has now attached the property of the judgment-debtor which has been described in the schedule as Nos. 1 and 2. The debtor himself did not make any objection; but a Mr. Scott who had been appointed by the Court as manager of the property, objected that under the will of Brojo Ruttun Doss, the ancestor of the defendant, the property attached by the decree-holder was specially reserved from being sold for Joykishen's debts. The 7th and 9th paras. of the will have been read to us, and from them it seems clear that the property was absolutely given to Joykishen. There is no question of trust involved in them. That being so, we see no reason why the property which was absolutely given to Joykishen, should not be sold for his debts.

It has been contended for the respondent that under any circumstances the judgment-creditor ought to proceed against the properties which have been mortgaged, and ought not to attach the other property until it is ascertained that the mortgaged properties are not sufficient to pay off the debts. It is not quite clear from the record whether the properties Nos. 1 and 2 or both of them are the mortgaged properties. The Vakeel for the appellant says that they are; but there is nothing on the record to show the fact. It may be as the respondent's Vakeel contends that they are not the properties mortgaged.

The order that we make, therefore, will be that the properties bequeathed by Brojo Ruttun Doss, notwithstanding the will, will be held liable to satisfy the debt due to the appellant; but that the sale of those of the properties which were mortgaged to the decree-holder will be first proceeded with. If the debt is paid off by the sale of these properties well and good; if not, any other property of the judgment-debtor will be brought to sale. It is argued that these properties have been declared liable in the first instance for the debts of the testator Brojo Ruttun Doss. If this be the case, they will be sold subject to that lien.

The appeal is allowed and the judgment of the Subordinate Judge reversed with costs.

The 22nd December 1871.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble H. V. Bayley, Louis S. Jackson, A. G. Macpherson, F. A. Glover, and Dwarkanath Mitter, *Judges.*

Right of Occupancy—Consecutive Pottahs—Sections 6 and 7 Act X of 1859.

Case No. 692 of 1870 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 20th January 1870, *reversing a decision of the Deputy Collector of Monghyr, dated the 3rd August* 1869.

Pundit Sheo Prokash Misser (Defendant) *Appellant,*

versus

Ram Sahoy Singh (Plaintiff) *Respondent.*

Mr. R. E. Twidale for Appellant.

Baboo Boodh Sein Singh for Respondent.

A ryot who has held or cultivated a piece of land continuously for more than 12 years but under several written leases or pottahs, each for a specific term of years, is entitled to claim a right of occupancy in that land.

Neither the mere fact of a ryot taking a lease for a term of years, nor the mere existence of the right of re-entry on the part of the landlord, amounts to an *express stipulation* within the meaning of Section 7 Act X of 1859, so as to prevent the right of occupancy being acquired under Section 6.

This case was referred to a Full Bench by Bayley and Mitter, JJ., with the following remarks :—

Bayley, J.—THE only point raised in this special appeal is "whether a ryot who has held or cultivated a piece of land continuously for more than 12 years, but under several written leases or pottahs, each for a specific term of years, is entitled to claim a right of occupancy in that land or not."

There seems to be a conflict of authority on this point; and as it is one of considerable importance, we think it desirable to refer the above question to a Full Bench. The following cases were cited before us in the course of the argument :—
5 W. R. (Act X Rulings), page 80; 2 W. R. (Act X Rulings), page 54; 4 W. R. (Act X Rulings), page 1; 5 W. R. (Act X Rulings), page 17; 11 W. R., page 88; *Ibid*, page 556; 6 W. R. (Act X Rulings), page 38; 7 W. R., page 283; Gap Number,* page 77; and Wyman's Journal, Volume 1, page 9.

The following are the judgments of the Full Bench :—

Couch, C. J.—The question which was referred to the Full Bench in this case was, whether a ryot who has held or cutivated a piece of land continuously for more than 12 years, but under several written leases or pottahs, each for a specific term of years, is entitled to claim a right of occupancy in that land or not? There is certainly some conflict of authority on this point which does render it desirable that the question should be determined by a Full Bench.

Now the question arises upon Sections 6 and 7 Act X of 1859; and looking at the language of those Sections, it appears to me that the question must be answered in the affirmative, and that a ryot who has so held is entitled to a right of occupancy in the land.

Section 6 says :—"Every ryot who has cultivated or held land for a period of 12 years has a right of occupancy in the land so cultivated or held by him, whether it be held under a pottah or not," which shows that the Legislature intended the Section to apply to cases of holding under a pottah. The Section then proceeds :—"so long as he pays the rent payable on account of the same." Then come the words :— "But this rule does not apply to *khamar, neej-jote, or seer* land belonging to the estate or tenure, and let by him on lease for a term or year by year, nor (as respects the actual cultivator) to lands sub-let for a term or year by year by a ryot having a right of occupancy." Here again the Legislature appears to have had in contemplation the case of holdings for a term. Then Section 7 provides that "nothing contained in the last preceding Section shall be held to affect the terms of any written contract for the cultivation of land entered into between a landholder and a ryot when it contains any express stipulation contrary thereto."

The whole question turns upon what is the meaning of an express stipulation contrary to the ryot acquiring the right of occupancy. Now, where there is a pottah for a fixed term, no doubt, at the expiration of that term, the landlord has a right of re-entry upon the land; and if the ryot does not give up possession, the landlord may recover the land from him. The landlord need not re-enter upon the land if he does not think fit; he may and often does (in this case, he did) allow the tenant to remain in possession of the land. I cannot consider that the right of re-entry which arises by reason of the expiration of the term named in the pottah can be regarded as an express stipulation that the ryot shall not, if he occupies the land for more than 12 years, acquire the right of occupancy given by Section 6. An express stipulation must mean something more than that. It is not necessary in this case to define precisely what would be an express stipulation. Of course, the clearest express stipulation would be an insertion in the pottah or written contract of a clause that the ryot shall not, by reason of his holding under that instrument, acquire any right of occupancy in the land. Or it might be that something less than that would suffice,—where, for instance, the term in the pottah exceeded 12 years, if the ryot agreed expressly to give up the land at the expiration of the term, that would be regarded as an express stipulation contrary to the right of occupancy, because an agreement that he would give up the land would be inconsistent with his having a right of occupancy, a right to retain possession of it.

In this case, the question as put to us is that of a man holding under a pottah which does not contain any contract or agreement of that nature. I think, as the question is put, that the fact of a simple holding under a pottah, which does no more than fix the term of the holding, cannot be considered as a written contract which contains an express stipulation contrary to the right given by Section 6, and that this question should be answered in the affirmative.

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* Sutherland's Reports of Decisions from January to July 1864.

It appears to me that the cases in which it has been held that the ryot did not acquire a right of occupancy have turned very much upon what was the effect of the right of re-entry on the part of the landlord. I think that the mere existence of the right of re-entry, the mere fact that, at the end of the term agreed upon, the landlord can turn out the tenant, and get possession of the land, is insufficient to bring the case within Section 7. The question must be answered in the affirmative.

I am authorized to state that Mr. Justice Louis S. Jackson, who is not present to-day, agrees in the opinion which I have expressed.

Bayley, J.—I concur.

Macpherson, J.—I concur in the proposed answer, although in doing so, I depart in some degree from the opinion which I have expressed on a previous occasion. The difficulty which I have always felt arises from the inconsistency which certainly exists between a ryot accepting a lease for a term, or several consecutive leases for several terms, and his acquiring at the same time an actual right of occupancy independent of and as it were in spite of those leases. On further consideration of Section 7 of Act X of 1859, however, and seeing how distinctly it is laid down there that any stipulation which is to prevent the ryot from acquiring a right of occupancy under the previous Section must be *express*, I think that the view now expressed by the learned Chief Justice is correct, because it is impossible to say that the mere fact of a ryot taking a lease for a term of years, amounts to an *express* stipulation, so as to prevent the right of occupancy being acquired.

Glover, J.—I concur with the Chief Justice.

Mitter, J.—The question we have to determine in this case is whether a ryot, who has cultivated a piece of land continuously for a period of 12 years, but under several pottahs each for a term of years, is entitled to claim a right of occupancy in the land so cultivated by him, or otherwise.

I am of opinion that this question ought to be answered in the affirmative.

I do not think it necessary, for the purposes of my decision, to enter into any discussion on the rights possessed by the ryots of this country previous to the promulgation of Act X of 1859. Let it be granted that the ryot in this particular case could not have claimed any right of occupancy but for the passing of that Act; and as, after this concession, the question must be determined with reference to the true construction of the 6th and 7th Sections of that Act, which are in fact the only two Sections bearing upon the point, it is to that construction that I wish to confine my attention.

The 6th Section says:—"*Every ryot who "has cultivated or held land for a period "of 12 years, whether under pottah or not, "has a right of occupancy in the land so "cultivated or held by him,* so long as he "continues to pay the rent payable on account "of the same."

If this provision had stood alone, no question whatever could have been raised as to the correctness of the answer proposed by me. But the 7th Section goes on to say:—

"But nothing in the preceding Section shall "be held to affect the terms of *any written "contract* entered into between a landholder "and a ryot when it contains *an express "stipulation contrary thereto.*"

The question is therefore reduced to this; whether a pottah must be held to contain an "*express stipulation*" within the meaning of the above Section, merely because it purports to be for a term of years?

I am of opinion that this question ought to be answered in the negative.

It may be conceded that a ryot who holds under a pottah for a specified term of years, is, as a general rule, under an *implied* obligation to surrender the land to his lessor on the expiration of that term. But not only is this obligation not an *express* obligation, but it is a mere matter of inference liable to be rebutted by the surrounding circumstances of each particular case. That it is a matter of inference only, is, I believe, a proposition beyond all dispute; for we cannot hold, without doing violence to the ordinary meaning of words, that a stipulation to hold for a particular period of time is *identical* with a stipulation to give up the land on the expiration of that period, or with a stipulation not to acquire a right of occupancy by reason of possession for 12 years.

Suppose, for instance, that a *khodkast* and *kudeemee* ryot, whose possession has continued from the time of the permanent settlement, and who would therefore have been entitled to claim a right of occupancy even if Act X of 1859 had not been passed into law, takes a pottah for a term of years. Or suppose that a ryot who has already acquired a right of occupancy under the provisions of that Act, takes such a pottah, or is obliged to take it by a decree of Court passed under the provisions of the 76th Section. Can it be contended for a single moment that the pottah so taken must be held to contain an express stipulation on the part of the ryot to surrender the land on the expiration of the term; merely because it purports to be a pottah for a term of years? That a pottah of this description is not necessarily inconsistent with the existence of a right of occupancy is clear from the provisions of the 76th Section above referred to.

The language of that Section is significant, and appears to have a very important bearing, upon the point now under our consideration. It runs as follows:—

"If, on the trial of a suit for the delivery "of a pottah instituted *by a ryot having a "right of occupancy*, the parties *do not "agree as to the term for which the pottah "is to be granted*, the Collector shall *fix such "term* as under the circumstances of the case "he may think just and proper. Provided "that *the term* shall not in any *case be longer "than* 10 *years*" &c., &c. These words are not only sufficient to negative the supposition that ryots possessing rights of occupancy never hold under pottahs for terms of years, but they show most conclusively, at least to my mind, that a pottah for a term of years does not necessarily amount to an express stipulation on the part of the ryot to surrender the land on the expiration of the term. Of course, in the cases supposed by me, there is a pre-existing right of occupancy; but this circumstance cannot affect the validity of my argument as far as it goes; for if a pottah is to be held to contain a stipulation of the above description, merely because it purports to be for a term of years, it would be just as much sufficient to destroy a pre-existing right of occupancy, as to bar the acquisition of a new one. The principle of construction must be the same in both cases, for the documents to be construed are precisely of the same character; and it is beyond all question that, if a ryot possessing a right of occupancy enters into an *express stipulation* with his landlord to surrender the land on the expiration of a stated period of time, he would be bound, like every other individual, to fulfil the terms of his contract. That he is at full liberty to enter into such a stipulation does not seem to require any discussion.

I do not mean to say that the stipulation contemplated by Section 7 should, as a matter of course, be worded precisely as follows:— "No right of occupancy shall be acquired by the ryot by continuous possession for *a period of* 12 *years*." But I maintain that there should be a written contract between the parties, and that this written contract should contain a distinct provision expressly negativing the acquisition of a right of occupancy, and this may be possibly done either by a covenant on the part of the ryot in the last pottah to surrender the land on the expiration of the specified term, or by a clause empowering the landlord to take possession of it on the occurrence of that event. No doubt, a Court of Justice might be fully warranted in holding, in the absence of any special circumstances to the contrary, that a pottah for a term of years implies the existence of a tacit understanding between the parties thereto that the ryot should give up the land to the landlord on the expiration of the term. But, as this is a mere matter of inference liable to be rebutted by the special circumstances, it cannot, in my opinion, supply the place of the "express stipulation" required by Section 7.

The above view appears to be fully borne out by the proviso in Section 6. That proviso is as follows:—

"But this rule does not apply to *khamar*, "*neej-jote*, or *seer* land belonging to the pro-"prietor of an estate or tenure, *and let by him on lease for a term or year by year*."

Now, if the Legislature had thought that a *lease for a term of years* must be taken as a necessary bar to the acquisition of a right of occupancy, what necessity was there for making this distinction between the ordinary lands, and the *khamar*, *neej-jote*, or *seer* lands of an estate. To treat this proviso as a mere surplusage would be contrary to all recognized rules for the construction of statutes, and yet this appears to be the only alternative left to those who contend that a lease for a term of years is necessarily inconsistent with the acquisition of a right of occupancy. Every word used in a legislative enactment must be presumed to have been used advisedly and deliberately, and a comparison of the language of this proviso with that of the following Section, namely, Section 7, clearly shows that the word "express" used in this last-mentioned Section is by no means an exception to the general rule.

It has been argued that a right of occupancy cannot be held to have accrued in this case, inasmuch as the landlord could have, if he liked, ejected the ryot on the expiration of the term fixed in each of the pottahs. I confess that I am at a loss to understand the force of this argument. If the meaning of this contention is that, in the face of the provisions of Act X of 1859, the landlord could have so ejected the ryot, notwithstanding an uninterrupted possession on the part of the latter for a period of 12 years, the argument would be clearly inadmissible upon the ground that it assumes the very question we have to determine in this case, namely, whether the landlord had the power to do so or not. If, on the other hand, it is intended to be urged that the landlord could have exercised such a power of ejectment on some date previous to the passing of that Act, or to the completion of the period of 12 years required by law to create a right of occupancy, the argument would equally fail, though upon a different ground, namely, that of irrelevancy. With reference to the first portion of the argument, it is sufficient to say that the case before us is admittedly governed by Act X of 1859, and it is therefore clear that nothing that the landlord could or could not have done before that Act became law, can affect our decision one way or the other. As for the second portion, it may be conceded over and over again that the landlord had the power which is now claimed on his behalf; but I am unable to see how this concession can advance his case in any manner whatever. That the existence of such a power cannot, by any stretch of reasoning, be construed into a stipulation of the nature contemplated by Section 7, is almost self-evident. A stipulation is a matter of mutual agreement, and it would be absurd to contend that, because one man has the power to eject another on a particular date, the latter must be held to have entered into an agreement with the former acknowledging his liability to be so ejected, either on that date, or on a subsequent one. What then is the force of this objection? Reduced to its naked form, it amounts to this; the landlord in this particular case might have, if he liked, ejected the ryot at some time before the latter had completed the 12 years of his possession. But I apprehend that there is not a single case arising under Section 6 to which the same argument would not apply with equal force, if there is any force in it at all. Take, for instance, the case of a mere tenant-at-will, who has been allowed by his landlord to remain in possession for a period of 12 years. It is beyond all question that such a tenant could have been ejected by the landlord at the end of each of those twelve years. But can it be contended, for a single moment, that, because he was liable to be so ejected, no right of occupancy would accrue to him by virtue of his possession for 12 years, if he is a ryot within the meaning of Section 6? Indeed, the right of occupancy referred to in that Section is, by its very nature, the offspring of the landlord's forbearance to eject the ryot for a specified period of time; and if any argument is to be drawn against the acquisition of that right from the fact that the landlord might have, if he liked, ejected the ryot on some date previous to the completion of that period, all that I can say is that Section 6 Act X of 1859 is the most meaningless piece of legislation I have met with. I have already shown that the question we have to determine is whether there was such a stipulation between the parties to this litigation as would bar the acquisition of a right of occupancy under the provisions of Section 6, and not whether the ryot had a right of occupancy before he was in a position to claim one under that Section; and in this view the fallacy of the argument under our consideration is too obvious to require further discussion.

It has been further argued that the acceptance of a new pottah, on the expiration of each old one, must be considered as an admission on the part of the ryot that there was an express stipulation between him and his landlord, within the meaning of Section 7. But the first question I have to ask is where is this stipulation to be found, whether in the old pottah, or in the new one? If the old pottah cannot be held to contain that stipulation, merely because it purports to be for a term of years, no admission made by the ryot on a subsequent date, namely, that of the new pottah, can introduce it there. If, on the other hand, it is said that it is to be found in the new pottah, our position is no way advanced by the supposed admission; for we are then obliged to go back to the original question with which we started, namely, whether a pottah must be necessarily held to contain an express stipulation of the nature contemplated by Section 7, merely because it purports to be for a term of years. It is to be borne in mind that the stipulation required by that Section, must be contained in a written contract; and if it is once conceded, that it is not to be found either in the old pottah, or in the new one, no inference drawn from any supposed admission on the part of the ryot can supply its place.

The following illustration, however, will, I believe, be sufficient to show the extreme weakness of the above mode of reasoning. Suppose, for instance, that a ryot has held a piece of land under a single pottah, but for a term exceeding 12 years, and the question whether he has acquired a right of occupancy in the land so held by him arises on the expiration of that term. In such a case, it is clear, no argument can be drawn from the acceptance of a fresh pottah, for there is no such pottah to fall back upon. Why then are we to attach any particular weight to that argument in the present case, when it is manifest that the acceptance of one pottah after another cannot introduce in either of them a clause which they do not themselves contain? A pottah granted for a term exceeding 12 years must be construed precisely in the same way as a pottah granted for a term below that period; and if we once admit that the one is not sufficient to meet the requirements of Section 7, merely because it happens to be a pottah for a term of years, there seems to be no reason whatever why the same conclusion should not be held about the other.

Much stress has been laid upon the fact that the pottahs in the present case were all granted previous to the promulgation of Act X of 1859. It has been argued that the landholders of this country could not have possibly anticipated the stringent provisions of that Act, and that it would therefore be extremely hard upon them if the Court were to insist upon a very strict compliance with those provisions. This argument also is in my opinion without any valid foundation. It is admitted on all sides that the provisions of Section 6 have a retrospective operation. This point was settled by a bench of 15 Judges in the case of Thakooranee Dossee*; and as it is impossible to contend that Act X of 1859 has made any alteration in the established rules for the construction of documents, I am unable to see how the mere fact of the pottahs being dated previous to the passing of that Act, can affect our decision one way or the other. A pottah granted previous to the date of the promulgation of Act X of 1859 is subject to the same rules of interpretation as a pottah granted subsequent to that date; and this being conceded, the answer to the question under our consideration must be the same in both cases. With reference to the plea of hardship, I wish to observe that there is nothing peculiar in the circumstances of this case to distinguish it from other cases in which a right of occupancy is acquired under Section 6. If a ryot, who is a mere tenant-at-will, can acquire that right by possession for 12 years, I do not see what peculiar hardship there would be for the landholders to complain of, if the same privilege is extended to a ryot who has been allowed to hold on for the same period, but under one or several pottahs for specific terms of years.

In conclusion I wish to say a few words about the decisions noted in the margin, which have been quoted to us by the pleader for the appellant. I have read these decisions as carefully as I could; but with great deference to the learned Judges by whom they were passed, I feel myself bound to say that I am unable to concur in the reasoning by which they were arrived at. In the first place, it appears to have been admitted, in almost all these decisions, that the question whether a pottah for a term of years is inconsistent with the existence of a right of occupancy depends upon the surrounding circumstances of each particular case; but this admission alone is in my opinion sufficient to show that such a pottah cannot be held to contain the "express stipulation" required by Section 7. Then, again, in some of the decisions at least, the learned Judges appear to have been considerably influenced by the fact that the pottahs they had to deal with were granted previous to the passing of Act X of 1859. I have already shown that this circumstance ought not to be allowed to affect our decision one way or the other, and I think it therefore unnecessary to dwell upon it any longer. I wish merely to add that the cases reported in 4 W. R., Act X Rulings, page 1; 2 W. R., Act X Rulings, page 54; and 11 W. R., page 88, are in the other way, so that there is no ground for contending that the conclusion arrived at by me is opposed to a uniform course of decisions.

5 W. R., Act X Rulings, page 17.
Ibid, page 80.
2 W. R., page 241.
7 W. R., page 283.
11 W. R., page 556.

The 22nd December 1871.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Execution—Limitation—Boná fide Application.

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* 8 W. R. (Act X Rulings), p. 29.

In the matter of

Kristo Bundhoo Chuckerbutty and others, *Petitioners,*

versus

Sudurnddee and others, *Opposite Party.*

Baboo Doorga Mohun Doss for Petitioners.

No one for Opposite Party.

The Collector's order striking off an application because he thought it was only made "to keep the case going," without his saying that it was not *bonâ fide*, was set aside, and he directed to hear the application.

Couch, C.J.—THE Collector does not say that the former application which was struck off on the 22nd April 1866, was not a *bonâ fide* application. If it was a *bonâ fide* application, the party was entitled to three years from that period, and the Collector had no right to refuse the application if it was made within the three years because he thought that it was only made "to keep the case going" as he calls it.

The order of the Collector by which he directed the application to be struck off, must, therefore, be set aside, and he must be directed to hear the application.

The 22nd December 1871.

Present.:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble Dwarkanath Mitter, *Judge.*

Appeal in Formâ Pauperis—Security for Costs—Sections 342 *and* 370 *Act VIII of* 1859.

Nusseerooddeen Biswas, *Petitioner,*

versus

Ujjul Biswas and others, *Opposite Party.*

Baboo Sham Lall Mitter for Petitioner.

Baboo Taruck Nath Sein for Opposite Party.

An Appellate Court has no power under Section 370 Act VIII of 1859 to annex to its order the condition that the party allowed to appeal should give security for costs. The provision in Section 342 which makes it discretionary in the Appellate Court to demand security for costs, is not applicable to appeals *in formâ pauperis*; and therefore the order of the Judge in this case requiring security for costs from the petitioner after his appeal had been admitted, and after the Judge on enquiry had found that the appellant was a pauper, was set aside.

Couch, C.J.—BY the 367th Section of the Code of Civil Procedure, which provides that a party to a suit may be allowed to appeal as a pauper, it is clear that it is to be subject to all the rules contained in the last preceding Chapter, that is Chapter VIII, and in Chapter V, in so far as they are applicable. The question really is whether that part of Section 342 which says that "it shall be in "the discretion of the Appellate Court to "demand security for costs from the appellant "or not, as it shall see fit, before the respond-"ent is called upon to appear and answer," is applicable to the case of an appeal *in formâ pauperis.*

Now, there is this distinction between an ordinary suit which is regulated by Chapter VIII and to which Section 342 applies and an appeal *in formâ pauperis*, that, in the case of an appeal brought by a pauper, the Appellate Court, according to Section 370, is, upon a perusal of the application, and the judgment and decree of the Court below, to see whether there is reason to think that the decision of the Court is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust, that is, is really to see whether there is ground for bringing the appeal; and if it does not see that there is a ground for bringing the appeal, it is to reject the application. But in the case of an appeal under Chapter VIII, no such consideration is required in the Appellate Court, and it has no power to reject the application, if, on perusal of it, and of the judgment and decree of the lower Court, it sees no reason to think that the decision is wrong. Then it proceeds to say, "If the application be not rejected upon any of the grounds above-mentioned, enquiry shall be made into the alleged pauperism of the applicant," unless there has been a previous enquiry into his pauperism, and then it would not be necessary to make a fresh enquiry without there being some special grounds for doing so. And there might be special grounds, because, although the applicant might have been a pauper when the suit was brought, he might have ceased to be one when he asked to be allowed to appeal, and then it would not be right to allow him to carry on the suit any longer as a pauper. Therefore it is that the Section provides that, if the application is not rejected, then the Appellate Court is to ascertain whether he is a pauper. That shows that, if he has a ground for appealing, and his application is not rejected, he is to be allowed to appeal, otherwise it would be useless to make the enquiry.

In this case the application to appeal was admitted. It must be taken, therefore, that the Judge had, upon perusal of the application and judgment and decree of the lower Court, been enabled to come to the conclusion that it was a proper case for an appeal,—in point of fact, that he must have seen that there was reason to think that the decision was wrong and that it ought to be appealed against. If that was so, he had no power under Section 370 to annex to his order the condition that the party allowed to appeal should give security for the costs of the respondent; and if we were to say that Section 342 gave him that discretion, it would be in reality to negative the right conferred by Section 370. It might render that Section nugatory if we were to give to the Judge a power of saying that, although on enquiry it has been found that the applicant is a pauper, and although there is just ground for appealing against the decision of the Court below, a condition shall be imposed that will render it impossible to go on with the appeal. That part of Section 342 which makes it discretionary in the Appellate Court to demand security for costs appears to be inconsistent with the provisions as to appeals *in formâ pauperis;* and being inconsistent, it is not applicable, and comes within this exception that the Rules in Chapter VIII are to be applied so far as they are applicable to appeals under Chapter IX. We think it is not applicable to a case of this kind. The Judge having found, as he must be taken to have done, that there was good ground for an appeal, and the applicant having been found to be a pauper (and it is not alleged that there was any necessity for further enquiry on that subject), the requiring security for costs was not authorized by law, and the order of the Judge requiring security must be set aside.

The 22nd December 1871.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble Dwarkanath Mitter, *Judge.*

Jurisdiction—Small Cause Court—Rent—Damages.

Bhoobun Mohun Bose, *Petitioner,*

versus

Chundernath Banerjee, *Opposite Party.*

Baboo Taruknath Paleet for Petitioner.

Baboo Mohendro Lall Seal for Opposite Party.

A notice was issued on defendant requiring him to quit the land or pay rent, and defendant refused to do either. Plaintiff therefore rightly brought his suit for damages, and not for rent, and the Small Cause Court had jurisdiction to entertain it. But as that Court rejected the suit as being substantially one for rent, its order was set aside, and the suit ordered to be restored to the file of that Court.

Couch, C.J.—IN this case, it appears from the plaint that a notice was issued on the defendant requiring him either to quit the land or to pay rent for it after a certain rate. The plaint then goes on to say that the defendant did not assent to that, and that allegation expressly excludes the creation of a tenancy on those terms. The suit, therefore, could not have been brought for the money as rent, because there was no tenancy created. On the face of the plaint it appears that there was no tenancy, and the only way in which the money claimed could be recovered would be as damages for not giving up the land. It may be that the defendant has a good answer to the suit, and he may show that he was entitled to continue in possession of the land, and that the plaintiff had no right to serve a notice on him and require him to pay more rent than what he had theretofore been paying. But that is not the question to be considered now. The question now is, whether the Small Cause Court had jurisdiction to entertain such a suit as that stated in the plaint; and the Judge himself, from the expression he uses, shows that it was a case in which he had jurisdiction, because he says that "it is substantially a suit for enhanced land rent," meaning thereby that the case is the same as if the plaintiff had brought a suit for enhanced rent. But that is not sufficient to deprive him of jurisdiction. The suit being for damages, and not for rent, the Small Cause Court had jurisdiction to entertain it, and the order of that Court rejecting the suit must be set aside, and the suit must be restored to the file of the Small Cause Court and heard.

The 22nd December 1871.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble Dwarkanath Mitter, *Judge.*

Decree—Staying Execution—Security—Section 36 Act XXIII of 1861.

Sukhee Monee Debia, *Petitioner,*

versus

Brojoraj Mookerjee and others, *Opposite Party.*

Baboo Bhowanee Churn Dutt for Petitioner.

No one for Opposite Party.

Before staying execution of a decree and preventing the decree-holder from receiving the fruits of his decree, or before requiring him under Section 36 Act XXIII of 1861 to give security for its restitution, probable cause must be shown of the judgment-debtor's inability to recover the money if the decree be reversed.

Couch, C.J.—We do not think that the petitioner has shown any special reason either for our staying execution of the decree and preventing the money being paid out of Court to the decree-holder, or for our requiring the decree-holder under Section 36 Act XXIII of 1861 to give security for its restitution. We think it ought to be shown to us that there is some probability that if the decree-holder receives the money and the decree is reversed, the judgment-debtor would be unable to recover it back from him, otherwise it would not be right for us to prevent him from receiving the fruits of his decree.

The rule must be discharged.

The 4th January 1872.

Present :

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Remand—Default—Informal Application.

In *re* Kalee Mohun Doss (*Petitioner.*)

Baboo Taruck Nath Sein for petitioner.

A case was remanded in appeal (in the presence of both parties) for a local investigation. A reasonable time was given, after the records had come, to the parties to appear and conduct their case. The petitioner not having appeared, the Lower Court treated it as a case of default, whereupon petitioner made application under Section 376 Act VIII of 1859. As that was not the proper form for him to apply, and as the time within which he ought to have come in the proper form had expired, the Lower Court declined to grant the application, the High Court approving of the order.

Bayley, J.—We think there is no case for our interference in special appeal.

The case is one which went up in appeal from the Moonsiff's Court, and was remanded by the Appellate Court for investigation. The records reached the Moonsiff's Court on the 4th July 1871, and the date fixed for the hearing of the case was the 11th July.

The Moonsiff remarks that the case had been remanded in appeal for a local investigation, the order being passed in the presence of the parties; that a reasonable time was given after the records had come to the parties to appear and conduct their case; that the petitioners could plead no valid excuse in merely saying that they were not aware of the records having come down, but that, on the contrary, it was their business to look after the case. The Moonsiff, therefore, thought that the case was one of default, and that the application under Section 376 which the special appellants adopted was not the proper form in which the petitioners had to come, and lastly the time within which they ought to have come in the proper form had expired. The Moonsiff, therefore, declined to grant the application.

We think the Moonsiff is right for the reasons given by him, and we accordingly reject this application.

Markby, J.—I am of the same opinion. I think we need not in this case go into the question as to what was precisely the right form in which the application had to be made to the Moonsiff, and as to whether the application that was made was made within the time prescribed by law, because it seems that the Moonsiff has in the latter part of his judgment dealt with the case on the merits. I think that the Moonsiff's observations shew good grounds for his opinion, and that we should not interfere with his decision.

The 4th January 1872.

Present :

The Hon'ble G. Loch and W. Ainslie, *Judges.*

Section 15 Act XIV of 1859—Suit to enforce Right of Way.

Haro Dyal Bose, *Petitioner,*

versus

Kristo Gobind Sein, *Opposite party.*

Baboo Nuleet Chunder Sein for Petitioner.

No one for Opposite party.

Section 15 Act XIV of 1859 is not applicable to a suit to enforce a mere right of way.

Loch, J.—We think that this rule must be made absolute and the order of the Moonsiff set aside. The opposite party has been served with notice, but he has failed to attend. The suit was one to enforce a right of way, and it was brought under the provisions of Section 15 Act XIV of 1859, and the plaintiff obtained a decree. It appears to us that the provisions of that Section are not applicable to a suit of this kind. That Section contemplates the recovery of possession of lands or other immoveable property of which the plaintiff has been deprived by an act of the defendant: it does not contemplate the recovery of a mere right, a right which may be shared by a hundred other people, but it contemplates the recovery of actual possession of the immoveable property in suit: a mere declaration made by a Court that the plaintiff has a right of way and that the obstruction is to be removed is not the giving of possession to the plaintiff as is contemplated by the terms of that Section.

We think, therefore, the order of the Moonsiff must be set aside, and the petitioner will recover costs.

The 5th January 1872.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Bond—Assignment of Rent—Government Revenue—Double Credit—Interest.

Case No. 882 of 1871.

Special Appeal from a decision passed by the Officiating Judge of Rajshahye, dated the 14*th March* 1871, *reversing a decision of the Subordinate Judge of Boaliah, dated the* 16*th May* 1870.

Maharanee Shibessuree Debia and another (Defendants) *Appellants,*

versus

W. Ladly and others (Plaintiffs) *Respondents.*

Baboo Kalee Kishen Sein for Appellants.

Mr. R. T. Allan and *Baboo Mohinee Mohun Roy* for Respondents.

The obligee of a bond for Rs. 7,000 gave the obligor an assignment of Rs 5,319 on account of rent due to the latter by the former, and the question in special appeal being whether the item of Rs. 350 paid on account of Government revenue had been twice credited as alleged by the obligor (appellant), the Court held that it had only once been credited.

The respondent on cross-appeal claimed interest on the Rs. 350 for 6 years and 8 months at 12 per cent. per annum, on the strength of a stipulation in the bond that, from a certain date, interest should accrue on the principal; but the Court disallowed the claim, on the ground that payment of interest on the item paid as Government revenue was neither expressly stipulated nor contemplated by the parties, and because it was open to the respondent to take measures to realize the sum so paid instead of letting it lie over and double itself by interest.

Bayley, J.—I THINK both this appeal and the cross-appeal should be dismissed, each party paying his own costs.

The sole point taken in special appeal is that the lower Appellate Court has wrongly given the plaintiff a deduction for the sum of Rs. 350 alleged to have been paid on account of Government revenue, and that this deduction has had the effect of making a double payment to the plaintiff of the said amount.

After hearing at great length the pleader for the special appellant, it appears to me that the single point to be looked to is as to how far it is shown in the evidence, and in the accounts between the parties, and in the sums admitted to have been paid and received, that this item of Rs. 350 had been received twice over by plaintiff or not. It was for the special appellant to show this, but he has entirely failed to do so. Irrespective of this, upon a comparison of the admitted items, it is clear that the item of Rs. 350 was allowed once and once only.

It appears on the record, and is admitted, there was a sum of Rs. 7,000 lent to the defendant on a bond, and there was an assignment of Rs 5,319 on account of rent due to the latter by the plaintiff. There was then an admitted satisfaction by decrees to the amount of Rs. 800. Deducting these two sums, there remains a balance of Rs. 4,519. Now, so far it is quite clear that the above specified items do not include any credit for Government revenue. Taking the bond for Rs. 7,000 on the one hand, and the above assignments of Rs. 5,319, and payments of Rs. 800 on the other, that is, taking Rs. 4,519 from Rs. 7,000, there remains the sum of Rs. 2,480. To this sum the item of Rs. 350 alleged to have been paid on account of land revenue being added and added once only, we arrive at the exact sum of Rs. 2,830, which the plaintiff all along alleged to be his due, and which he sued for in this case. It has been strongly pressed on us that this is not the account stated in the plaint; but we have to observe that the point taken in special appeal is, not that the decision is against the plaint, but that in the calculation of the sums paid and received the sum of Rs. 350 is twice credited. To do, therefore, justice between the parties, and see whether the calculation is correctly made, we think that the proper proceeding is the one adopted by us, *viz.*, to place on the one side the total amount due on the bond, and on the other the sums realized by assignments and satisfactions, keeping in the first instance the sum of Rs. 350 paid for land revenue out of consideration. By this process, as shown above, it is quite clear that the item of Rs. 350 has only been once credited on account of the respondent's claim.

There is a cross-appeal with regard to interest. It is urged that interest on the sum of Rs. 350 which comes to about double the amount for six years and eight months, at the rate of 12 per cent. per annum, has been disallowed by the lower Appellate Court, and is rightly due to the plaintiff under a stipulation of the bond which directs that, from a particular date, interest should accrue on the principal. We do not, however, think that, when the bond was drawn up, it was ever contemplated by the parties that this item of Rs. 850, which was paid as Government revenue, should be one on which interest should run. It certainly is not so expressed by any specific stipulation. It cannot be said, therefore, that interest on Rs. 850, said to be paid for Government revenue, was provided for either expressly, or in the intention of the parties. Irrespective of all this, we think that the lower Court has given very good reasons for not giving interest. There was a means open to the respondent to take measures to realize the sums which he paid on account of Government revenue long before, instead of letting that sum lie over, and nearly double itself by interest at the rate of 12 per cent per annum.

In this view, when there is no express stipulation with regard to the payment of interest on this particular item of Rs. 850, and looking to the various phases of the litigation, we do not think we ought to interfere with the order of the lower Appellate Court in this respect.

The appeal and the cross-appeal are both dismissed, each party paying his own costs.

Markby, J.—I am of the same opinion.

The 5th January 1872.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Limitation—Execution—Keeping Decree alive.

Case No. 268 of 1871.

Miscellaneous Appeal from an order passed by the Judge of East Burdwan, dated the 25th April 1871, *reversing an order of the Moonsiff of Bamunmarrah, dated the* 16*th July* 1870.

Sree Narain Mitter (Judgment-debtor) *Appellant,*

versus

Maharajah Dheraj Mahtab Chund Bahadoor (Decree-holder) *Respondent.*

Baboo Woopendro Chunder Bose for Appellant.

Baboo Jugodanund Mookerjee for Respondent.

In this case certain proceedings of the Beerbhoom Courts in 1866, appealed to and finally decided by the High Court in 1868, were held to be proceedings that would have, while they were being carried on, prevented the decree-holder (respondent) from executing his decree, and therefore proceedings that prevented the bar of limitation from applying to the execution of that decree.

Jackson, J.—We see no reason to interfere with the decision of the Judge. On the question which he has determined, we quite agree with him that the proceedings before the Beerbhoom Courts in 1866, which were appealed up to the High Court, and finally decided by this Court in 1868, are such proceedings as would have prevented the decree-holder from executing his decree while they were being carried on; they are not, as has been put before us, mere applications to a wrong Court, which were at once rejected and the party referred to the proper Court; they were applications which were admitted and acted upon; and the requests contained in them allowed by two different Courts. Under the effect of these proceedings, the Maharajah recovered the amount due to him under this decree, and it was impossible that while the Court admitted his claim as a set-off, he should continue to execute his decree. It would be extremely hard to hold that these proceedings are now of no value whatever in preventing the bar of limitation applying to the execution of the Maharajah's decree. There seems to be no ground whatever for holding that such proceedings were, as contended before us, *malâ fide*, and that they were deliberately and intentionally taken in the wrong Court. This is the only point upon which the Judge of Burdwan has decided, and upon this point we concur with him, and therefore dismiss the appeal with costs.

Another point has been stated before us, namely, that the proceedings cannot be carried on as against Sree Narain Mitter until the provisos contained in the decree are first carried out against the other defendants therein named. It does not appear that any decision has been passed upon this point. If any such objection is raised by the judgment-debtor, the lower Courts will, no doubt, make the necessary enquiries and pass proper orders thereon.

Kemp, J.—I concur in this judgment.

The 5th January 1872.

Present :

The Hon'ble E. Jackson, *Judge.*

Alluvial Lands—Clause 3, *Section* 4, *Regulation* XI. 1825—*Large Navigable River—Goomtee—Ganges—Megna—Survey—Evidence—Possession—Title.*

Application for Review of Judgment passed by the Hon'ble Justices E. Jackson and Onoocool Chunder Mookerjee, on the 3rd July 1871, *in Special Appeal No.* 141 *of* 1871.

Mohinee Mohun Doss, Defendant (Respondent) *Petitioner,*

versus

Khajah Assanoollah, Plaintiff (Appellant) *Opposite Party.*

Mr. Piffard and *Baboos Sreenath Doss* and *Boykunt Nath Doss* for Petitioner.

No one for Opposite party.

Suit regarding a *chur* claimed by defendant as having formed on the bank of the river adjacent to his village, and by plaintiff on the ground that the bed of the river belongs to his village.

HELD that the words "a large navigable river" in Clause 8 Section 4 Regulation XI. 1825, are not applicable to the Goomtee, but to such rivers as the Ganges and the Megna, upon which navigation can always be carried on.

The survey in this case having been made at a time when neither of the present parties held any right in the land, but when both villages belonged to the same proprietor, was held to be some evidence of possession at that time, not only of the *julkur* but of the right of property in the river, and possession under those circumstances to be some evidence of title.

Jackson, J.—I HAVE given full consideration to the arguments urged by Mr. Piffard in his application for review. But I am still of opinion that the main points upon which our judgment in special appeal was founded are correct in law.

The proprietors of two villages, between which flows the river Goomtee, claim a *chur* which has formed on the bank of the river adjacent to the defendant's village. The plaintiff claims the *chur* on the ground that the bed of the river belongs to his village. The defendant claims it on the ground that the *chur* has accreted to his bank. It is proved that at the time of the survey the two estates belonged to Government. It is proved that in the course of the survey, enquiries were made as to the estate to which the river belonged. That fact is shown by the different maps produced in evidence, which show that in some places the river was demarcated wholly with one village, in other places wholly with another village, and in a third place half with one village and half with the village opposite to it. In every case there is a distinct demarcation of the river as appertaining to the village on either the one or the other bank, or as belonging to both villages on both banks in equal shares. Such demarcation must have been made after due enquiry; and there seems, as regards the part of the river now in dispute, to have been then no claim put forward on the part of the then holder of the defendant's village claiming that portion of the river as belonging to that village. But it is said that the *chur* now in dispute was not then in existence, and that the demarcation then made was only of a *julkur* right. But there is no ground for supposing this to have been intended by the survey authorities. If the bed of the river belonged to Government, the river would never have been demarcated as belonging to the different estates on the river bank. It is not the case of a large navigable river alluded to in Clause 3 Section 4 Regulation XI of 1825. The Goomtee, though a deep river, would not come within the definition of a large navigable river. Even, then, if the words of the Section, which state that the bed of such river is not the property of individuals, are declaratory of the law on the point, that Section would not apply to this case. It is urged that the river is not fordable; but even if it is not fordable, it does not follow that the river comes within the definition of a large navigable river. Every river can to some extent be used by boats, but the "words large and navigable" must be held to apply to such rivers as the Ganges and the Megna, upon which navigation can be always carried on. If I thought that the decision at which we had arrived in this case was wrong, I should have no objection to admit a review, but the more I consider the case the more I am satisfied that, in upholding the state of matters which existed at the time of the survey when neither of the present parties held any rights in the land, but when both villages belonged to the same proprietor, we have passed a proper decision. That survey is at the very least some evidence of possession at that time, and possession I think not only of the *julkur* but of the right of property in the river. And possession then, and under the circumstances of that enquiry, is some evidence of title. On the side of the defendant there is no satisfactory evidence whatever of either possession or title except that the *chur*, since its formation, has been taken possession of.

I dismiss this application.

The 5th January 1872.

Present :

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Procedure—Claims to Attached Property—Section 246 *Act VIII of* 1859.

Issur Chunder Gangolly, *Petitioner,*

versus

Mohinee Mohun Doss, *Opposite Party.*

Baboos Ashootosh Dhur and *Huree Mohun Chuckerbutty* for Petitioner.

No one for Opposite Party.

Order passed on the 16*th August* 1871 *by E. Jackson and Onoocool Chunder Mookerjee, J.J.*

A refusal to make enquiry as to whether an intervenor is in possession of the shares of attached property which he claims, or whether the judgment-debtor is in possession of the share only which the intervenor says the judgment-debtor is in possession of, is opposed to the principles of Section 246 Act VIII of 1859.

Jackson, J.—In this case it appears from the *ex parte* application which is made before us, that the decree-holder has attached, as the property of his judgment-debtor, the whole of two *talooks*, Nos. 108 and 109. Certain parties have intervened, alleging that the whole of those two *talooks* did not belong to the judgment-debtor, but only a certain specified share, and that the other shares belonged to themselves. Upon this objection being raised before the Moonsiff of Bhonga, in Zillah Dacca, the Moonsiff has declined to make any enquiry under Section 246 to ascertain whether the intervenors are in possession of the shares which they claim, or whether the judgment-debtor is in possession only of the share which they say he is in possession of. But because he finds that the judgment-debtor's name is registered in the Collector's *towjee*, therefore he states he will make no further enquiry, but will sell the rights and interest of the judgment-debtor in the property. This refusal to make enquiry seems to be opposed to the principles of Section 246 Act VIII of 1859, and also to a Full Bench decision of this Court upon this specific point, to be found in XIII Weekly Reporter, page 68, Full Bench Rulings. In accordance with that decision, the Moonsiff was bound to make the enquiry which he has refused to make. Until that enquiry is made, we think that the sale should not be allowed to proceed.

We, therefore, direct that until further orders the sale be stopped, the attachment to continue as before, and that notice be served upon the opposite party to show cause why the order of the Moonsiff, refusing to exercise the jurisdiction which he ought to have exercised, should not be set aside. A notice will also be given to the Moonsiff, in order that he may furnish any explanation on the point he may think proper.

Final Order.

Kemp, J.—In this case no one appears to show cause why the order of the Moonsiff should not be set aside. The Moonsiff himself has furnished no explanation on the point. Under such circumstances, the rule must be made absolute, the order of the Moonsiff dated the 4th of August 1871 must be set aside, and the Moonsiff directed to try the questions at issue between the parties in accordance with the provisions of Section 246 of Act VIII of 1859.

The 6th January 1872.

Present :

The Hon'ble G. Loch and W. Ainslie, *Judges.*

Partition—Limitation — Easement — Permissive Enjoyment — Adverse Possession — Building House.

Case No. 697 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Sarun, dated the 27*th February* 1871, *reversing a decision of the Moonsiff of Chupprah, dated the* 18*th July* 1870.

Baboo Jahanoby Deo Narain Singh (Plaintiff) *Appellant,*

versus

Baboo Umbica Pershad Narain Singh and others (Defendants) *Repondents.*

Mr. J. T. Woodroffe and *Baboos Mohinee Mohun Roy, Rughoobuns Sahoy,* and *Bhyrub Chunder Banerjee,* for Appellant.

Messrs. Marindin and *R. T. Allan* and *Baboo Mohesh Chunder Chowdhry* for Respondents.

Held that the right of the plaintiff, as a joint owner of the land in dispute, could not be questioned unless it could be shown that he was barred from enforcing that right by the law of limitation or by any right of easement which the defendants enjoyed; and that the defendants, as joint proprietors with the plaintiff, could not, by the use of the land with the tacit assent of the plaintiff, create a right contrary to his interest, nor would their use of it, before they became co-proprietors, operate to create any such right.

In giving the plaintiff a decree for partition, the Court declined to make any decree permitting him to build a house upon his own land, but left him to do what he pleased with his own land provided he did not interfere with the legal rights of others.

Loch, J.—This case, cleared of all unnecessary details and prayers with which the plaintiff has loaded his plaint, is simply a suit for the partition of a parcel of land to enable plaintiff to hold separate possession of his share and to do what he likes with it.

The land in dispute is part of a parcel 6 cottahs which belonged to one Bullub Singh. He died leaving two sons Hur Deo and Gunga Deo. Hur Deo had four sons, the defendants 1 to 4 in this case, who make no opposition to the plaintiff's claim. Gunga Deo had one son, Jahanoby Deo, the plaintiff. A person called Takool Bukkut is said to have purchased the share of Hur Deo, and from him it was transferred to Burma Deo in October 1844. Burma Deo had three sons, defendants 5 to 7, and one of them Roodroo Deo made over his share,—*i. e.*, one anna to the defendants 8 to 11, by a deed of gift, dated 19th March 1867, and these last are the substantial defendants in the case and oppose the plaintiff's claim.

Of the six cottahs 3¼ cottahs have been let to tenants and the remainder 2¾ cottahs is the subject of dispute. It is a piece of waste land in front of the east side of defendant's house, but, as shown in the map put in by the defendants, separated from the house by a public metalled road. It has apparently been used for years by the defendants for picketting their cattle and elephants and for processions.

Plaintiff's right to a share of the land is undeniable, and is in fact admitted by Roodro Deo in his deed of gift under which the defendants 8 to 11 hold. The first Court gave plaintiff a decree for partition, holding that his right to a moiety and possession had been fully established. In appeal, the Subordinate Judge raised for the first time an issue on the question of limitation, and his second issue was whether the erection of a building by plaintiff would block up the exit from the defendant's house; and, in case of its being a source of trouble and inconvenience to the defendants, is it legal to prevent plaintiff from erecting a building there?

The Subordinate Judge has certainly not decided the issue of limitation, nor does he hold that the suit is barred by the adverse possession of the defendants, though he finds that the land in dispute is situated before the door of the house of the defendants and serves as a passage for exit, and that it has remained waste for a long time; that during those twelve years no building existed there, and therefore the order of the Moonsiff permitting the plaintiff to erect a building on that land by effecting a partition of shares is not proper. It is fully proved that, by plaintiff's erecting a new building there, the passage for going out from the defendant's house would be blocked up, and thereby the defendants would experience much trouble and inconvenience. The Subordinate Judge holds further that, as no house previously existed on the disputed land and it has lain waste for twelve years, the plaintiff has no right to erect a new building, especially when it is clearly evident that the plaintiff by not raising a house there would experience no loss; and the only relief to which the Subordinate Judge considers plaintiff to be entitled is to demand a fair rent from the defendant for the occupation of his land.

In special appeal, it is urged that the Subordinate Judge should not have raised the question of limitation, as no objection to the suit had been taken on this ground in the first Court; that there being no adverse possession and plaintiff's title being indisputable, his right to a partition and to do what he liked with his own land was unquestionable, and the order of the Subordinate Judge limiting his rights to a right to realize a fair rent was erroneous; that defendant could not, under any right of easement, prevent the plaintiff having the partition he asked for, and that the Subordinate Judge was wrong in holding that the exit from defendant's house would in any way be affected were plaintiff to build a house on the disputed land, for the defendant's own map showed that the defendant's house was separated from the land by a road on which the defendant's east door opened, the use of which could not be interfered with, and further the partition need not necessarily be made in such a manner as to interfere with the defendant's access to the moiety of the land awarded to him under the partition.

It appears to me that the Subordinate Judge has lost sight of the real question between the parties. It is true that plaintiff asked the Court to give him permission to build a house as he also asked the Court to do various other things which are quite beside the question at issue which is simply this—Is plaintiff entitled to have the partition of this piece of waste land comprising

2¾ cottahs as prayed for by him. If he has, he may after partition do what he likes with his allotted portion without any permission from the Court, provided that in what he does he does not interfere with the legal rights of other parties. The question between the parties is therefore of a very simple character; and as the plaintiff's position as a joint owner of the land is indisputable, his right to have a partition cannot be questioned unless it be shown that he is barred from enforcing that right by the law of limitation or by any right of easement which the defendant enjoys.

As regards limitation, it is clear that the Subordinate Judge has not considered the plaintiff's suit to be barred; for, had he thought this, he must have dismissed the suit altogether. But he evidently treats this plot of land as joint property which has for a long time been used by the defendants (plaintiff having no need of it); and because of the inconvenience to which defendants may be put if plaintiff erect a house on the land in dispute, he refuses to grant the prayer of the plaintiff who is clearly entitled by law to have a partition. We think it unnecessary to give an opinion as to whether the Subordinate Judge was in error in raising the issue of limitation for the first time when the case came before him in appeal, for, as has already been observed, he does not decide that point.

Then as regards the question of easement, we think that defendants have failed to make out any such rights as against the plaintiff. As joint proprietors with the plaintiff, they could not by the use of the land with the tacit assent of the plaintiff create a right contrary to his interest, nor would their use of it, before they became co-proprietors, operate to create any such right. Even if their previous possession be admitted, yet, as it appears to me, it cannot now be pleaded either as an adverse possession against the plaintiff, or as an easement which enables them to resist plaintiff's right of partition. In fact, adverse possession, as is contemplated by the law, is not pleaded. It is merely said that plaintiff has not had possession,—*i. e.*, he has not exercised any acts of possession for some years. He has allowed defendants to use the land; and now that they have become joint owners of the property, and the question of plaintiff's right is raised for the first time, they cannot plead that permissive enjoyment of the land against him. As to the finding of the Subordinate Judge that, were plaintiff to build a house, it would interfere with the exit of defendants, we have only to look at the defendant's map to discover that this finding is altogether erroneous, nor is it supported by any evidence. A partition, it is true, would interfere with defendant's enjoyment of the whole of the land in dispute, but it would not interfere with the free ingress and egress to and from his house, and the partition must of course be made so as not to interfere with the defendant's right to the free use of his moiety of the land. We think the judgment of the Appellate Court must be set aside and that of the first Court restored in so far as it gives plaintiff a decree for partition; but we think it unnecessary to make any decree permitting him to build a house upon his own land, for he may do what he pleases with his own land, provided he does not interfere with the legal rights of others. We shall therefore limit our decree to declaring the plaintiff's right to partition and directing that a partition be made, each party to obtain a moiety of the land; and the costs of the partition as well as the costs of the Lower Appellate Court and of this Court to be borne by the defendants who appealed from the judgment of the Moonsiff and have been made special respondents in this Court.

Ainslie, J.—I concur.

The 20th December 1871.

Present:

Sir James W. Colvile, Lord Justice James, Lord Justice Mellish, Sir Montague Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Minor (Guardianship of)—Religion—Marriage—Education.

On Appeal from the High Court at Allahabad.

Skinner *v.* Orde and others.

Appeal from an order of the High Court confirming an order of the Zillah Judge, removing an infant ward and her property from the custody and guardianship of her mother and the mother's second husband. The minor was the issue of a Christian marriage, the child of a Christian father who was massacred at Delhi in 1857, and was under the protection of her mother who was of Mahomedan ancestry. In 1867 the mother and second husband, after cohabiting together for some time, both became Mahomedans and contracted a Mahomedan marriage, the second husband being already the husband in Christian marriage of a living Christian wife. The PRIVY COUNCIL, without relying on the rule in force in the Courts of Chancery requiring that, in the matter of religious education, great and (in the absence of controlling circumstances) paramount weight should be given to the expressed or implied wishes of the deceased father, affirmed the order of the High Court, being of opinion that, from the very necessity of the case, a child in India, under ordinary circumstances, must be presumed to have his father's religion and his corresponding civil and social *status*, and that therefore it was ordinarily, and in the absence of controlling circumstances, the duty of a guardian to train his infant ward in such religion.

The PRIVY COUNCIL agreed with the High Court in doubting the validity of the Mahomedan marriage, and suggested, in the selection of a school in such cases, the desirableness of having some independent person as guardian, to whom the ward could apply, in whom the Court and the ward could confide, and whose duty it would be to communicate to the Court any matter which might arise.

THIS is an appeal from an order of the High Court of the North-Western Provinces, in substance confirming an order of the Zillah Judge, removing an infant ward and her property from the custody and guardianship of her mother the appellant, and the second husband of that mother.

The application was made to the Judge under the provisions of the Indian Act, No. IX of 1861, which are as follows:—

"1. Any relative or friend of a minor who may desire to prefer any claim in respect of the custody or guardianship of such minor, may make an application by petition, either in person or by a duly constituted agent, to the principal Civil Court of original jurisdiction in the district by which such application, if preferred in the form of a regular suit, would be cognizable, and shall set forth the grounds of his application in the petition. The Court, if satisfied by an examination of the petitioner, or his agent if he appear by agent, that there is ground for proceeding, shall give notice of the application to the person named in the petition as having the custody or being in the possession of the person of such minor, as well as to any other person to whom the Court may think it proper that such notice should be given, and shall fix as early a day as may be convenient for the hearing of the petition, and the determination of the right to the custody or guardianship of such minor.

"2. The Court may direct that the person having the custody or being in possession of the person of such minor shall produce him or her in Court, or in any other place appointed by the Court, on the day fixed for the hearing of the petition, or at any other time, and may make such order for the temporary custody and protection of such minor as may appear proper.

"3. On the day appointed for the hearing of the petition, or as soon after as may be practicable, the Court shall hear the statements of the parties, or their agents, if they appear by agents, and such evidence as they or their agents may adduce, and thereupon shall proceed to make such order as it shall think fit in respect to the custody or guardianship of such minor and the costs of the case."

The Judge accordingly made the provisional order on the *ex parte primâ facie* case presented to him, appointed a day for hearing it, heard it, and made an order, removing the ward from her mother. An appeal was presented to the High Court, which pronounced the order complained of. The Act gives no further power of appeal, but on the statement that the real question was as to the religious education of the ward, and that considerations of importance as regards the religious feeling of the Christian and Mahomedan populations of India were or might be involved in it, special leave was given by her Majesty, on the recommendation of this Board, to present to Her Majesty in Council the appeal now to be disposed of.

Several English cases have been cited to their Lordships, and one is referred to and relied on in the judgment of the High Court; and it is, obviously, of very great assistance to the Courts in India and to this Board to see how, in the exercise of a similar jurisdiction for the same object, the Courts in this country have thought it best to act for the protection and welfare of infant wards. The course of decision in the English and Irish Courts of Chancery has been such as to lay it down as a matter of positive law of the Court that in the matter of religious education great, and, *in the absence of controlling circumstances*, paramount, weight should be given to the expressed or implied wishes of the deceased father. It was contended with some plausibilty before their Lordships that this rule had its origin in the statutory power of English fathers to appoint guardians for their children.

However this may be, their Lordships do not think it necessary or desirable for the determination of this case to refer to or rely on any such rule.

The Indian Act certainly does not expressly refer to any such right, and appears to have had one object in contemplation, the protection of the infant ward, and to have given the Judge (subject, of course, to appeal) the power and to have imposed on him the duty of doing what in his judgment is best for the infant, and no other power or duty.

In India, however, all, or almost all, the great religious communities of the world exist side by side under the impartial rule of the British Government. While Brahman and Buddhist, Christian and Mahomedan, Parsee and Sikh, are one nation, enjoying equal political rights and having perfect equality before the tribunals, they co-exist as separate and very distinct communities, having distinct laws affecting every relation of life. The law of husband and wife, parent and child, the descent, devolution, and disposition of property are all different, depending in each case on the body to which the individual is deemed to belong; and the difference of religion pervades and governs all domestic usages and social relations.

From the very necessity of the case, a child in India, under ordinary circumstances, must be presumed to have his father's religion and his corresponding civil and social *status*; and it is therefore ordinarily, and in the absence of controlling circumstances, the duty of a guardian to train his infant ward in such religion.

What are the facts of the present case? Beyond all qestion the ward was the child of a Christian father, the issue of a Christian marriage. She was left an infant of very tender years, her father being one of the victims of the great outbreak and massacre at Delhi in the year 1857. She remained thenceforth under the protection of her mother, a lady apparently of ancestry not Christian, and with no great knowledge of Christian tenets or attachment to Christian habits. But she was married to a Christian in a Christian Church, and does not appear to have professed any other faith or to have reverted in costume or customs to her ancestral faith until the autumn of 1867. The child up to that time had certainly been brought up, and, so far as she was educated at all, educated as a Christian girl, eating, drinking, and associating with her Christian cousins, and going to a school.

In the autumn of 1867 this occurred: The house of the widow became the house of one John Thomas John, a clerk of inferior grade in the Judge's Court, and they lived and cohabited together as husband and wife, John Thomas John being already the husband in Christian marriage of a living Christain wife. It is suggested that this union was sanctified and legalized thus—that the widow became a Mahomedan, that John Thomas John became a Mahomedan, and that having thus qualified himself for the enjoyment of polygamous privileges, he contracted in Mahomedan form a valid Mahomedan marriage with the widow, the appellant.

The High Court expressed doubt of the legality of this marriage; which their Lordships think they were well warranted in entertaining.

But however this may be, their Lordships can entertain no doubt that when the connection between John Thomas John and the widow was formed, whether it was merely adulterous or under the cover of a Mahomedan marriage, the home was no longer a fit home for a Christian young girl; and if the matter had then been brought to the notice of the Judge, it would have been his plain duty, without delay, to find a more suitable home and guardianship than what had become in fact the home and guardianship of John Thomas John. The matter was not, however, brought so soon as it ought to have been to the attention of the Judge.

Some relatives interfered, in order that the child might be sent to a proper school—a proper Christian school; and John Thomas John and his wife, professing to yield to the suggestion, took the girl in June 1869 up to Simla, with the avowed object of placing her at a school—a Christian school there. They then represent that this project failed, by reason of the girl's refusal to go to school; and that she began to express a preference for the Mahomedan religion, and the Oriental mode of feminine life in seclusion behind the *purda;* and that at some period (the time is not exactly fixed) a Moulvie was introduced, who confirmed her in her resolution to become a Mahomedan. The young lady, who by this time had attained the age of 14 years, or thereabout, made a deposition, which is as follows:

"DEPOSITION of Victoria Skinner, otherwise Nan Shabi Begum, before me, on solemn affirmation, under Act V of 1840, on the 1st April 1870.

I know Mr. John. I first knew him when we came to Meerut, and for the past two years know him well. No one has ever persuaded me to be a Mussulman. My own feelings alone have prompted me. I wish to remain a Mussulmani. I would not be persuaded to become a Christian, because it is from my own conviction that I am a Mussulmani. I am in the *purda* by my own free will.

I went up to Simla with my mother and Mr. John. They wished me to go to school, and pressed me very much to go, but I would not consent.

I heard of the marriage of my mother to Mr. John, five or six days after it took place. I cannot say how long Mrs. James Skinner has known of the marriage, but she must have known of it a long time, as they have lived together for two years, and it has been matter of notoriety. I believe all Mrs. Skinner's family must have known of it. I wish to return to my mother.

I believe Mrs. James Skinner to be a Mussulman; Mrs. Orde to be a Christian.

To Counsel for Petitioners.—My mother can read very little—small story books; but she cannot read Persian, nor write at all. She can only read the Urdu in print, not the written character excepting very good text-hand

I have read easy books on religion in Urdu, but not studied them. I am studying the Koran with a teacher.

There was a picture of my father, and there were several other pictures; but as I had heard that it was strictly forbidden to keep pictures by our religion, I therefore destroyed them with my own hands. The picture was on paper in a frame with glass. It was destroyed soon after we returned from the hills. I heard that to keep pictures was prohibited after my return from the hills, from a preacher, a Moulvie, who came to the house and preached a sermon. No one advised me otherwise.

I had long thought of becoming a Mussulman, but when I was young did not understand the different religions; when I returned from the Hills, I turned my attention to it, and had the preacher called to preach. Almost all my family are Christians.

I have had no intercourse during the last six or seven months with any others who are Christians, but their family and Mrs. Benu.

Since I have been in their house I have not had any letter of any kind from Mr. John.

I had some letters from my cousin Sophy who is in Calcutta and Charlie, which were on my table. These I sent for. Two from Charlie I sent for the day before yesterday, which were old, and I tore them up; the other from Sophy I sent for yesterday, and showed it to Mrs. Aldwell. The two from Charlie I sent for by Achakrai, and the one from Sophy by my ayah.

To Counsel for Petitioners.—I know Mrs. Benu. I have seen her several times since I came from Simla. I know her to be a Christian.

This evidence was, with the consent of the Counsel on both sides, and also of the principal parties, though the questions and answers were put and given in the vernacular of the country, Urdu, recorded by the Court in English, and was read over to the witness in Urdu, and by her acknowledged to be correct."

The case of the appellant was, in fact, rested on this deposition. An eloquent appeal was made to their Lordships' feelings not to sanction such a violation of the young lady's present religious convictions and natural feelings as was involved in tearing her from her Mahomedan home and mother, and committing her to the care of a Christian strange schoolmistress.

The Judges of the High Court, however, did not think that deposition sufficient to induce them to abstain from making in July 1870 the order for the removal of the guardian, which would have been the only possible order that could have been made in 1867.

Their Lordships cannot dissent from that conclusion. It would be very easy, of course for a mother under such circumstances to procure from a young daughter the expression of a wish to remain with her and to become a Mahomedan like her rather than continue a Christian and go to a strange school; and it is impossible, in their Lordships' judgment, to believe that in the interval which had occurred between the visit to Simla and the application to the Court any such knowledge of the differences between the two religions had been acquired, or any such settled conscientious convictions had been formed, as to make it really likely that her moral and religious condition would be endangered by placing her where she should receive the secular and religious instruction and training which she ought to have long previously and without interruption enjoyed. Their Lordships are therefore of opinion that the order, in so far as it removed the ward from her mother and step-father, and placed her under a Christian guardian, was right, and that is really the only matter that has been brought before them.

Their Lordships will humbly report to Her Majesty that in their opinion the order of the High Court ought to be affirmed, and this appeal dismissed with costs.

This recommendation of their Lordships is, of course, without prejudice to any application to be made by or on behalf of the ward concerning her future position; and considering the present age of the young lady, their Lordships think it would be very proper for the Court to ascertain for itself what her present opinions and wishes are, and what, having regard to those wishes and opinions, would in the present state of things be best for her.

Affirming the principle of the order, their Lordships feel that it would be very difficult for an Appellate Tribunal in this country to interfere without injury as to the details of the particular guardianship and scheme which must so essentially be a matter of *quasi* parental discretion to be exercised on the spot by those best acquainted or best able to acquaint themselves with all the circumstances, and their Lordships disclaim any desire so to interfere. But they suggest, for the consideration of the Court of India in similar cases, that while selecting a school (such, for example, as Miss Scanlan's in this instance), it would be desirable, where practicable, to have some independent person as guardian, to whom the ward could apply, in whom the Court and the ward could confide, and whose duty it would be to communicate to the Court any matter which might arise.

The 6th January 1872.

Present:

The Hon'ble A. G. Macpherson and F. A. Glover, *Judges.*

Execution—Immoveable Property—Khas Possession—Sections 263, 264, and 269 Act VIII of 1859 — Jurisdiction — High Court — Letters Patent, s. 15.

Hur Kishore Audhicary, *Petitioner,*

versus

Sudoy Chunder Nundee, *Opposite Party.*

Baboo Debendro Narain Bose for Petitioner.

Baboo Chunder Madhub Ghose for Opposite Party.

Held that the Moonsiff had jurisdiction to issue an order for *khas* possession under Section 263 Act VIII of 1859, although in the first instance he had ordered possession to be given under Section 264; and that the petitioner, if he was wrongfully dispossessed in the course of executing the Moonsiff's decree, had his remedy under Section 269; also whether the Moonsiff was right or wrong, the High Court had no power to interfere under Section 15 of the Letters Patent.

Macpherson, J.—Applying the principle which was laid down in two cases reported in IX Weekly Reporter, page 459, and XII Weekly Reporter, page 285, with regard to Sections 223 and 224 Act VIII of 1859, we think that the Moonsiff had jurisdiction to issue the order for *khas* possession under Section 263, although, in the first instance, he had ordered possession to be given under Section 264. And if the Moonsiff had jurisdiction, the present application must fail, because whether he was right or wrong in making that order, we have no power to interfere under Section XV of the Letters Patent. Moreover, if the present petitioner was wrongfully dispossessed in the course of executing the Moonsiff's decree, he had his remedy clearly laid down in Section 269; and there being a clear remedy prescribed by the Code of Civil Procedure, we should not be justified in interfering (if we have the power to interfere) in any way under the special provisions of Section XV. Rule discharged with costs.

The 8th January 1872.

Present:

The Hon'ble J. B. Phear, *Judge.*

Abetting the Waging of War against the Queen—Forfeiture—Act XI of 1857—Act XXV of 1857 Section 3.

Gunneshloll *versus* Ameer Khan.

The property of a judgment-debtor convicted of an offence under Act XI of 1857, which has been attached intermediately between the time of commission of the offence and the time of conviction, is property forfeited to the Crown under Section 3 Act XXV of 1857. The forfeiture relates back to the time of commission of the offence.

On the 29th June last the plaintiffs, as the endorsees of certain *hoondees,* obtained a decree against the defendant for Rs. 7,566, with costs; and on 17th July, in execution of the decree, attached property in Calcutta belonging to the defendant. On the 4th August, the plaintiffs applied *ex parte* for an order for sale of the property so attached. The Court directed that notice of the application should be given to Government, and directed the Secretary of State for India to show cause why the attached property should not be sold in execution of the decree.

Mr. Lowe (with him *Mr. Evans*) now moved, on notice to the Government of India, calling on them to show cause why the aforesaid property should not be sold, and the proceeds applied towards satisfying the plaintiffs' decree.

The learned Counsel, having mentioned the facts above set out, stated that on 26th July last the defendant was convicted under Section 1 of Act XI of 1857 and Section 121 of the Penal Code of abetting the waging of war against the Queen, the convictions and the sentence thereon being in the following terms :—"The Court, differing from three of the four assessors, finds Ameer Khan guilty of the offence specified in the charge, namely, that he (Ameer Khan), during or about the month of September 1861, A.D., at Calcutta, abetted the waging of war against the Queen, and has thereby committed an offence punishable under Section 1 Act XI of 1857 ; and the Court directs that the said Ameer Khan be sentenced to transportation for life, and forfeiture of all his property ;" and "The Court, differing from three of the four assessors, finds Ameer Khan guilty of the offence specified in the charge, namely, that he (Ameer Khan) in or about the month of September 1861 A.D., at Calcutta, abetted the waging of war against the Queen, and has thereby committed an offence punishable under Section 121 of the Indian Penal Code, and the Court does not pass any separate sentence, as he has been already sentenced on the first head of the charge to transportation for life."

The Government will contend that the forfeiture relates back to the date of the offence in 1861. We, on the other hand, contend that the forfeiture only affects such property as was in the defendant's possession at the date of the conviction. The property under attachment at the date of the conviction was in the custody of the law, and not in the defendant's possession, nor had he any rights in respect of it, except subject to those of the plaintiffs. The Government cannot stand in a higher position than the defendant stood, (*see* Chitty Junior on the Prerogative of the Crown, Ch. XI., s. 1, p. 219), where it is laid down that "the Crown, or its grantee, on forfeiture, will take the estate subject to all charges binding on the party, though voluntary, if no fraud." In this case neither fraud nor collusion is alleged; we are innocent judgment-creditors. In the Attorney General *vs.* Norstedt, 3 Price, 97, the Court says :—"The King shall not have this distress, as a forfeiture, unless he do satisfy the party who distrained, for this was lawfully taken *tempore captionis;* so that there is a case when, though the King would be entitled to the forfeiture, yet, because it was lawfully taken *tempore captionis,* the right would attach only subject to the claim of the party making the distress ;" and in The Duke of Bedford *vs.* Coke, 2 Vesey, 116, the Lord Chancellor said:—"The Crown on a forfeiture takes the estate subject to all charges and incumbrances which would have bound the party forfeiting, and must be bound, too, when there is no fraud in respect of the Crown." See also Megit *vs.* Johnson 2 Douglas, 542, and the case of Oodit Doss *vs.* The Government, Marshall, p 260, in which Steer and Campbell, J.J., held that judgment-creditors having *bonâ fide* attachments upon property of their debtors at the time that that property became forfeited to Government under Act XXV of 1857, are entitled to priority to Government.

Phear, J.—Has not that case been held to be no authority one way or another ?

Mr. Lowe.—It may be ; but, if so, the case is not reported.

Act XXV of 1857 merely relates to the native army and to the forfeiture of property of officers and soldiers convicted of mutiny, as appears from the title and the preamble of the Act. Section 2 relates to the adjudication of forfeiture of property belonging to persons convicted, who have been killed, or have died, or have escaped out of the territories of the East India Company, or who cannot be found. "The offence aforesaid" in Section 3 means the offence of mutiny, and not a state offence under Act XI of 1857, and therefore does not apply. Section 5 empowers the Court to specify the day on which the offence was committed ; there is no such provision in Act XI of 1857. The only words in that Act working a forfeiture are those in the latter portion of Section 1, which clearly only applies to property and effects of the felon at the date of conviction, and those only pass to the Crown subject to all charges binding on the party.

The Advocate-General and *the Standing Counsel (Mr. Kennedy)* appeared to show cause against the rule.

The Advocate-General.—The defendant Ameer Khan has been tried and convicted for abetting the waging of war against the Queen under Act XI of 1857, and the conviction has been confirmed on appeal by the High Court. Act XXV of 1857 is general in its terms, and therefore, on conviction of the prisoner, all property which he has held since the time when the offence was committed is confiscated to the Crown.

It has been said that Act XXV of 1857 Section 3 is not applicable to the present case; but that it applies only to officers and soldiers of the Native army. But there is nothing in the title or the preamble which restricts its operation. It is an Act "to render officers and soldiers in the Native army liable to forfeiture of property for mutinying, and to provide for the adjudication and recovery of forfeitures of property in certain cases." The first Section forfeits the property of every description of every officer and soldier or other person subject to the Articles of War for the Native army who shall be convicted of mutiny. The second Section is general in its terms, and relates to ***any person*** who shall have committed treason or any offence for which by this Act, or Act XI of 1857, or Act XIV of 1857, or Act XVI of 1857, his property is declared to be forfeited. And the Section concludes "that on proof that the person charged with having committed the offence was guilty thereof, and that he is dead, or has escaped out of the territories of the East India Company, or cannot after diligent search be found, the Court shall adjudge that all the property of such offender shall be forfeited to Government."

Section 8 says :—

"The forfeiture, whether upon conviction of such an offence as aforesaid, or upon an adjudication of forfeiture under this Act, shall extend to all property and effects of or to which the offender shall have been possessed or entitled, either at the time of committing the offence, or at the time of the conviction, or of the adjudication of forfeiture or at any intermediate time; and no sale, alienation, or other disposition of such property, made subsequently to the commission of the offence, or made at any time with the fraudulent intention of preventing a forfeiture, shall have any effect against the right of Government to the forfeiture. Provided that nothing in this Section contained shall affect any transferee of any negotiable security, who shall prove that he acquired the same in good faith and with due caution for valuable consideration."

And as regards the proviso to this Section, it has not been shown that the property in question is a negotiable security which the plaintiffs have acquired in good faith and with due caution for valuable consideration.

The only question then for the Court to decide is whether the forfeiture relates back to the time of the commission of the offence. The date of the execution is July 1871; the offence was committed in 1861. Clearly then the right of the execution-creditor was acquired at an intermediate time between the time of committing the offence and the time of the conviction.

Mr. Justice Phear.—If your contention be the correct one, then no one can have acquired any valid title to property through Ameer Khan since the year 1861, except in the case of a few negotiable securities.

The Advocate-General.—I submit that that is the law.

The case cited by Mr. Lowe, Oodit Doss *vs.* The Government (Marshall, 259), in which the property of Kooer Singh was confiscated to the Crown is an authority in my favor as far as it goes. The case has been reported very bare of details. The Judge had ruled that no such attachment could interfere with the effect of the forfeiture. The Court said :— "Disallowing, then, the Judge's interpretation of the law, and the facts not being clear, we remand the case to the Judge, with directions that he will ascertain whether the attachment of the petitioning creditor has been made and was in actual force *before Kooer Singh had committed the offences* for which his property was eventually confiscated, and without the intention of preventing forfeiture in anticipation of such offence; and whether the attachment subsisted and continued in force from such prior time till the time when the order of forfeiture was passed. If such be the state of facts, then we think that the creditor is entitled to continue his execution against the property attached."

Mr. Justice Phear.—Is not there a decision on the Act on this side of the Court? I believe there is a decision in which it was held that the case you cite was no authority one way or the other.

The Advocate-General.—I am not aware of any such decision; and I do not rely on the case but on the words of the Act. Still so far as the case is an authority, it is in my favor.

Mr. Justice Phear.—If the words of the Act are to have the meaning you suggest, then every alienation of the sort of kind that has been made since 1861 has not passed any property.

The Advocate-General.—Yes, that is the effect of the Section. Section 6 provides that the conviction shall be evidence that the offence was committed on the day specified therein or stated in the charge, and I submit that the forfeiture takes effect from that day.

The Standing Counsel.—I hardly think it necessary to trouble your Lordship much further. The question is simply one of the meaning of the words used in Section 8 Act XXV of 1857. The document put in conclusively determines the fact of the conviction; the conviction has been confirmed by the High Court, and for the purposes of this application is conclusive against all the world. The intention of the Legislature is expressed in the clearest language, and the Court has nothing to do with the wisdom, policy, and justice of this Act of the Legislature. We have got the express words of the Legislature in our favor; and if any further authority were necessary, the case cited by the learned Advocate-General supports our contention. The only thing we have to consider is whether the attachment was in force *bonâ fide* before the time of the commission of the offence, and if it was not, the attachment is void.

Mr. Lowe and *Mr. Evans* were heard in reply, and the Court reserved judgment till the following morning when the following judgment was delivered :—

Phear, J.—The question on which my decision will turn is simply this, do the words in Section 3 of Act XXV of 1857 "such an offence as aforesaid" refer to the offences mentioned in Section 2 of that Act, as well as to the offence of mutiny mentioned in Section 1. Mr. Lowe, on behalf of the judgment-creditor, says that it refers only to the offence of mutiny; but the words "such an offence as aforesaid" seem certainly to be large enough to apply to all the offences previously mentioned in the Act, and they seem to me also almost necessarily to apply to a plurality of offences. The words "such an offence" would hardly be used if only one offence was referred to. It is also obvious that there is a distinction made by the Legislature in the two parts of this Section. The Section runs :—" The forfeiture whether upon conviction of such an offence as aforesaid, or upon an adjudication of forfeiture under this Act." If Mr. Lowe's contention gives the right construction, then it would have been more simple for the Legislature to have said:—" On a conviction for mutiny under this Act, as well as for an adjudication of forfeiture under this Act," &c. On the whole therefore I think that "such an offence as aforesaid" does refer to the offences mentioned in Section 2, as well as to the offence of mutiny mentioned in Section 1.

It is incontestible that the judgment-debtor in this case has been convicted of one of the offences mentioned in Section 2 of Act XXV of 1857. He has been specifically convicted of an offence under Act XI of 1857. Then, upon the construction which I feel bound to place upon Section 3 of Act XXV of 1857, it follows that the forfeiture declared by Act XI of 1857 of the convict's property by Section 3 of Act XXV of 1857 extends to "all property and effects of or to which the offender shall have been possessed or entitled either at the time of committing the offence, or at the time of the conviction or of the adjudication of forfeiture, or at any intermediate time." Therefore, the property which has been attached in this case was, at the time of the attachment, which was admitted to be intermediate between the time of commission of the offence for which the prisoner was convicted, and the time of conviction, property forfeited to the Crown.

I did throw out yesterday whether, in consequence of the property being locally situated in Calcutta, that part of the English law applies, which makes the passage of the property to the Crown take place, not upon the occurrence of the event causing the forfeiture, but upon what is technically termed "office found." I have not had the advantage of any argument on that point, and I do not know whether it has ever been held that it is necessary to complete the forfeiture of a felon's property that inquisition should be had and office found when that property was immoveable property situated in Calcutta. Probably not; because the necessity of such a proceeding in England arose from the peculiar circumstances of the feudal tenure. Even there personal property was not subject to it. But more, the Statute of Henry VIII made forfeiture immediate without office found in the case of High Treason; and the offence of which Ameer Khan has been convicted under Act XI of 1857 seems to be indistinguishable from High Treason. However this may be, I think the words of the Section themselves must be taken to mean absolute forfeiture. I do not suppose that the Legislature of this country, when passing Act XXV of 1857, had in its mind any such qualification of the term forfeiture as that which has been contended for. I cannot say that I have any doubt that the Legislature intended the property to pass at once to the Crown. The application must be dismissed with costs.

Mr. Lowe applied that his client should not be mulcted in costs, unless the Government specially asked for it. The law is a very stringent one.

The Advocate-General said, he would ask for costs. The motion had held over at the request of the attorney who first appeared for the execution-creditor, on the understanding that, if the conviction of Ameer Khan were upheld on appeal, the matter should not be further proceeded with. There had been a change of attorney since, and now the execution-creditor still pressed his claim, notwithstanding the confirmation of the conviction.

Mr. Lowe stated that it was not so; the matter had been postponed at his request, and no such undertaking had been given. He had only asked that the rule should not be argued until after the appeal had been decided.

Phear, J., said that, as the Government pressed for costs, he must give costs against the execution-creditor.

The 8th January 1872.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Jurisdiction—Illegal Contract—Suppression of Criminal Prosecution—No Suit.

Reference to the High Court by the Judge of the Small Cause Court at Midnapore, dated the 27th November 1871.

Jeetoo Mahato, *Plaintiff,*

versus

Moneeram Mahato, *Defendant.*

Where, to suppress a criminal prosecution for having accidentally caused the death of his wife, plaintiff voluntarily paid money to defendant, knowing defendant to be the nearest relative of the deceased who could take a part in the prosecution, the contract was held to be void as against morality and public policy, and plaintiff held not entitled to sue for the money so paid.

Case.—THE plaintiff in this case sued to recover a sum of Rs. 300, which he had been compelled to pay as an illegal gratification to defendant, on the allegation that he, plaintiff, had, with the intention of chastising his wife, who was a woman of dissolute character, given her a slap which accidentally proved fatal; and whilst he was about to inform the village Police, the deceased's uncle, the defendant in this case, under threat of criminally prosecuting him for murder, took from him Rs. 150 in Magh 1278, and again Rs. 150 in Falgoon following, and instead of burning her corpse, threw it into some secret place; that the eventual disclosure of the case led to the commitment of both parties by the Magistrate to the Sessions Court, where the plaintiff was acquitted of the charge of murder, and the defendant convicted of having caused the disappearance of the corpse, the evidence of the offence, and of having taken illegal gratification for that purpose.

The defendant denied having received the money as alleged.

It however struck me at the very outset whether such a case was at all maintainable as opposed to the principles of morality and public policy, and whether the plaintiff has any equitable right to relief from a Court of Justice.

The plaintiff's pleader refers to Sections 296 to 300, Story's Equity Jurisprudence, pages 293 to 299, and contends in the first place that the plaintiff was not a *particeps criminis*; and even if he was, the Court is to consider to what extent; and that even a *particeps criminis* is entitled to get back the money paid by him.

Before setting forth my arguments in support of the view taken by me, I would beg leave to premise that the effect of the evidence of the witnesses adduced by plaintiff, who are all members of his own family, whilst it proves the payment of the money, goes against the gist of the plaintiff's argument.

The witnesses unanimously declare that the plaintiff had kept the deceased's body concealed in his room for 8 days before the defendant was called for, and consulted as to the course to be adopted, when he advised not to report the occurrence to the Police, and promised to hush up the affair if he were paid Rs. 300, saying that he was the only person who had a right to complain.

On referring to the Sessions record, I find that this evidence is quite consistent with that previously given.

The facts, therefore, elucidated by the evidence, do not exculpate the plaintiff from criminal and immoral purpose which he had from the beginning of the occurrence by trying to conceal it, and having actually done so far more than a week before it came to defendant's knowledge with whom he contracted and combined for the same purpose.

It is clear from the evidence on the plaintiff's side that, to suppress a criminal prosecution, the plaintiff of his accord made an offer of the money to the defendant, knowing defendant to be the nearest relative of the deceased who could take a part in the prosecution, and thus the contract "one to give, and the other to receive the money" being against policy and being void, the plaintiff, who was a party to an immoral act, is entitled to no relief in the present suit for the refund of the money paid; for one obvious reason that the Court of Justice shall refuse to countenance all claims arising out of illegal contract, and shall equally refuse to enforce the refund of the money already paid by plaintiff for the express purpose of inducing another to do an immoral act.

The judgment of the High Court was delivered as follows by—

***Markby,** J.*—The Small Cause Court Judge is right. See Smith's Leading Cases, 4th edition, page 274, Volume I.

The 8th January 1872.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Insolvency—Dismissal of Petition—Authority of Official Assignee—Notice of Insolvency—Payment to Insolvent.

Reference to the High Court by the Officiating Judge of the Court of Small Causes of the Suburbs of Calcutta, including Howrah, dated the 6th November 1871.

Rajkristo Singh, *Plaintiff,*

versus

Shaikh Sefatoollah, *Defendant.*

An authority (assuming it to be sufficient) given by the Official Assignee to settle the outstandings of one who has filed a petition of insolvency does not enure after the dismissal of the petition, and cannot entitle the person so authorised to sue at all.

The mere fact that a payment was made to a person at a time when his petition was upon the file of the Insolvent Court, which petition was afterwards dismissed, does not invalidate the payment.

Semble.—The general notice published by the Chief Clerk of the Insolvent Court is not sufficient, but a special notice of insolvency is necessary, to prevent a payment made to the insolvent from being *bonâ fide.*

Case.—PLAINTIFF and a person called Kalee Doss Bose carried on business as partners under the style of "Kylash Chunder Shome and Mothoora Nath Mitter." Plaintiff was a partner in the firm to the extent of 4 annas, and Kalee Doss Bose owned the remaining 12. The latter was also the managing partner. Defendant had been a customer of the firm, and swears that he always dealt with Kalee Doss Bose only, and knew nothing about plaintiff, and this I believe to be the truth. Kalee Doss Bose filed a petition of insolvency on 15th March 1869, which was finally dismissed on the 4th June 1870. Defendant paid Kalee Doss Bose what he owed the firm, subsequently to the filing of the petition; and plaintiff, who had in the mean time been authorised by the Official Assignee to collect the outstandings of the firm, now sues defendant for the amount which the latter paid Kalee Doss Bose. The following is the letter of the Official Assignee, conveying the authorization in question:—

"I have no objection to your collecting "the outstandings due to the firm of Kylash "Chunder Shome and Mothoor Mohun "Mitter, wherein the above insolvent was "(12) twelve annas shareholder, and yourself "(4) four annas shareholder, and to satisfy "the debts of that firm, but I give you no "authority to use my name in any suit at "law without receiving my particular consent in writing."

I dismissed the case on the ground that defendant had not notice of the insolvency of Kalee Doss Bose at the time that he paid the amount of his debt to the firm, but I think the case might have been dismissed on other grounds as well. Plaintiff has applied for a new trial, and whether it shall be granted or not will depend on the decision of the High Court on the following points, which are hereby submitted for its opinion:—

(1). Whether plaintiff is under the circumstances entitled to sue at all, and

(2). Supposing he is, ought the suit to be dismissed for want of notice to the defendant.

Plaintiff relies on the Official Assignee's letter on the first point. In pursuance of it, he (plaintiff) satisfied several of the debts of the firm out of his own funds, but he did not obtain the consent in writing of the Official Assignee alluded to in the latter part of the letter. I think this consent was not a mere matter of form, but a necessary preliminary to the institution of this suit; and that, in fact, the authorization in question could not have been given by the Official Assignee without the previous leave of the High Court, *vide* Section 29 of the Insolvency Act, and Rule of Practice 25. I think that even admitting the authorization sufficient, it cannot be held to have enured after the date of the dismissal of the petition. The letter is dated 9th March 1870, and the petition was dismissed on the 4th June following, and this suit was not brought till more than a year after the latter date. No doubt, by Section 7 of the Act, the estate of the insolvent vested in the Official Assignee immediately on the filing of the petition, and the Official Assignee was empowered to authorize plaintiff to settle the outstandings of the firm between the date of the vesting order and the adjudication of the petition; but by the same Section it is provided "that in case, after "the making of such vesting order, the petition of any such petitioner shall be dismissed "by the said Court, such vesting order made "in pursuance of such petition shall from and "after such dismissal be null and void to all "intents and purposes." It would seem to follow, therefore, that the power of whatever nature conveyed to plaintiff by the Official Assignee ceased on the dismissal of the petition, and such being the case, that plaintiff has no right to bring this suit.

With regard to the second point, the notice is said to have been given verbally by plaintiff to defendant in Aughran 1276, *i. e.* about nine months after the petition of insolvency had been filed; there is no proof of notice (which is said to have been a verbal one) having been given, except the oral evidence of plaintiff, which is contradicted by defendant; and as well as I can judge from the circumstance under which it is said to have been given, and the demeanour of the parties, respectively, while giving evidence, I am of opinion that plaintiff has not proved that notice was given. But it is contended by the Attorney who has appeared for plaintiff that it must be presumed that defendant had notice of the insolvency inasmuch as it was advertised by the Chief Clerk of the Insolvent Court, and everybody is presumed to have knowledge thereof, and that no special notice to defendant was necessary. There seems no doubt of the general principle, although the Indian Act appears to be silent on the point, that a payment made by a debtor to the bankrupt after an act of bankruptcy and before adjudication, is valid, if made in good faith and without notice of an act of bankruptcy having been committed by the payee; this is expressly laid down in the English Bankruptcy Act, 32 and 33 Victoria, Chapter 71; but it does not seem that the publication of the general notice like that referred to in Section 82 of the Indian Insolvency Act would be sufficient to bring home to the debtor a knowledge of the act of insolvency so as to prevent a payment from being valid,—*vide* Smith's Mercantile Law, 8th edition, page 651; and if not in England, a *fortiori*, not in this country, where people in the condition of life of the defendant are not in the habit of reading the *Government Gazettes.*

As a matter of fact, I did not credit the statement that plaintiff had given defendant the verbal notice, which he says he did; and as a matter of law, I think, for the reasons above given, that as no special notice of the insolvency has been proved to have been given to defendant, the general notice directed to be given by the Chief Clerk by Section 82 of the Act, and 12 of the Rules of Practice, is insufficient; and that the payment by defendant to the insolvent being *bonâ fide*, the second question ought also to be given against plaintiff.

The judgment of the High Court was delivered as follows by—

Markby, J.—The Small Cause Court Judge is clearly right upon the first point. The petition being dismissed, the authority given by Mr. Miller, the Official Assignee, falls to the ground.

The Small Cause Court Judge is, we think, also right, under the circumstances of the case, upon the second point. The validity of the payment to Kalee Doss depends on his authority to receive the money; and we do not think that the mere fact that, at the time the payment was made, there was a petition upon the file of the Insolvent Court, which was afterwards dismissed, invalidates the payment. The merits of the case, we understand, to be entirely in favor of the defendant, who has acted with perfect good faith.

The 8th January 1872.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Execution—Attachment—Property in Zenana.

Reference to the High Court by the Judge of the Small Cause Court at Dacca, dated the 29th September 1871.

Doorga Churn Mitter, *Decree-holder,*

versus

Huree Mohun Gooho, *Judgment-debtor.*

There is nothing in Act VIII of 1859 which exempts from attachment property to be found in the zenana of a judgment-debtor.

Case.—In this case the decree-holder applies for a general attachment of the defendant's property which is to be found within the zenana or private apartment of the judgment-debtor; and as such an application is, I believe, the first of its kind, I feel rather reluctant in complying with it, as by the late Supreme Court Rules (*see* Smoult and Ryan's Rules and Orders, Volume II, pp. 8 and 9, and Skinner's Rules and Orders, pp. 11 and 12), zenanas were not to be entered by the Sheriff, &c., in civil causes, except on affidavit made to the satisfaction of a Judge of the necessity thereof, &c., and in Doorga Doss Mookerjee *vs.* Sreemutty Bindoo

Bassinee Dossee (Fulton's Reports, page 370), which was a motion for an attachment against the attorney and the Sheriff's officer for alleged abuse of the process of the Court by entering the zenana, a private apartment of the defendant, and removing property seized there under a writ of sequestration. Mr. Justice Grant, in delivering the judgment of the Court, said:—"It is a great mistake to suppose that the circumstances of Hindoo females being or not "being actually present makes any difference "whatever. The object of the rule is to preserve inviolate the sanctity of the zenana "itself; and if the officer enter upon the mere "chance of finding the premises untenanted "without any warrant or order from this "Court, it is a high offence. We are also of "opinion that there is no authority for removing "goods upon a writ of sequestration or mesne "process, and that this proceeding therefore "was illegal."

I also find that the late Calcutta Sudder Court held 11th July 1860, and the Madras Sudder Court 1st October 1860, that females who are entitled to the privilege granted by Section 21 of Act VIII of 1859 are not liable to arrest so long as they remain in their zenanas, but these cases, although not referred to in the argument or judgment in the case of the Maharanee of Burdwan *vs.* Sreemutty Buroda Soonduree Debee, Weekly Reporter, Volume X, F. B., page 21, must be held to have been overruled by the decision in that case.

There appears to be no prohibition in Act VIII of 1859 as to entering a zenana, nor is there any Rule or Circular Order of the High Court on the subject. I am, therefore, inclined to hold that, as the decree-holder has shown sufficient grounds in his application for complying with his prayer, the attachment asked for may issue; but as I have said before that I feel rather reluctant in complying with it for the reasons stated above, I beg to solicit the opinion of the Hon'ble the Judges of the High Court as to whether or not such an application may be complied with.

The judgment of the High Court was delivered as follows by—

Markby, J.—We are not called upon to say that the Court is bound to grant this application for execution, if there is other property available, and if there is any good ground for supposing that it is intended to harass, or annoy the defendant. But there is nothing in the law which exempts the property which is to be found in the zenana, and probably if proper warning were given, and proper precautions taken, the execution (should it be considered necessary to grant it) might be carried out, so as to avoid any annoyance to the defendant or disturbance of her privacy, provided always that she herself gives (as she is bound to do) every facility to her judgment-creditor to obtain possession of her property.

The 8th January 1872.

Present:

The Hon'ble H. V. Bayley and W. Markby,
Judges.

Limitation—Promissory Notes payable on Demand—Hindoos.

Reference to the High Court by the Officiating Judge of the Small Cause Court of the Suburbs of Calcutta, including Howrah, dated the 18th December 1871.

Poorno Chunder Dutt, *Plaintiff,*

versus

Gopal Chunder Doss and another,
Defendants.

In the case of a promissory note payable on demand, the parties to which are Hindoos, limitation begins to run from the date of demand.

Case.—The question in this case is whether, in the case of a promissory note payable on demand, the parties to which are Hindoos, limitation begins to run from the date of making the note, or from the date of demand. There are three reported cases in which the principle at issue has been discussed generally; but as this particular point has not apparently been yet decided, the parties have requested me to refer it to the High Court.

In Parbati Churn Mookerjee *versus* Ram Narain Mutilall, V Bengal Law Reports, 396, a case heard on the Original Side, the authority of the English cases, although dissented from by the Judge, was held binding in the case before him, and limitation on a deposit returnable on demand was held to begin to run from the date of making the deposit, and not from that of the demand, although interest had been regularly paid up to within 12 months of the suit. In Moonshee Abdool Ali *vs.* Tara Chand Ghose, VI Bengal Law Reports, 292 (also on the Original Side), although the point was not expressly in issue, the case was evidently decided on the supposition that the cause of action accrued from the making of the note. But in Tarinee Pershad Ghose *vs.* Ram Kristo Banerjee, it was laid down that the doctrine on this subject of the English Common Law, ought not to be introduced into the mofussil, and in that case limitation on a loan payable on demand was held to run from the date of the demand. The last case is Brahma Maye Dossia *vs.* Obhoy Churn Chowdhry, VII Bengal Law Reports, 489, which was decided in the same way as Ram Kristo Banerjee's case.

I am of opinion, notwithstanding the anomaly pointed out in argument in the first of the cases quoted above, that the cause of action must be held to have arisen on the date of the demand. This is expressly laid down in the new Limitation Act, 2nd Schedule, Article 72, and I should not have referred the question, had not the operation of this part of the Act been suspended by Section 1, Clause A.

The judgment of the High Court was delivered as follows by—

Markby, J.—We think the cases referred to authorize the construction adopted by the Small Cause Court Judge.

The 8th January 1872.

Present :

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Jurisdiction (of Small Cause Court)—Deed of Gift—Deed of Sale.

Reference to the High Court by the Judge of the Small Cause Court at Pubna, dated the 19th September 1871.

Grish Chunder Roy, *Plaintiff,*

versus

Gobind Singh, *Defendant.*

A Small Cause Court has jurisdiction in cases involving questions as to the validity or otherwise under the Hindoo law of a deed of gift or a deed of sale.

Case.—The plaintiff has come to Court, with the allegations that one Alanga Voishnavi, having relinquished her right to some of her moveable property which she had earned, gave it to the plaintiff on the 32nd Assar 1278 B. S., under a registered document; that the plaintiff kept the property in the house of the said Voishnavi, and enjoyed possession by making use of it as occasion required; that on the death of the Voishnavi, on the 25th Srabun 1278 B. S., he made an attempt to take the property at his own house, but was opposed by the defendant, who has taken possession of the same under the false allegation that it had been sold to him; and that the Voishnavi never sold it to the defendant, nor had she power to do so after the date when she gave it to him (plaintiff) under registered document. Under these circumstances, the plaintiff has brought this suit for recovering the moveable property above referred to, or its price Rs. 282 from the defendant.

The defendant pleads that he did not know that Alanga Voishnavi gave the moveable property set forth in the plaint to the plaintiff in gift; that, as the said Voishnavi owed him money, she sold all her moveable and immoveable property to him under registered *kabala* dated the 25th Srabun 1278; that he heard from the said Voishnavi that she had been made to execute a deed of gift in plaintiff's favor; that defendant has taken no property belonging to plaintiff; that the conditions of the *danputro* has not been fulfilled; and that in accordance with law, this case cannot go on in the Small Cause Court.

Issues.

1. Is this case cognizable by the Small Cause Court?
2. Is the deed of gift mentioned by plaintiff a genuine document; if so, have the conditions mentioned in it been fulfilled; and if its conditions have not been fulfilled, can the gift obtained by plaintiff be considered valid under the laws?
3. If the registered deed of sale, by which defendant is said to have purchased the moveable property in dispute, together with some immoveable property, be a genuine document, will it be prejudicial to plaintiff's claim and the gift obtained by him?
4. If plaintiff's claim be proved, will he be entitled to get the moveable property in dispute or the value thereof; what will be the value of the disputed property?

Judgment.

I proceed to decide the first issue. I read both the deed of gift filed by plaintiff, and the deed of sale filed by the defendant. The deed of gift states that the donor gave the property in gift to the plaintiff, on the conditions that the latter would maintain her during her life-time, and perform the posthumous ceremonies after her death. The *kabala* filed by defendant states that, as the plaintiff in whose favor the deed of gift was executed did not maintain her, nor fulfil the other conditions mentioned in the document, she executed the deed of sale in defendant's favor, on taking a part of the consideration in cash, the remainder being applied in satisfaction of her debt to the purchaser. Section 6 of Act XI of 1865 provides that a suit for moveable property or price thereof should be brought in the Small Cause Court, and the decision of the Honorable High Court, dated the 26th August 1868, published at page 51 of the Small Cause Court Ruling book* rules that questions of right which rise incidentally in Small Cause Court cases may be decided by the same Court, whose decision in such matters would not be regarded as conclusive. These circumstances, however, do not give birth to the conclusion that the mere ground that a case has been instituted for moveable property, always binds the Small Cause Court to take cognizance of and decide it. *Vide* Weekly Reporter, Volume XIII, page 99, case of Moozdin Gazi and others, decided on 26th January 1870. The present case is of a very important and intricate nature: in the course of its trial, it is necessary to decide whether the *danputro* filed in this case is genuine; whether the plaintiff has fulfilled the conditions mentioned therein; and if he has not done so, whether it can be considered valid under the Hindoo law. It is also necessary to give a finding as to the deed of sale mentioned by defendant, in which some immoveable property are included. For the above reasons, I am of opinion that the questions involved in this case are of such an important and complicated nature that they are not triable in the Small Cause Court. They can be decided only in competent Courts of ordinary civil jurisdiction. This Court is not empowered to give decision as to the validity or otherwise of a *danputro* or deed of sale. Should Small Cause Court give finding on such documents, its decision would be conclusive. Under these grounds, I find that the case is not cognizable by the Small Cause Court; but as I entertain doubt on the point, I respectfully refer it for the opinion of the Honorable Judges of the High Court.

It is ordered that, pending the orders of the Honorable High Court on the issue in bar, the case be dismissed with costs, on the ground that it is not cognizable by the Small Cause Court. The defendant's costs will be paid by plaintiff. The latter will not be barred by this order from instituting his claim in a Court of competent jurisdiction.

The judgment of the High Court was delivered as follows by—

Markby, J.—We think the Small Cause Court Judge had jurisdiction in this case. See Special Number of Weekly Reporter, page 127, and Marshall, page 99.

The 8th January 1872.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Execution—Attachment—Sale—Rival Decree-holders—Priority.

Reference to the High Court by the Officiating Judge of the Small Cause Court at Dacca, dated the 11*th October* 1871.

Huree Mohun Shaha, *Plaintiff,*

versus

Panchoo Beparee and another, *Defendants.*

The decree-holder by whom the property in question is first attached, and not the decree-holder at whose instance the sale takes place, is entitled to be first paid out of the proceeds.

Case.—PLAINTIFF Huree Mohun Shaha obtained a decree against Panchoo Beparee and his wife Azmut Bibee, in Case No. 826 of 1871, on 2nd May 1871. Goloke Chunder Paul and another also obtained a decree against Panchoo, in Case No. 358, on 6th May 1871. But Azmut Bibee was no party to that case. In pursuance of the decree obtained by Huree Mohun Shaha, he on the 2nd May made an application for the attachment of his judgment-debtor's moveable property and the decree-holder in Case No. 358 also likewise applied on the 6th May for the attachment of their judgment-debtor's moveable property, and both the writs of attachment (the writ in Case No. 826 being dated 3rd May and that in Case 358 on 6th May) were simultaneously made over to the peon on 10th May, and in pursuance of same four cows of judgment-debtors in Case No. 826 were attached on 30th Bysack 1278, or 12th May 1871, and the attachment in Case No. 358, as regards three of the said cows, was put into force on the very same day, and the remaining one was attached on the 30th Joyte, or 12th June 1871, at the instance of the said decree-holder, the said cow being then in the custody of the Nazir of the Court.

In Case No. 826, a new trial was applied for on the 15th May by defendant Azmut Bibee, and on 12th June it was granted and the execution proceedings struck off on the same day by the order of the then Judge, and on 18th September she was dismissed from liability. In No. 358 Azmut Bibee put in a claim to the cows attached, but that was rejected on the 3rd June, and three of the cows were sold by auction on the 19th June and one on the 1st July at the instance of the decree-holder in Case No. 358; and it is under the above circumstances that the decree-holder in Case 326 asks to be allowed to participate equally with the decree-holder in Case No. 358 in the proceeds of the sale; and the question arises whether he should be allowed to do so or not, and if not whether he is entitled to priority over the decree-holder in Case No. 358.

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* Sutherland's Small Cause Court's Rulings.

Looking at the provisions of Act VIII of 1859, and the precedents bearing on the subject, it appears to me that the decree-holder by whom the property is first attached, and not the decree-holder at whose instance the sale takes place, is the party entitled to be paid, and that the point of time to determine priority of execution is not the moment in which judgment is obtained, but that in which the writ of execution is delivered to the Nazir; and in the present case it happens that the writ of attachment of 3rd May was in his hands prior to the writ of the 6th May. Consequently the maxim *qui prior est tempore potior est jure* ought to have been his guide; in other words, he ought to have executed them according to their priority which as to writs in this country ought, I apprehend, to be according to the time of their delivery to him, and by executing is meant that he is to apply the proceeds so, and it is not material whether he seized the cattle under the first or under the last writ of attachment, for, when seized, they were in contemplation of law in his custody under all the writs he then had, and when he sold he sold under all; hence I think the decree-holder in Case No. 326 is, for the foregoing reasons, entitled to be first paid, and if the proceeds be more than sufficient to satisfy his writ of attachment the surplus must go to the second writ. But as I have doubts in the matter, I beg to refer it for the opinion of the High Court.

The judgment of the High Court was delivered as follows by—

Markby, J.—The property must, under the circumstances, be considered as having been attached on the application of the plaintiff in Suit No. 326, and therefore under Section 270 of the Code, he is entitled to be first paid out of the proceeds.

The 8th January 1872.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Law of Bailment—Applicability in the Mofussil.

Reference to the High Court by the Officiating Judge of Rajshahye, dated the 4th September 1871.

Doomun Peadah, *Plaintiff,*

versus

Shook Chand Paul, *Defendant.*

The general principles of the law of bailment are applicable in the Mofussil, and they are substantially the same as those which prevail under English law.

The following letter from the Moonsiff of Nattore was submitted by the Judge of Rajshahye for the orders of the High Court:

"I beg most respectfully to state that in this Small Cause Court suit the plaintiff took a loan of 12 rupees by pledging a neck belt worth 24 rupees from the defendant. The plaintiff paid 8 rupees first, and when he went with 4 rupees to take the return of the ornament, the money was not taken from him, and he was told in reply that the neck belt would be returned afterwards as it was under great *goolmal.* The plaintiff again went to him on the 30th Joist 1278, corresponding with the 22nd June 1871, for the ornament, but now he learned from the defendant that it was stolen away by thieves, and the defendant, being dragged by the plaintiff in this Court, pleads that he was not answerable for the ornament according to the law of bailment. It is seen that the law of bailment prevails in England, but the law-makers in this country have not touched upon it, and therefore I hold doubts whether the above law applies here, and therefore under Section 28 Act XXII of 1861 and under Section 22 of Act XI of 1865, I solicit the opinion of the High Court on this point. Though Macpherson's Law of Contract and Mortgage is observed in the Courts of this country, and in that book there is mention of the same, but as the law-makers of this country have not taken upon themselves to determine the point, therefore I think the principle of bailment is hardly applicable here. If you do not think it worth referring to the High Court, you will favor me with your opinion on the point.

Though Small Cause Court Judges have the power to make references, and this Court has the powers of a Small Cause Court Judge till 50 rupees, but those who are independent of the Zillah Judge can alone directly make references, and as we are under the control and supervision of the Zillah Judge, I therefore make this reference to your Honor."

The judgment of the High Court was delivered as follows by—

Markby, J.—This reference is wholly irregular in form; but in order to prevent further vexation and delay, we inform the Small Cause Court Judge that the general principles of the law of bailment are applicable in the Mofussil, and that they are substantially the same as those which prevail under English law.

The 8th January 1872.

Present:

The Hon'ble H. V. Bayley and W. Markby,

Judges.

Indigo Contract—Consideration.

Reference to the High Court by the Judge of the Small Cause Court at Kooshteah, dated the 10*th August* 1871.

Messrs. W. Ledlie and others, *Plaintiffs,*

versus

Gopal Mundul, *Defendant.*

Mr. R. T. Allan for Plaintiff.

No one for Defendant.

Where a ryot, in consideration of an advance of money, has stipulated to grow indigo for a certain number of years, the contract is not void as being without consideration because, during the period it had to run, the debt due from the ryot is extinguished by the delivery of indigo leaves. The contract is one entire contract upon one entire consideration, and a contract which was at its commencement based upon a valid consideration cannot become void for want of consideration by any change whatever in the situation of the parties.

Case.—THE claim is for Rs. 20, amount of damages sustained by reason of the defendant not sowing two beegahs of land with indigo in 1271, for which advance was taken and agreement made on the 27th February 1869.

The particulars of the case, as stated by plaintiffs in their petition of plaint, are that defendant was their indigo ryot, and on adjustment of his accounts, there was found against him a balance of Rs. 5-3-3 of the amount advanced to him in 1868. Besides this balance, he took a fresh advance of Rs. 1-2, making a total of Rs. 6-5-3 due by him to plaintiffs. In consideration of this sum, he executed, on the 29th February 1869, an agreement binding himself to cultivate and sow indigo on two beegahs of land every year successively for five years from 1869 to 1873, and in default to pay damages at Rs. 20 per year.

The agreement on which the plaintiff's claim is based runs thus:—

"I, Gopal Mundul, do execute this indigo advance *kubooleut* in 1869. I am indebted to your Sonai Kundu Factory to the extent of Rs. 5-3-3 being the balance of amount advanced to me in 1868. The amount was found due by me on adjustment of indigo advance accounts for that year. Besides this amount, I now take Rs. 1-2 in cash, making a total of Rs. 6-5-3 as advance taken by me for cultivating 2 beegahs of land with indigo every year for five years from 1869 to 1873. I do willingly stipulate by this *kubooleut* to sow indigo on the above mentioned quantity of land every year and to deliver indigo leaves to the above named factory.

"2nd. I do stipulate to mark out every year good and fertile land fit for indigo cultivation, and you are to measure and mark the same after you make choice of it, and I do agree that every beegah of the land should be measured with a measure of 80 cubits, a cubit being 20 inches long.

"3rd. I do stipulate to cultivate and prepare every year the land for sowing indigo in proper time, that is, I will cultivate and prepare the land for sowing indigo from the month of Kartick up to 15th Bysack, or on any like time and day you will order me. I will take from you indigo seed that will be required and its expenses. You are to pay me the expenses now though they had been given to me and debited in my name before. On the first rain-fall or on any time you will order, I will sow in the very time indigo seed on the land marked and measured.

"4th. When the indigo plants will come out, I will weed them and will very carefully do other field works. And I do stipulate that I will not be unmindful in this respect.

"5th. I will cut for the 1st or for the 2nd time indigo plants every year within 30th September, as I will be ordered to do every day, and I will pay the expenses which will be incurred in cutting them.

6th. If I delay or neglect to cultivate, sow, weed, or cut at the time ordered, you are empowered to cultivate, sow, weed, and cut on my account, and I will pay the expenses which you will incur in so doing.

"7th. I do stipulate that I will deliver the indigo leaves at the factory, but you are to pay the hire of boats and carts to be employed in taking them to the factory.

"8th. I myself will go to the factory with the indigo plants and will cause bundles of them to be measured by your servants in the presence of Mohurer, with a chain of 6 feet in length. And I will cause the number of bundles to be entered in my *hatchitta* every day and will get the price for my leaves of the 1st and 2nd cuttings at 5 bundles per rupee.

"9th. Every year after the indigo manufacturing is over, I will go to the factory for adjustment of my accounts. If I had taken any money for weeding, &c., the amount would be debited in my account. I am to receive in cash any amount that may be found due to me after the adjustment of accounts; but if I be found indebted to the factory, I would consider the amount of my debt as advance received for the coming year. If any sum be found due by me to the factory after expiration of the terms of this agreement, I would pay it in cash or continue to cultivate the above mentioned quantity of land with indigo and to deliver the produce of the land at the rate agreed upon in the former contract, until the whole of my debt is liquidated.

"10th. I will bring and sell to the factory at the Bazaar rate all the indigo seeds that my indigo plants will produce.

"11th. I do further stipulate and agree that as long as the agreement will remain in force, if I fail to cultivate or do not cultivate from Kartick to 15th Bysack, or on any other time in any one year or years as you will order, the whole of the 2 beegahs of land after you have selected, measured, and marked it; or if I fail to sow indigo in any year or years to which the contract will extend, the whole of the 2 beegahs of land (the measurement scale of which is mentioned in this agreement) then in either of the two eventualities or alternatives, I do hereby agree and consent to give you Rs. 20 for every year as your damages and do fix the above amount as damages for every year for any loss you would suffer in consequence of non-fulfilment on my part of the conditions mentioned in this clause. And I would raise no objection to the amount when you bring a suit for the realization of it. And you would be at liberty to sue me for recovery of damages which you would sustain, if I fail to carry out and through my carelessness I fail to observe any other principal condition (which I am required to perform) mentioned in this agreement.

"12th. If I fail to abide by and to carry out any other condition of the principal conditions mentioned in this agreement, you are empowered to sue me for recovery of the damages which you would sustain for every act of my carelessness in carrying out those conditions. I do agree that the damages which you will recover from me for one or more years for breach of contract on my part will not make this contract null and void, or release me from liability for the remainder of five years. I would be liable to damages for every year of the five years and you would be entitled to sue me for damages for every time I commit breach of contract."

The defendant pleaded that he never made the agreement nor received advance of Rs. 1-2 in cash and that he was not liable.

The issues adjudicated in this case were whether the defendant executed the agreement and received the advance, and whether the agreement was valid to make the defendant liable to damages.

With regard to the first issue, the witnesses examined on both sides proved that defendant took advance and executed the agreement. The 1st plea was therefore overruled.

In going through the adjudication of the second issue, it appeared from the evidence of Manick Chunder Sandyal, *gomastah* of the factory, that the advance given to defendant in 1869, for making the agreement binding, had been worked off by delivery of indigo leaves in 1870. After the manufacturing of indigo in 1870 was over, the defendant's accounts were adjusted, the price of indigo leaves delivered by him was paid to him partly in cash and partly by bringing to his credit the whole amount of advance given to him before and his *hatchitta* was taken back. This squaring of the defendant's accounts by transferring his advance to the payment of the price of the indigo leaves delivered by him in 1870 left no advance against him. This converted the agreement into a mere gratuitous promise for 1871, in consequence of there being no consideration to make it binding for that year. When a contract was not valid for want of consideration, it could not be binding upon the executant. Thinking, therefore, that the plaintiffs were not entitled to have a decree in their favor, I dismissed the case with costs.

The plaintiffs, not being satisfied with the decision, applied for a new trial of the case on the following grounds.

1st.—The order of dismissal passed by the Court, was opposed to the provisions of the agreement and to the principles of law, inasmuch as it did not dispose of the case on the plea of denial raised by defendant and disproved by plaintiffs, but on the ground of there being no consideration for making the agreement valid,—a plea the defendant did not raise at all.

2nd.—The advance mentioned in the 1st paragraph of the agreement was given to defendant for five years to sow indigo on 2 beegahs of land every year ; and according to the 9th paragraph of it, after his accounts were adjusted, the defendant was to get in cash every year the price for the indigo leaves which he would deliver in excess of the value of his advance, and if there be any balance against him, it would be counted as advance made to him for the coming year. Under these circumstances, the defendant could not be considered released from his liability according to the terms of the agreement, even if there be no advance against him in any one year of the period for which the contract ran.

3rd.—According to the 9th paragraph of the agreement, the defendant is entitled to recover from us by bringing a suit against us, the excess price of indigo leaves which may be due to him. So when we paid him of our own accord, the defendant could not get off from his obligation as long as the agreement remains in force.

4th.—The defendant cannot ignore his liability, unless he could disprove the execution of the agreement which he executed for cultivating indigo for five years in consideration of the advance taken by him, or could show that some unavoidable circumstances stood in the way of his cultivating indigo. *Vide* High Court's decision dated 21st November 1865, Lal Mahomed Biswas *vs.* Messrs. Robert Watson & Co.*

5th.—If the judgment passed in the case, be not set aside, the applicants prayed that the case might be referred for the decision of the Hon'ble Judges of the High Court under Section 22 of Act XI of 1865.

With reference to the 1st ground, I hold that though the defendant did not raise a plea of confession and avoidance but denied execution of the agreement, yet his plea of non-liability did not take away the Court's power to look into the validity or otherwise of the agreement, and that when there was no consideration to make it valid, it became a mere gratuitous promise and the plaintiffs could not expect to make it binding on the defendant. This ground for review of judgment is therefore overruled.

The second ground is thus determined and overruled. It is true that the advance was made for five years, but there is nothing in the agreement to show that this advance was to be worked out or paid to defendant in lieu of cash payments for indigo leaves delivered by him. The plaintiffs were therefore not borne out by the terms of the contract when they stated that "the defendant "was to get in cash every year the price of "indigo leaves which he would deliver in "excess of the value of his advance." A reference to the 9th paragraph would show that cash payment would be made to defendant for the indigo leaves he would deliver, and if he be found indebted to the factory after adjustment of accounts, the balance against him would be considered as advance made to him for the coming year. The words "in excess of the value of his advance" are nowhere to be found in the agreement.

The third ground is not entitled to any attention as there are no reasons given in it to make me alter the view I took of the case.

The case of Lal Mahomed Biswas *vs.* Messrs. Watson and Co., cited in the 4th ground, is not to the point. That case was disposed of by the High Court, on the supposition that the advance was not worked out. For I cannot persuade myself to think that an agreement made in consideration of some advance could be any longer considered valid when that advance is taken back somehow or other before the expiration of the term of it.

So the grounds set forth in the application for new trial, not appearing valid to me, I rejected it, making my order contingent upon the opinion of the Hon'ble Judges of the High Court as prayed by the applicants.

The points, therefore, referred for the decision of the Hon'ble Judges of the High Court are whether the plea of general issue could preclude this Court from enquiring into the validity of the document upon which plaintiffs based their claim, and whether the agreement, though at first executed for valid consideration, could be considered valid when that consideration was withdrawn.

The statement of the case given above would give my view upon the points referred.

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* 4 W. R., Civil Rulings, p. 62.

Copy of the summons book and all the papers of the case are herewith forwarded.

The judgment of the High Court was delivered as follows by—

Markby, J.—We are asked in this case whether the agreement, though at first executed for valid consideration, could be considered valid when that consideration was withdrawn.

Reading this question with the facts of the case, we take it that what we are asked is, whether, where a ryot has taken an advance of money and in consideration of that advance has stipulated to grow indigo for a certain number of years, the contract is to be considered void, as being without consideration, because during the period which it had to run the debt due from the ryot is extinguished by the delivery of indigo leaves.

We think the contract is not void on that account. The contract is one entire contract upon one entire consideration, and a contract which was at its commencement based upon a valid consideration, cannot, as far as we are aware, become void for want of consideration by any change whatever in the situation of the parties.

The 8th January 1872.

Present :

The Hon'ble H. V. Bayley and W. Markby,
Judges.

Breach of Contract—Indigo Cultivation—Liquidated Damages—Penalty—Reference—Review of Judgment.

Reference to the High Court by the Officiating Judge of Moorshedabad, dated the 12th August 1871.

Talim Mundal and others (Defendants)
Appellants,

versus

Messrs. R. Watson and Co. (Plaintiffs)
Respondents.

The sum agreed to be paid by a ryot as damages for breach of contract in respect to the sowing of certain lands with indigo, must be regarded as liquidated damages, and not as a penalty.

A reference cannot be made upon an application for a review of judgment.

Case.—This is an appeal against a decree of the Moonsiff of Gowas, who gave a decree in favor of plaintiffs for Rs. 30 on the strength of a *kubooleut* executed by defendant in favor of plaintiffs, by which defendant bound himself to pay a sum of Rs. 10 per annum per beegah as damages for breach of contract in respect to the sowing of certain lands with indigo. The Moonsiff found on the merits of the case in favor of plaintiffs, and treating the sum which defendant agreed to pay as liquidated damages, gave a decree for Rs. 30 in favor of plaintiffs. The defendant appealed against that decision, and the Officiating Judge (my predecessor) agreeing with the Lower Court on the questions of fact decided that, in accordance with the decision of the High Court in the case of Doyle *vs.* Mundul (5th Weekly Reporter, Small Cause Court References, page 10), the Lower Court should have treated the sum agreed upon by defendant as a penalty, and remanded the case for assessment of damages. Subsequently, the respondents, having discovered a decision of the High Court of a later date than that relied upon by the Judge, *viz.*, May 29th, 1869, in Case No. 460, J. W. Ledlie and others *vs.* Bhadoon Paramanick (Reference by Judge of Small Cause Court of Rajshahye), applied to this Court for review of judgment.

I cannot say that there was any error in point of law in the judgment of my predecessor, dated April 19th, 1871; but as that judgment certainly appears to be opposed to the ruling of the High Court, dated May 29th, 1869, and is not open to special appeal, I have, at the earnest request of the respondents, consented to refer the following question to the High Court:—

Is the sum fixed by the *kubooleut*, of which translation is annexed, to be regarded as a penalty, or as liquidated damages ?

The judgment of the High Court was delivered as follows by—

Markby, J.—I must adhere to the previous decisions upon the point referred, namely, that, in contracts of this description, the sum agreed to be paid by the ryot in default is liquidated damages, and not a penalty.

Since this case was heard, it has been brought to our notice in another case, that this is a reference upon an application for a review, and we have held in another case decided to-day, that such a reference cannot be made. But having already expressed our opinion upon the point referred to us, we do not consider it necessary to withdraw it.

The 8th January 1872.

Present :

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Section 28 Act XXIII of 1861—References to High Court—Trial—Review of Judgment.

Reference to the High Court by the Subordinate Judge of Midnapore, dated the 23rd September 1871.

Bonomally Deo (Plaintiff) *Appellant,*

versus

Ram Sadoy Chuckerbutty (Defendant) *Respondent.*

Baboo Taruck Nath Sein for Appellant.

Baboo Bhowaney Churn Dutt for Respondent.

Section 28 Act XXIII of 1861 merely authorizes the reference of such questions as may arise in the trial of the suit, and not of questions arising on an application for a review of judgment which cannot in any sense be considered as the trial of a suit.

Case.—PLAINTIFF averred that he obtained a decree against one Khoodee Debia, and made over the same to his Mooktear, the defendant Ramchurn Ghose, for taking out execution against the judgment-debtor; that Ramchurn fraudulently sold the decree in his (plaintiff's) name to defendant Ram Sadoy Chuckerbutty (who was a relative of the debtor), and caused a false admission of the sale to be made in Court, and that the defendants then took out execution of the decree and caused the sale of the debtor's effects which were purchased by defendant Ram Sadoy for Rs. 110 in satisfaction of the decree.

Plaintiff, therefore, sued the defendants in the Moonsiff's Court to have the fictitious deed of sale set aside or cancelled, and to recover the sum of Rs. 110 realized by the defendants in execution of the decree.

The defendants contended that the deed of sale was a *bonâ fide* transaction, whereby plaintiff sold his decree for proper value, and that plaintiff's transfer of the decree by sale or assignment was duly certified to the Court.

The Moonsiff, Baboo Judoonath Mullick, in his decision, dated 18th April 1869, found as a fact that plaintiff executed the deed of sale for proper value and certified the transfer to the Court, by petition presented through a pleader.

In appeal, my predecessor, Baboo Nobin Kishen Paleet, differed from the Moonsiff and held that the deed of sale was not proved and was evidently got up by the defendants.

He, therefore, reversed the Moonsiff's order dismissing the suit, and awarded a decree to the plaintiff on the 29th December 1869.

The defendants preferred a Special Appeal, No. 527 of 1870, from my predecessor's decision, and that appeal was dismissed by a Division Bench of the Hon'ble Court on the 17th November 1870, on the ground that the suit was one for recovery of money realized in execution of a decree below Rs. 500, and therefore no special appeal could lie under Section 27 Act XXIII of 1861.

An application for a review of my predecessor's order, dated the 29th December 1869, decreeing plaintiff's appeal, has now been made by the defendants, and the grounds taken in the application are that, as according to the decision in the special appeal, the plaintiff's suit was of a nature cognizable in the Small Cause Court, the Civil Courts had no jurisdiction to try it, and that though this objection was not preferred before either the first Court or the Lower Appellate Court, yet the decisions passed by those Courts, in a case in which the Courts had no jurisdiction, cannot legally be enforced.

The questions on which I solicit the Hon'ble Court's opinion are—

1*st.*—Was the plaintiff's suit of a nature cognizable in the Small Cause Court ?

2*nd.*—If the first point be answered in the affirmative, whether an application for review can be entertained after the disposal of the special appeal ?

In my opinion a claim for money was cognizable by no other Court than that of Small Causes under Sections 6 and 12 Act XI of 1865. The plaint engrossed a prayer to set aside a fraudulent sale; but by reason of such prayer, I do not see the jurisdiction of Small Cause Court over a suit in which the consequential relief was a recovery of money, could be barred, as the Small Cause Court can incidentally decide upon questions of title relating even to land or other immoveable property. The view which I have taken is supported by the decision of the Division Bench, dated 17th November 1870.

2*nd.*—A decision on the second point depends on the construction of Section 376 Act VIII of 1859. The procedure laid down in Act VIII aforesaid, I observe, does not provide for a hearing, in the case of a special appeal, as had been the rule under the old law, to consider the grounds for its admission, and doubts therefore arise to my mind as to the meaning of the word "admitted," as may be found in the Section. In the course of argument, it was said that the Deputy

Registrar's registering a special appeal must be taken for its admission. To this view I cannot altogether subscribe, because if that had been the meaning of the Legislature, the word "preferred," and not "admitted," should have been used. Further, I refer to the new practice introduced in the Hon'ble High Court, according to the rules of which every special appeal is brought to a Bench to consider the grounds urged and to admit or reject it as the merits of the case require. The new rule of practice clears up my doubts, for I feel no hesitation to think that, if a special appeal be thus rejected, the appellant shall not be precluded from seeking for a review of the order of the District Court in appeal. Under the circumstances, I am of opinion, that the filing of a special appeal, when such appeal could not lie, is no bar to the application for review.

The judgment of the High Court was delivered as follows by—

Markby, J.—We do not think we need call upon the Vakeel, who appears against the opinion of the Small Cause Court Judge in this case, because after hearing the Vakeel on the other side, we think the Small Cause Court Judge is wrong in making this reference to us in this case.

The point arose on the construction of Section 28 Act XXIII of 1861, which provides that "if in any suit in which an "order or decision is made final under the last "preceding Section, any question of law or "usage having the force of law or the con-"struction of a document affecting the merits "of the case shall arise on which the Court "trying such suit shall entertain reasonable "doubts, the Court may, either of its own "motion or on the application of either of "the parties to the suit, draw up a statement "of the case and submit such statement with "its own opinion for the decision of the "Sudder Court." Now, it appears that in this case there had been a decision of the Moonsiff in favor of the defendant which decision was reversed on appeal by the Subordinate Judge, and the case coming on in special appeal to this Court, this Court held that as it was one of the class of cases which come under Section 27 Act XXIII of 1861, no special appeal would lie. Thereupon, the defendant applied to the Subordinate Judge for a review upon the ground that it appeared from the judgment of the High Court that this was one of the suits which fell within the provisions of Section 27 Act XXIII of 1861, that therefore it was a suit over which the Small Cause Court had jurisdiction, and under the particular circumstances exclusive jurisdiction, and that he was therefore entitled to a review of judgment on the ground that all the proceedings up to that point had been without jurisdiction. The Judge states his own opinion that the proceedings were without jurisdiction, and that he ought to grant the application for review, but before doing that he asked our opinion on the matter. The objection taken is that under Section 28 already quoted, no such reference can be made.

It appears that interpretations have already been put upon similar provisions of the Legislature—Section 22 of the Small Cause Court Act for the Mofussil, and Section 23 of the Burmah Recorders Act. Upon both these Sections which are very similar to the present, it has been held that the only questions which can be referred to this Court are those which arise pending the trial of the suit, and that no question which arises either previous to the hearing of the suit or in execution after the decision of the suit can form the subject of reference under either of those two Sections; and expressly to remedy that defect the Legislature thought fit to pass Act X of 1867 which enables Small Cause Courts in the Mofussil to refer for decision to the High Court questions arising previous to the hearing of suits, or in execution of decrees or orders. We think, therefore, that we must take it as now finally decided upon the Small Cause Court Act and Recorders Act that that is the true construction.

It is argued that there is a difference between Section 22 of the Small Cause Court Act and Section 28 Act XXIII of 1861, because the former Section says "if *in the trial* of any suit, &c." Whereas Section 28 simply says "if in any suit, &c." But in this respect the Section, now under consideration, is precisely similar to that in the Burmah Recorders Act which was discussed in a case to be found in page 27, Volume XIII, Weekly Reporter; and we fully concur in the reasonings given in that case to which I gave my assent at the time. It is clear that the words "if in any suit" mean in the trial of any suit, and this view is further borne out by the subsequent words of the Section, where it is said "on which the Court *trying such suit* shall entertain reasonable doubts," &c. It seems to us, therefore, that Section 28 merely refers to such questions as may arise in the trial of the suit, and not to questions arising on an application for review which cannot, in any sense in which we can understand the words, be considered as the trial of a suit. We think, therefore, that the Subordinate Judge had no power to make this reference.

The papers should be sent back to the Subordinate Judge with this expression of our opinion. The party who appeared in support of the view taken by the lower Court should pay the costs of this reference.

The 9th January 1872.

Present :

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Ijara Lease—Erection of Indigo Factory by Lessee—Determination of Lease—Removal of Materials.

Case No. 1089 of 1871.

Special Appeal from a decision passed by the Officiating Judge of Rungpore, dated the 23rd June 1871, *modifying a decision of the Subordinate Judge of that district, dated the* 12*th June* 1869.

Kinoo Singh Roy (Plaintiff) *Appellant,*

versus

Nusseerooddeen Mahomed Chowdhry (Defendant) *Respondent.*

Baboos Grija Sunker Mojoomdar and *Issur Chunder Chuckerbutty* for Appellant.

Baboo Woomeshchunder Banerjee for Respondent.

Where a lessee of land under an *ijara* erected an indigo factory thereon, with the knowledge of and without any objection by the lessor, upon the determination of the *ijara* lease, and the delivery of possession to the lessor, the lessee was held entitled to remove the materials.

Markby, J.—We think we need not call the pleader for the special appellant in reply. The facts are shortly these. The plaintiff was a putneedar of certain land. The defendant was in occupation under an *ijara* from the plaintiff of some 50 or 60 beegahs of land, and upwards of twelve years ago he erected upon portion of the land an indigo factory. The lease has expired, and the putneedar plaintiff has obtained possession of the land, but the defendant has obtained permission to retain possession of the indigo factory, paying the plaintiff a reasonable rent. That is how we understand the decision of the Lower Court.

The plaintiff, appellant, objects here that the utmost which the defendant is entitled to obtain is either some compensation or permission to remove the materials at the plaintiff's option according to a Full Bench Ruling, reported in Weekly Reporter, Volume VI, page 229.

Now, the only difference between that case and the present is this, that the Court below in this case has found that though the defendant's allegation of a special written permission to erect the building was false, yet there was so far an acquiescence on the part of the plaintiff in his building the factory, that, knowing that the building had been erected, the plaintiff made no objection thereto. Now we are desirous not to be understood as laying down any general rule whatever that acquiescence of the land-owner in the acts of his tenant might not, under some circumstances, as suggested by Mr. Justice Trevor in the Weekly Reporter for 1864, page 166, give a right to the tenant to hold on at a reasonable rate of rent; but confining ourselves to the particular circumstances of this case, we think the equitable course to adopt in this case will be to declare, not that the defendant has a right to hold on the land, but that he has a right to remove the materials, that being the course which we understand the plaintiff would prefer.

The decree, therefore, would be that the decree of the Lower Appellate Court be reversed, and that of the first Court restored with this modification that the defendant be at liberty to clear off the materials of the factory within six months from this date, and for that purpose to have such reasonable access as may be necessary to the premises.

The special appellant will be entitled to his costs of this Court and of the Lower Appellate Court, inasmuch as the first Court gave substantially a right decree.

The 11th January 1872.

Present :

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Execution of Decree—Attachment and Sale—Inheritance.

Case No. 260 of 1871.

Miscellaneous Appeal from an order passed by the Officiating Judge of Midnapore, dated the 25th May 1871.

Maharajah Dheraj Mahtab Chund Bahadoor (Decree-holder) *Appellant,*

versus

Doyamoyee Dossee and others (Judgment-debtors) *Respondents.*

Baboo Chunder Madhub Ghose for Appellant.

No one for Respondents.

The Officiating Judge's order rejecting an application of the decree-holder to have certain property attached and sold as belonging to the estate of his judgment-debtor and in the possession of her heir, on the ground that there was a former decision by the former Judge against the decree-holder, was reversed; THE COURT holding that the properties in the two cases were different, and that even if they were the same, the property now applied for was liable to be attached and sold in satisfaction of the decree-holder's decree if he could prove that the property was the property of his judgment-debtor, which had come by inheritance into the possession of her heir.

Kemp, J.—THIS is an appeal on behalf of the decree-holder, the Maharajah of Burdwan. No body appears for the opposite party, the judgment-debtor. It is admitted that the Rajah obtained a decree against one Radhamonee, and the heir of Radhamonee, Rajnarain, who is dead, has been succeeded by Mongolachurn. The decree-holder applied to have certain properties mentioned in his application attached and sold as belonging to the estate of his judgment-debtor and in the possession of her heir.

The Lower Court, the Officiating Judge of Midnapore, has rejected the application, because he says that, as there seems to have been a former decision of the same Court passed in the time of the former Judge, Mr. Lance, on the 18th of February 1869, which was against the decree-holder, therefore there was no reason why the Court should not adhere to its former decision on the same point.

It is now contended that the decision of the Officiating Judge is wrong, inasmuch as the former application made by the Rajah was not for the same property which he now seeks to bring to sale in execution of his decree.

Referring to the *tupseel* of the property which was the subject of the former application, and comparing it with the schedule of property in this case, we find that the boundaries do not agree.

There is therefore, no reason why this application should not be entertained. If the judgment debtor raises any objection as to the identity of the land now claimed in satisfaction of the decree, that question can be gone into and decided; or if he raises a claim on the ground that he has not inherited any property from the judgment-debtor, this plea also can be considered by the Lower Court. This appeal must, therefore, be allowed and the order of the Lower Court reversed.

Jackson, J.—I would only add that I cannot understand from Mr. Cornell's judgment what the grounds of it are. He says that he sees no reason why he should not adhere to the former judgment of the Court passed by his predecessor, Mr. Lance. That judgment was to the effect that the decree-holder had not shown sufficient grounds for proceeding against certain properties which he said formerly belonged to his judgment-debtor and had come into the possession of that judgment debtor's heirs. Now, as I understand it, the decree-holder wishes to proceed against some property, which he also states belonged formerly to his judgment-debtor, and is now in the possession of her heir. Whether the property is the same or different from that which formed the subject of the former application, seems to me not to be very important in the case if he can prove that the property was the property, of his judgment-debtor, which has come by inheritance in the possession of her heir, and is as such liable to be attached and sold in satisfaction of his decree.

I must say that Mr. Cornell's judgment does not show any reason why proceedings should not now go on against this property, whatever the result of these proceedings may be after enquiry. Even if it could not have been shown on the former enquiry that the property had belonged to the judgment-debtor, the decree-holder may be prepared to prove it now. In addition to this it is alleged, and *primâ facie* on good grounds, that the properties are distinct.

The 11th January 1872.

Present:

The Hon'ble G. Loch and W. Ainslie, *Judges.*

Joint-Family Property—Sale by Widow—Purchase out of Separate Funds—Reversioner.

Application for Special Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 27th September 1871, *affirming a decision of the Moonsiff of that district, dated the* 13*th July* 1871.

Madho Pershad and others (Plaintiffs) *Appellants,*

versus

Lalla Jeetun Lall and others (Defendants) *Respondents.*

Mr. G. A. Twidale for Appellants.

No one for Respondents.

Suit for possession of certain property as part of a joint-family property sold by widow without authority.

Plaintiff applied to appeal specially on the ground, but could cite no authority in support of it, that when the eldest member and manager of the family purchases out of his own separate funds, because the family is joint, the property must be considered as joint-property.

Having failed in this character, the Court declined to allow him, in special appeal, to come in as a reversioner and ask for a decree declaring the widow's act void as against reversioner.

Loch, J.—We think this application cannot be admitted. The plaintiff came into Court on the ground that the property in dispute was a part of the joint-property belonging to the family; that it was purchased by Kalee Pershad, the eldest member and manager of the family, from family funds, and as such the widow was not competent to sell it.

The Lower Courts have found that Kalee Pershad did, out of his own separate funds, purchase this property, and that it did not form any part of the joint-family property.

A special appeal has been preferred on the ground that, admitting Kalee Pershad to have purchased this property out of his own funds, yet, as the family was joint, no separation being proved or alleged, the property must be considered as joint-property. But the pleader for the petitioner is unable to support this plea by any authority.

The pleader then urges that he is entitled as the reversioner to come in and to ask the Court to declare that the acts of the widow are void as regards reversioner, though he cannot ask the Court to give him possession. We think in this suit we cannot give him the relief he asks for. He chose to come into Court in a certain character, and upon a certain state of facts, and we cannot in special appeal allow him to alter his position and to come in as a reversioner and ask us for a declaratory decree.

The application is rejected.

The 11th January 1872.

Present :

The Hon'ble G. Loch and W. Ainslie, *Judges.*

Limitation—Execution—Boná fide Proceedings—Keeping Decree alive.

Miscellaneous Appeal from an order passed by the Judge of Sarun, dated the 14*th August* 1871, *reversing an order of the Moonsiff of that district, dated the* 28*th December* 1870.

Jado Lall and another (Decree holders)
Appellants,

versus

Radha Kishen Misser (Judgment-debtor)
Respondent.

Moulvee Mahomed Yusoof for Appellants.
No one for Respondent.

The Full Bench decision in 6 W. R., Misc. Rul., p. 98, cannot be cited in support of proceedings taken against the judgment-debtor, but against parties who have nothing whatever to do with the decree (*e. g.*, debtors of the judgment-debtor); and such proceedings cannot be considered as *boná fide* for keeping the decree in force.

Loch, J.—We think this application must be rejected. It is clear that from the time of the decree up to the present petition no proceedings have been taken against the judgment-debtor, though his name has been given in the application for execution. More than once the decree-holder has most unwarrantably applied to have the property of debtors of the judgment-debtor seized and sold, and the Moonsiff has, in one instance, allowed this to be done; and the petitioner before us now urges that such proceedings were *boná fide* proceedings, and that he is entitled to have the benefit of the opinion of the Court, as expressed in the judgment of the Full Bench in the 6th Volume of the Weekly Reporter, in support of his contention that the proceedings heretofore taken by him were *boná fide*. We think that that judgment cannot in any way be brought in support of such proceedings as these, where the decree-holder does not proceed against the judgment-debtor, but against parties who have nothing whatever to do with the decree, and such proceedings cannot be considered as *boná fide*.

We reject the application.

The 12th January 1872.

Present :

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Certificate—Act XL of 1858 *s.* 7*—Claimant under a Will—Natural Guardian.*

Case No. 274 of 1871.

Miscellaneous Appeal from an order passed by the Judge of Hooghly, dated the 10*th June* 1871.

Bhoobun Mohinee Debee (Petitioner)
Appellant,

versus

Poorno Chunder Banerjee (Objector)
Respondent.

Baboos Chunder Madhub Ghose and *Rajendro Nath Misser* for Appellant.

Mr. R. E. Twidale and *Baboos Bama Churn Banerjee* and *Ashootosh Dhur* for Respondent.

Under Section 7 Act XL of 1858, a person claiming a right to have the charge of the property of a minor by virtue of a will is entitled, if the will be a genuine instrument, to a certificate of administration, notwithstanding the existence of a natural guardian of the minor in the person of his mother.

Kemp, J.—THE appellant in this case, Bhoobun Mohinee Debee, is the widow of the late Okhil Chunder Banerjee, who predeceased his father Gora Chand Banerjee. Okhil Chunder left two sons, who are minors; one appears to be of the age of 16, and the other about 8 years old. The present application is made by the mother of the two minors, Bhoobun Mohinee, for a certificate under the provisions of Act XL of 1858; and the object with which the application is made, in as far as that object can be gathered from the application itself, is to institute and defend suits on behalf of the minors. The application was made on the 24th of March 1870, and was opposed on the 25th of April of the same year by Poorno Chunder Banerjee, the eldest son of the late Gora Chand Banerjee. In his petition of objection, he relies upon the will of his father, dated the 29th Assar 1270, or 5th of April 1864. He also states that he had previously applied for a certificate under the provisions of Act XXVII to collect the debts due to the estate of his father; and that having obtained such certificate, he was managing the whole of the estate of the late Gora Chand; that, according to the terms of the will, he, Poorno Chunder Banerjee, was entitled to the management of the whole estate until the minors should arrive at majority, and that their mother was not entitled to a certificate to administer to that estate.

The Judge, Mr. Bright, says that in this case the point at issue is whether the will propounded by the objector is valid or not, and whether, under its terms, he is entitled to the management of the minor's property. The Judge observes that oral evidence has been produced by both parties: the mother of the minors contending that the will is a forgery. The Judge then goes into the evidence. The objector, Poorno Chunder Banerjee, appears to have been examined, and also a number of witnesses who allege that they subscribed their names to this will, and witnesses on behalf of the widow have also been examined. The Judge upon this evidence observes that there is nothing in the case to raise a presumption of fraud with respect to the will or any of the property, or disposition of the property recited in it; that the execution of the will was, in the Judge's opinion, proved; that as it empowered Poorno Chunder Banerjee, the eldest son, to manage the estate of the minors, he is entitled to a certificate to that effect, but Poorno Chunder Banerjee was directed to furnish accounts of receipts and disbursements to the Judge every six months; and with reference to the fact that the mother was the natural guardian of the minors, and also to the fact that the family were not on amicable terms, the Judge deemed it expedient that a certificate of guardianship of the persons of the minors should be granted to the applicant, Bhoobun Mohinee Debee. Each party to pay their own costs.

In this Court the question of the validity of the will propounded by Poorno Chunder Banerjee has been argued at great length. Before proceeding to give an opinion upon this point, I would refer to a case reported in Volume IX Weekly Reporter, page 343, present Justices Loch and Mitter. In that case, on the question of whether the applicant for a certificate under the same Act, namely Act XL of 1858, was to obtain a certificate, or her application was to be rejected on the objection of the opposite party; the point was, whether the will propounded in that case was a genuine document. The Judge in that case held that he was not competent to enquire into that question, but the learned Judges, who decided the case on appeal to this Court, held that, under Section 7 Act XL of 1858, the Judge was bound to enquire into the question, whether the will propounded was a genuine document or not; for, as they observed, if the will propounded by the appellant in that case was a genuine document, a certificate must be granted to him for the management of the estate, notwithstanding the existence of a natural guardian.

Therefore, in the case before us, if the will is a genuine document, a certificate must be granted to Poorno Chunder Banerjee, notwithstanding the existence of a natural guardian to these minors in the person of their mother, the applicant, Bhoobun Mohinee Debee; for Section 7 of the Act says, "If it "shall appear that any person claiming a right "to have charge of the property of a minor is "entitled to such right by virtue of a will or "deed, and is willing to undertake the trust, "the Court shall grant a certificate of adminis-"tration to such person." We, therefore, think that in this case, although our decision will not be conclusive on the question of the genuineness or otherwise of the will, we are bound to express an opinion on the evidence, as it is on the record, as to whether this will is a genuine instrument or not.

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The 12th January 1872.

Present :

The Hon'ble G. Loch and W. Ainslie,
Judges.

Attachment—Manager—Sufficiency of Assets.

No. 251 of 1871.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Tirhoot, dated the 16*th May* 1871.

Baboo Ajoodhya Doss and another
(Decree-holders) *Appellants,*

versus

Baboo Doorga Dutt Singh (Judgment-debtor) *Respondent.*

Baboo Romesh Chunder Mitter
for Appellants.

No one for Respondents.

Property cannot be put under a manager unless it has been attached, and the Court has no right to assume that the assets are sufficient to meet the claims of the creditors.

Loch, J.—We think that the judgment of this Court passed on the 22nd November 1871, in the case of Bunwaree Lall Sahoo *v.* Girdharee Singh, reported at page 278 of the 16th Volume, Weekly Reporter, is applicable to the circumstances of the case now before us. It appears that the petitioner, appellant before us, Ajoodhya Doss, held a decree against Doorga Dutt, and he applied for the attachment of Doorga Dutt's estate; that on the petition of Doorga Dutt who prayed that the estate might not be attached and sold, but be placed under the manager who had the management of Girdharee Singh's estate, the Court assented to the petition and ordered the estate to be placed under the manager, notwithstanding the objections raised by the petitioner that the assets of the estate were insufficient to meet the claims.

The decree-holder has raised two objections in this Court, namely, that property cannot be put under the manager unless it has been attached; and, secondly, that the Court had no right to assume that the assets were sufficient to meet the claims of the creditors. We think that the order now appealed against must be set aside, and the petitioner must be left to make further application to the Court for execution of his decree.

The order of the lower Court is reversed with costs, sixteen rupees being allowed for pleader's fees.

The 18th January 1872.

Present :

The Hon'ble G. Loch, A. G. Macpherson,
and W. Ainslie, *Judges.*

Jurisdiction—Suit for Prosecution (malicious and without probable cause) against whom it lies—Damages—Onus Probandi—Evidence.

Case No. 187 of 1871.

Regular Appeal from a decision passed by the Subordinate Judge of Shahabad, dated the 3rd April 1871.

Baboo Ram Buddun Singh (Plaintiff)
Appellant,

versus

Sirdar Dyal Singh and others (Defendants)
Respondents.

Baboos Chunder Madhub Ghose and *Taruck Nath Dutt* for Appellant.

Baboos Kalee Mohun Dass and *Romesh Chunder Mitter* for Respondents.

A suit will lie for instituting a prosecution against the plaintiff maliciously and without probable cause.

The issues fixed to be tried in such a case.

Macpherson, J.—The Subordinate Judge has taken a wholly mistaken view of this case. The main question to be decided was whether the defendants, or any of them instituted a prosecution against the plaintiff maliciously and without probable cause. If they did, the plaintiff was entitled to a decree and the Subordinate Judge is utterly wrong in supposing that such a suit as this will not lie.

The case must be remanded to the Judge's Court, and the Judge will take it up and try it himself.

The following are the issues to be tried:—

1. Whether Ram Dyal Singh in making the charge (which he admits he made) acted maliciously and without probable cause.

2. Whether the defendants Fatteh Chand, Fukeera Aheer, Cheragun Khan, Bageshuree Pershad, Mothoora Lall and Pudaruth Hasam, or any and which of them, made a charge against the plaintiff as alleged, and if so, whether maliciously and without probable cause.

3. Whether the charge was made by order of and under instructions from Sirdar Dyal Singh.

4. If the charge was made maliciously and without probable cause, what damages has the plaintiff sustained?

It is for the plaintiff to prove malice and absence of probable cause, and *both* of them must be proved or the suit fails.

If Sirdar Dyal Singh ordered the prosecution, he is liable for the consequences of his doing so, if malice and want of probable cause are proved. But mere evidence of enmity between him and the plaintiff will not prove that he ordered the charge to be made; and no liability will accrue in this suit to Sirdar Dyal Singh if it should turn out that the prosecution was not instituted by his orders, though it was instituted by his servant in the hope of pleasing or benefitting him.

The mere giving of false evidence in the course of the proceedings, is not malicious prosecution. But if it is proved that the persons who gave the false evidence were in fact from the first acting with Ram Dyal and that Ram Dyal was by agreement among them put forward to make the false and malicious charge, then all of them might be liable as having instituted the charge.

The case of each defendant must be considered and dealt with separately, although (in the event of plaintiff obtaining a decree) only one sum will be given by way of damages.

The Judge will be good enough to take this case up and dispose of it at once. He is not restricted to the issues which we have laid down, if he finds it necessary to add any others. Costs to follow the result of this remand order.

The 18th January 1872.

Present:

The Hon'ble G. Loch and W. Ainslie,
Judges.

Certificate (under Act XXVII of 1860*) — Hindoo Law — Joint Family — Separation — Dissolution—Evidence.*

Nos. 256 and 292 of 1871.

Miscellaneous Appeals from an order passed by the Judge of Sarun, dated the 16*th June* 1871.

Mussamut Phooljhuree Kooer, *Appellant,*

versus

Ram Pershun Singh and others, *Respondents.*

Messrs. C. Piffard and *C. Gregory,* and *Baboos Mohesh Chunder Chowdhry* and *Bhood Sein Singh* for Appellant.

Mr. R. T. Allan and *Baboos Unnoda Pershad Banerjee, Chunder Madhub Ghose,* and *Rughoobuns Sahoy* for Respondents.

Rival claims by widow and cousins of a deceased person to a certificate under Act XXVII of 1860, the former asserting separation, and the latter joint tenancy. THE COURT decided in favor of the cousins.

Though the general rule of Hindoo Law is in favor of the widow's succession, and her exclusion as to joint estate governed by the Mitakshara law is an exceptional qualification, yet in the districts governed by the Mitakshara the fundamental idea is that all property is joint, and that separate property is exceptional.

Though actual division by metes and bounds is not necessary to complete the dissolution of the joint tenancy of a Hindoo family, yet a mere definition of an interest in a joint estate in terms of a fraction of the whole without any indication of intention to divide interest and liabilities is not sufficient to constitute a legal dissolution of a joint family. Even if for common convenience the parties took the rents and profits of the estate in certain defined shares, still in the face of a distinct declaration that the community of interest remains unbroken, it would be no evidence of separation; nor also would false statements made by the parties for their common benefit in a particular matter be evidence of separation.

Ainslie, J.—THESE two appeals arise out of applications for a certificate in respect of the debts due to the estate of the late Sheo Pershun Roy, under Act XXVII of 1860.

Rughoobeer Singh, who died in 1232 (1825) had three sons, Nunkoo, Brijoo, and Kuchoo. Nunkoo had two sons, Trilokedharee, who died childless before his father, and Sheo Pershun, whose estate is the subject of this suit.

Brijoo had left two sons, Ram Pershun and Gridharee; and Kuchoo had left two sons, Sham Narain and Sunt Pershad. The rival claimants are Mussamut Phooljhuree, widow of Sheo Pershun, on one side, and Ram Pershun, Sham Narain, and Sunt Pershad, on the other: Gridharee has not appeared.

The question tried by the Judge was, whether Sheo Pershun at the time of his death was living in union with or separated from the other members of the family.

He found that the family was joint and undivided, and therefore dismissed the widow's application, and granted a certificate to the cousins.

Mr. Piffard appears for the widow, and contends,—*1st*, that the personal representative of the deceased, *i. e.* his client, is the party entitled to the certificate ; *2nd*, that, as a matter of fact, there had been a separation and separate enjoyment of the rents; and *3rd*, that the declarations of the parties *per se* amounted to a separation, and made it necessary for the opposite party to establish re-union, which they do not attempt.

It has been contended that the party in all cases entitled to a certificate under Act XXVII of 1860 is the personal representative of the deceased, and that the general rule of Hindoo law is in favor of the widow's succession, and that her exclusion in respect of joint estate governed by the Mitakshara is an exceptional qualification : the authority of the Privy Council Judgment in the Seeva Gunga case* is cited in support of the contention. In theory, no doubt, this is a correct statement of the law, but it must also be borne in mind that in the districts governed by the Mitakshara the fundamental idea is, that all property is joint and undivided, and that separate property is exceptional; so that in practice the qualification becomes the rule, and the rule is the exception.

Cases may arise in which doubts may be entertained whether the certificate should be granted to the surviving co-sharers or to the personal representative, there being both joint and separate property left by the deceased, but this is not one of these. It is not said, on the one side, that Sheo Pershun held some separate property, or on the other, that he held some joint property ; the parties respectively declare him to have been wholly separated and wholly unseparated. If he was wholly separated, the respondents have no interest in his estate ; if he was wholly united, the widow has nothing but her right to maintenance, and cannot interfere with the estate, and consequently cannot claim a certificate.

The question of separation has been divided into two parts—actual separate enjoyment and separation by declarations which have the effect of dissolving the joint tenancy. Taking the latter first, I am quite prepared to admit that, on the authorities cited, it is settled law that actual division by metes and bounds is not necessary to complete the dissolution of the joint tenancy of a Hindoo family.

The cases, however, do not go so far as they have been pushed. In the judgments of the Privy Council, XI Moore, 75,† and XIII Moore, 113, it is determined that, when the members of an undivided family agree among themselves with regard to particular property that it shall thenceforth be the subject of ownership in certain defined shares, then the character of undivided property, and joint enjoyment is taken away from the subject-matter so agreed to be dealt with, and that this is a separation in interest and in right, though not immediately followed by a *de facto* actual division of the subject-matter. In both these cases, there was a distinct agreement to hold certain shares separately at the sole disposal of the parties respectively. It was not the mere fact that the parties had described their interests in the joint property, in terms of the shares they would have been entitled to take on a partition, but there was also a distinct declaration of an intention to separate their interests.

The case of Lalla Mohabeer Pershad, VIII Weekly Reporter, 116, and that of Kulponath Doss, VIII Weekly Reporter, 302, both rest on agreements to be separate in interest. The case of Samoondra Koonwur, XIII Weekly Reporter, 199, did not turn on the existence of an agreement to separate, though one was tendered at the hearing of the appeal, but went on the ground that the sharers had transacted business and dealt with parts of the property separately ; the Judges cited the case reported in VI Weekly Reporter, 193, in which it was said :—" A legal " partition is proved, if it be found that the " parties have separated in food and residence, " that there has been a distinct separation in " estate indicated by separate enjoyment and " *separate liabilities*, and that they have " dealt with their respective shares separately " and in a manner inconsistent with the idea " of their being still joint."

The case in XIII Weekly Reporter, 469, can hardly be said to bear upon this case as there was a deed of division and also distinct proof of separation.

The cases in XIV Weekly Reporter, 415, and XV Weekly Reporter, F. B., 7, do not require notice.

The respondent has cited VI Weekly Reporter, 139, quoted above, and XII Weekly Reporter, 510, of which the marginal note runs thus :—" Though actual partition by " metes and bounds is not necessary to a " separation between the members of a joint " Hindoo family, yet there must be some " unequivocal act or declaration on the part " of the family of their intention to separate." And with reference to the case of Appovier *v.* Rama Sabha Aiyan, XI Moore, 75, cited by Mr. Piffard, he brings forward the judgment of Justices Louis S. Jackson and

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* 2 W. R., P. C., 81.

† 8 W. R., P. C., 1; Sutherland's P. C. Cas., 657.

Glover, XIV Weekly Reporter, 31, in the case of Mooktakeshee Debee, in which the former learned Judge says, "It seems to me "it would be going very much beyond what "their Lordships intended in that case were "we to attribute to vague expressions and "statements contained in petitions not directed to that particular subject, the effect of "solemn deeds or agreements between the "parties, whether reduced to writing or not, "but agreements contemplating the very "subject of separation." I fully concur in these remarks, and I altogether fail to see that the decisions either of the Privy Council or of this Court warrant us in saying that a mere definition of an interest in a joint estate in terms of a fraction of the whole without any indication of intention to divide interest and liabilities is sufficient to constitute a legal dissolution of a joint family. No doubt, the expression of a joint tenant's interest in the joint estate as a half or a third, or any other fraction, is not strictly consistent with the theory of the joint family property, as set forth in the judgment in Appoovier's case, but as a matter of fact it is extremely common, and by no means necessarily implies any intention to abandon interests in the entire property, or to withdraw from common liabilities.

In this particular case, the first document relied on, *viz.* the petition of 2nd October 1841, though it certainly sets forth that the three brothers were entitled to equal thirds in the property held by them, and might, if so minded thereafter, make a partition into three equal parts, at the same time distinctly recites that they were at the date of the petition holding the whole jointly, and it is evident from a perusal of the document that the object of it was solely to guard against any one or more of them laying claim to any portion of the property held in his or their separate names as his separate property. So far is this document from indicating any separation in 1841 that it proves just the contrary, and it is impossible to overrule the express declaration of continuing joint ownership, because the parties have given definitions of their shares, by describing them as what they would be if any one claimed a partition. I would go further and say that even, if for common convenience they took the rents and profits of the estates in certain defined shares, yet in the face of this distinct declaration that the community of interest remained unbroken, it would be no evidence of separation.

Passing from this, the earliest, to the Income-tax Returns of 24th December 1869, one of the latest documents put in, in which it is said that the former returns were made jointly, but that there had subsequently been a separation, I am not prepared to admit that this statement is conclusive evidence of separation. The Judge below, looking at the whole of the evidence, has come to the conclusion (a correct one, I think), that this statement was a mere device to evade payment of income-tax. Unless there was a distinct understanding among the parties to separate their interests and liabilities, the fact that they made a false statement for their common benefit in a particular matter is wholly immaterial. The statement would be evidence, and of the strongest character, if believed; but when found to be false, it is of no effect whatever. It is the intention of the parties to have no further community of profit and loss which is material, and not their expressions, except so far as these are evidence of intention.

I do not propose to go through the whole of the oral and documentary evidence which has been read and commented upon. Much of it is inconclusive and might consist with either state of facts; those documents which specify the shares of the parties in the transactions referred to therein are quite in keeping with their petition of 1841.

The evidence does not raise the slightest doubt in my mind as to the absence of any separation, and it was for the party pleading separation to prove it.

I would dismiss the appeals with costs, allowing 10 gold mohurs for the pleader's fees.

Loch, J.—I concur fully.

The 9th December 1871.

Present:

Sir James W. Colvile, Sir Montague Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Judgment in rem—Marriage—Legitimacy.

On Appeal from the High Court at Calcutta.*

Jogendur Deb Roy,

versus.

Funinder Deb Roy Kut.

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* On appeal from the judgment of Kemp and E. Jackson, JJ., 24th July 1868.

Plaintiff, a younger son, failed in a former suit to recover possession of a Raj and of the property belonging to it from his elder brother on the ground that he, plaintiff, was legitimate, and his brother illegitimate He proved the former, but not the latter ground. He now sues for the same object on the ground not only of his brother's illegitimacy, but also of his priority of right by reason of the superior nature of the marriage of his own mother; and the question was whether the judgment in the former case was not a judgment *in rem*. It appeared to the PRIVY COUNCIL very doubtful where there existed in India (exclusive of the particular jurisdictions which are exercised by the High Courts in matters of probate and the like, and which in the case of war might be exercised in matters of prize) any ordinary Court capable of giving a judgment *in rem*; but without considering whether an ordinary Zillah Court could pass a judgment *in rem* determining the legitimacy of a party against all the world, they held that the judgment pleaded in bar in this case could not be treated as one of that nature upon any principles whether derived from the English law or from the law and practice of India.

THIS appeal is brought by Jogendur Deb Roy Kut, the defendant in the suit out of which the appeal arises, against a decree of the High Court which overruled a decree of the Zillah Court, whereby a judgment in a former suit which had been pleaded was declared to be a bar to the further prosecution of this suit, and directed that the cause should be remanded to the Zillah Court for trial upon the other issues raised therein. This was the only point before the High Court, and the only point which is now legitimately before their Lordships. Mr. Doyne indeed suggested that their Lordships might give certain directions concerning the further trial of the suit if it went back to be tried in the Zillah Court, but that course would be entirely contrary to the practice of this tribunal. The ground of appeal to the High Court was that the learned Judge was wrong in holding that the decision of the late Sudder Court, dated 8th February 1853, was a judgment *in rem*, and as such a bar to the present suit. The High Court's judgment is to this effect:—"The Judge holds that "that judgment of the Sudder Court was a "judgment *in rem*, declaring the title of the "defendant Mokurund Deb to the disputed "Raj, and consequently that that judgment "was a binding judgment not only against "the party in that case, but against all the "world, and it follows, according to the opi"nion of the Judge, that that judgment was "decisive against the present plaintiff, and "that the present plaintiff cannot consequent"ly succeed." They then refer to the judgment of the full bench in the 7th Weekly Reporter, page 388, in which the law was laid down that judgments of this description were not judgments *in rem*, but judgments *inter parties*. They also say, "It is evident "that the issues which were raised in the "former suit are by no means identical with "the issues which arise in this case. The "plaintiff or his representative was in no way "a party to the former judgment and was "not represented in that suit, and the decree "then passed can in no way be binding upon "him. The decision of the Judge must be "reversed and the case remanded to him in "order that he may try the remaining issues "which arise in it." Therefore it is perfectly clear that the question which I have stated is the only question which now presents itself for their Lordships' decision.

Their Lordships do not think it necessary to embarrass themselves with much discussion considering the nature of a judgment *in rem*, technically so called. It appears to them to be extremely doubtful whether there exists in India (exclusive of the particular jurisdictions which are exercised by the High Courts in matters of probate and the like, and which in the case of war might be exercised in matters of prize) any ordinary Court capable of giving what can be called technically a judgment *in rem*; but they will look to the substance of the thing, and consider whether there is any reasonable ground for the contention that the effect of a judgment *in rem* ought to be given to such a judgment as that which was pleaded in this case.

Now the circumstances of the former suit were these. Hill Rajah Surbodeb Roy Kut, the father of the respondent, and grandfather of the appellant, died in 1850, and there arose a contest among the members of his family, children by various wives or concubines, as to who should succeed to the Raj, and, with the Raj, to the possession of the property. It is admitted that the succession is impartible, and on the death of a Rajah passes to the eldest of the sons of equal rank; and it is further alleged, though not perhaps admitted, that according to the custom of the family the issue of one kind of marriage is to be preferred to the issue of another kind of marriage. On Surbodeb's death Mokurund Deb (the father of the appellant) the eldest of his sons was put into possession by a summary award of a Court of Justice under the Act XIX of 1841. Upon that, Ranee Bissessuree, one of the three surviving wives of the late Rajah, in conjunction with another person, brought a suit on behalf of her infant son Rajender Deb, in order to have that order of the Court set aside and to recover from Mokurund Deb the possession of the Raj and the possession of the property that went with the Raj. The suit necessarily involved two issues; one of them was the legitimacy of the plaintiff, who insisted that his mother had been married to the deceased Rajah under the Gundharbo form of marriage. If he succeeded in proving that he had to go a step further, and to prove that Mokurund Deb, his elder brother, was, as he alleged, illegitimate, that he was the son of a woman who had not been married to the Rajah at all, but the son of a slave girl.

The Court of first instance found in favor of the plaintiff in that suit. It went by appeal to the Sudder Court. The Judges of that Court were divided, but the majority found that the plaintiff in that suit had made out his title to be legitimate by the Gundharbo marriage; and as regards Mokurund Deb they found that he also was legitimate, though they do not appear to have found in terms that he was the issue of marriage in the Brahmo form, which was what he had pleaded. They seem to have thought that by reason of the declarations and acknowledgments of his father he must be taken to be legitimate; and that being at least in equal rank with the plaintiff in that suit, and being the elder, he was as between those two parties entitled to succeed to the Raj.

In the present case the plaintiff comes forward and raises, no doubt, the same question that was raised in the former suit, as to the illegitimacy of Mokurund Deb, but he also raises the question of a priority of right by reason of the superior nature of the marriage between the original Rajah and his mother. The issues in the two suits therefore are not precisely the same. But if they had been precisely the same, their Lordships would still have been of opinion that the decree in the former suit is not a bar to the further prosecution of this suit. They think that this case cannot in any degree be likened to those which sometimes occur in India, wherein the interest of a joint and undivided family being in issue, one member of that family has prosecuted a suit or has defended a suit, and a decree has been made in that suit which may afterwards be considered as binding upon all the members of the family, their interest being taken to have been sufficiently represented by the party in the original suit. It is clear that in this case all the members of the family had conflicting interests. If such a suit as the first suit were brought here and tried according to the law of this country, there could be a pretence for saying that the judgment in it was anything like a judgment *in rem* or that it could bind any but the parties to the suit. It would have been a mere suit for possession by a party claiming to have a preferable right to the party in possession, and having failed to establish that case by proving the illegitimacy of the other party.

It therefore seems to their Lordships unnecessary to consider whether an ordinary Zillah Court in India could in any case pass a decision which would have the effect contended for at the bar in this case, viz., that of determining the legitimacy of a party against all the world. It is sufficient for their Lordships to say that the judgment pleaded in this case in bar cannot be treated as one of that nature upon any principles, whether derived from the English law or from the law and practice of India, which can be applied to it, and that they must humbly advise Her Majesty to dismiss this appeal. It is an *ex parte* appeal, and it is therefore unnecessary to say anything about costs.

The 19th December 1871.

Present:

Sir James W. Colvile, Lord Justice James, Sir Moutague Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Sale of Ancestral Property—Necessity—Mortgage—Want of Consideration—Procedure of Privy Council—Findings of Facts—Printing of Privy Council Appeal Records in India.

*On Appeal from the High Court at Calcutta.**

Mussumat Humeeda *alias* Bebee Khajoo,

versus

Mussumat Amatool Mehdee Begum.

Suit to set aside a sale of ancestral property by a minor's father and guardian as made without necessity and for the father's profligate expenditure, and without enquiry by the purchasers as to whether it was for the infant's benefit. Defendants alleged that the sale was made under pressure of a foreclosure suit on account of a demand under a former mortgage for an ancestral debt. Plaintiff having failed to establish his case, sought to go back and open the consideration for the mortgage made so long as twenty-two years ago; but the PRIVY COUNCIL (agreeing with the High Court), declined to allow plaintiff to do so, observing that whereas in this case, the question of fact has been tried upon evidence fairly warranting the conclusion to which the High Court has come, and there has been no adverse finding of facts, their Lordships will require a strong case to be made out before they will recommend Her Majesty to reverse such a decision.

THEIR LORDSHIPS referred to the extent to which the record in this case had been swelled with a quantity of superfluous documents, and expressed a hope that some means might be taken in India to prevent such a waste of the suitors' money.

THIS is an appeal from a decree of the

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* On appeal from the judgment of Steer and Seton-Karr, JJ., 20th June 1868.

High Court, dismissing the plaint of the appellant. The plaint had also been dismissed in the Court below, but upon a different ground. In the Court below, the Court of the Sudder Ameen, it had been dismissed on the ground of a legal objection, as to the splitting of suits. The legal objection so taken was disposed of in favor of the plaintiff in the High Court, but as against the plaintiff they found the merits in favor of the defendant.

The suit was brought by, or rather in the name of, a person who had been an infant, and who had, according to the statement in his own plaint, attained his majority in the year 1848. The suit was not brought until the year 1858, and was then proceeded with, not by the former minor, but by a person who had bought the right of him and who then prosecuted the suit on his own behalf.

The case of the plaintiff was that many years before, 18 years before the suit was filed, a sale had been made by the minor's father and guardian for Rs. 17,000 without any necessity whatever, merely for the purpose of raising money for his own profligate expenditure, and that the purchasers took the property under that sale without any reasonable ground for supposing that it was made for the benefit or on behalf of the infant.

The case made by the defendants was this: That it was not a sale for Rs. 17,000 money paid to the guardian and expended by him in a profligate manner; that if it was so expended as to any part, it was so to the extent of 2,500 rupees only, the only money which they had actually paid; but that the real transaction connected with the sale, which alone was impeached before the High Court and now before their Lordships, was that that sale was made under the pressure of a foreclosure suit actually brought for the purpose of enforcing a demand for Rs. 14,500 out of the Rs. 17,000 which were due upon a former mortgage.

That former mortgage, which was for an ancestral debt, was a mortgage at that time due from the property, was a charge upon it, and was the subject of a suit; and the guardian under the pressure of that suit gets Rs. 2,500 in fact for the equity of redemption. As the High Court says, and it appears to their Lordships rightly enough, it is not suggested in the evidence that Rs. 17,000 was at all an inadequate price for the property. The guardian had no alternative but to pay the money, which he seems to have had no means of doing, or allow it to be foreclosed for Rs. 14,500, or to have done the best he could and sold it for the Rs. 14,500 and the Rs. 2,500 which he received at that time in money as guardian for his infant son. It does not appear to their Lordships that there could be any ground for questioning the transaction.

But then it is said that the mortgage transaction, which was the origin of the suit and the origin of the sale, was itself questionable, that is to say, that there never was any debt at all. But the Court enquired into that, and found that there was really an honest mortgage transaction for a debt amounting to Rs. 10,000, the origin of which was fully explained. It is true that at the time the mortgage was made there was a further sum advanced. The debt being only Rs. 10,000, the mortgage was taken for Rs. 14,500. But that is not the case made by the plaintiff. The case is not that the estate was parted with for Rs. 4,000 less than it ought to have been, but that it was entirely a case of fraud, a sham transaction from beginning to end, that there never was such a debt, and that there never was any real foundation for the sale which was the ultimate result of the transaction which had commenced in the ancestor's life-time.

Their Lordships entirely agree with the High Court that after so great a lapse of time, twenty-two years, it would be utterly impossible to allow a plaintiff in a suit which does not raise that point, in a suit which is based entirely on a case of gross fraud in respect to the sale itself, to go back and open the consideration for a mortgage made so long ago. The High Court were satisfied upon the evidence, and their Lordships are satisfied upon the evidence, that the plaintiff entirely failed to make out the case so far as it was upon him to make it out, and that the defendants did prove apparently a very honest case, exactly in accordance with their pleadings.

That being so, even if their Lordships were sitting as a Court of first instance, they would have very little hesitation in coming to the same conclusion at which the High Court has arrived. Their Lordships desire to repeat what has been frequently said at this board, that where a question of fact has been fairly raised and tried by the Courts in India, and there are concurrent decisions by the Courts there, their Lordships will not reverse those decisions merely upon a balance of evidence, or a probability that they in the first instance might have come to another conclusion, unless they are satisfied that there has been some miscarriage of law, or some very good reason for satisfying them that the Judges of the Courts below have come to a wrong conclusion as to the evidence. This case does not come strictly within that rule, as the decision of the High Court proceeded upon the merits and the evidence, the decision of the first Court being on a legal objection. But where, as in this case, the question of fact has been tried upon evidence fairly warranting the conclusion to which the High Court has come, and there has been no adverse finding of facts, their Lordships will require a strong case to be made out before they will recommend Her Majesty to reverse such a decision.

Their Lordships also desire to observe in this case that they have seen with great regret the extent to which the pleadings on the record have been swelled with a quantity of superfluous documents printed at enormous length in India, where apparently there is not the same supervision exercised with regard to the selection of papers for printing that there is in this country; many of these documents are utterly irrelevant, mere details of the copies of accounts of private expenditure of some parties in respect of collateral matters raised in the suit, and these should not have been printed at all. Their Lordships trust that some means may be taken in India to prevent such a waste of the suitors' money as is caused by swelling the record in this manner.

On the merits of the case their Lordships are of opinion that they must humbly recommend Her Majesty that this appeal should be dismissed with costs, and the decree of the High Court be affirmed.

The 21st December 1871.

Present:

Sir James W. Colvile, Sir Montague Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Mahomedan Law—Long Possession—Title—Presumption—Inheritance—Renunciation—Right of Widow.

On Appeal from the late Sudder Court at Agra.

Mussamut Hurmut-ool-Nissa Begum

versus

Allahdia Khan and Hajee Hidayat.

Suit in the nature of ejectment by principal respondent as residuary heir according to the Mahomedan law of a deceased person, to recover from his widow, the appellant, three-fourths of her deceased husband's estate, of the whole of which she had for upwards of eleven years been in possession. His title as residuary heir was put in issue, as well as other issues touching the widow's dower, &c. The PRIVY COUNCIL, thinking it of the utmost importance that those who had thus sanctioned a long possession should not be allowed lightly to disturb it, or to escape from those legitimate inferences and presumptions which on a conflict of evidence arose from their own acts and conduct, decided in favor of the widow, holding that the respondent had failed to establish his title upon which he sued.

According to the Mahomedan law, there may be a renunciation of the right to inherit, and such a renunciation need not be express, but may be implied, from the ceasing or desisting from prosecuting a claim maintainable against another.

As a general rule, a widow takes no share in "the return" *i.e.* on failure of residuaries; but some authorities seem to hold that, if there are no heirs by blood alive, the widow would take the whole estate to the exclusion of the fisc.

THEIR Lordships have carefully considered the evidence, and the arguments which have been addressed to them on the only question in this appeal which has yet been argued, and have come to a conclusion which will render the argument of the other issues unnecessary.

The reasons which have led them to that conclusion I have now to state:

Allahdia Khan, the first and principal respondent on this appeal, instituted a suit in the nature of an action of ejectment against the appellant. He claimed, as the residuary heir according to the Mahomedan law of one Hydur Ali Khan, to recover from his widow, the appellant, three-fourths of her deceased husband's estate, of the whole of which, for upwards of eleven years, she had been in possession. His title as residuary heir was put in issue, and other issues were raised in the suit involving questions concerning the rights of the widow in respect of her dower, the amount of such dower, and whether certain of the lands claimed were part of the estate of the deceased, or had been acquired by her own funds.

The Zillah Judge having determined this first issue in favour of the defendant, deemed it unnecessary to try the others, but the late Sudder Court of Agra having overruled his decision on the first issue, tried and determined the whole case. Against their decree this appeal is brought.

In the course of the litigation two other persons were brought on the record: one as co-plaintiff, the other as co-defendant. Both were purchasers *pendente lite;* the one of part of the plaintiff's claim, the other of part of the defendant's interest. Each, therefore, must stand or fall with his respective vendor.

The only question, then, now to be considered is, whether the respondent, the plaintiff in the suit, has established his title as residuary heir of Hydur Ali Khan. Up to a certain point the parties agree as to the pedigree of Hydur Ali Khan. It is admitted that he was the son of Wajid Ali Khan, who was the son of Mahomed Ashruf Khan; but the respondents contend that Mahomed Ashruf Khan was the son of one Bheekum, who died, leaving three other sons, from one of whom (Hossein Khan) Allahdia Khan, the respondent, is descended. On the other hand, the appellant insists that Mahomed Ashruf Khan was the son of one Mahomed Hossein Khan, who had but two sons, namely, Mahomed Ashruf Khan and Mahomed Afzul Khan, who died childless, and consequently that there is no proof of the descent of the respondent and Hydur Ali Khan from a common ancestor.

Before considering the direct testimony on this disputed question of pedigree, it will be convenient to recapitulate certain facts which have been admitted or proved beyond doubt, and the inferences to be drawn from them. Hydur Ali Khan died at Benares on the 12th of December 1852. Upon his death some officious person, styling himself "A well-wisher of Government," presented a petition to the Magistrate of the district, suggesting that the deceased had died without any legal heir of his caste (I think those are the words), or any lawful widow, and consequently that his property would pass to the Crown. The Magistrate directed the *kotwal* of the city to enquire into the facts and to submit a report thereon. This order is dated the 13th of December.

I may here pause to observe that this proceeding was not likely to take place, if the deceased had notoriously any recognized relations in the line of succession according to Mahomedan law. There must have been a notion not only that his marriage was incapable of proof, but that there was no person, at least on the spot, who could make out a title to the property as his heir; and so far the fact that this proceeding was taken at all, is in some degree more favorable to the case of the appellant than to the case of the respondent.

On the 16th of December, the appellant presented a counter petition to the Magistrate, which was also referred to the *kotwal* for report. On the 18th of December, that officer made a report to the effect that he had made the enquiry in the presence of the "Well-wisher," and of two persons described as witnesses cognizant of the facts of the case, including the respondent, Allahdia Khan; that the marriage of the appellant with Hydur Ali Khan had been established by the evidence of Abdool Ali Khan, who performed the ceremony, and of the two persons who were formal witnesses to it; that she was stated by the above parties to be the lawful heir of Hydur Ali Khan, and that the depositions taken were returned with the report.

Amongst these depositions were those of the respondent and of his nephew, Abdool Ali Khan, who seems to have taken the principal part, or a principal part, in bringing or prosecuting this suit.

The first deposition is to the effect that Hydur Ali Khan did marry the appellant, and therefore that it could not be said there was no heir to his property, since she, his heiress, was alive. The other proves the performance of the marriage ceremony. The Magistrate on this, and after a reference to a Principal Sudder Ameen known to have been a friend of Hydur Ali Khan, released the property from attachment on the 29th of December 1852.

On this or some other occasion the appellant seems to have procured the two papers called "General Testimonials," which are at pages 96-7 of the record, to be signed by her friends and acquaintance. The first of these purports to have been signed by the respondent Allahdia Khan. Allahdia Khan, when called by the appellant, the defendant, denied his signature to this paper, a fact which does not tend to his general credit, inasmuch as his Counsel has admitted that his subscription of that document can no longer be disputed.

Again, in due time, after the recognition of his title, the appellant applied for and obtained, by proceedings for the mutation of names, the transference from her husband's name to her own in the books of different Collectorates of the several landed estates belonging to him. She also got herself substituted as his representative in more than one suit; and having thus obtained the sole possession of the property, she remained in undisturbed possession of it until the commencement of this suit on the 2nd of February 1864.

Now, if Allahdia Khan were the residuary heir of Hydur Ali Khan (and if now such residuary heir, he was equally so in 1852), why did he fail for nearly twelve years to assert his title and to treat the appellant as the sole owner of the estate? It is said, and truly said, that he did not in his deposition, or the subscription to the testimonial, assert that she was the sole heiress of Hydur Ali Khan. It was also said that he could not have so treated her, inasmuch as being the widow merely of Hydur Ali Khan she could take only one-fourth of the estate with such a lien on the whole property as she might be entitled to for her dower. But it is to be observed that the latter proposition, which assumes that, if there were no residuaries, the three-fourths of the property would necessarily go to the Crown, may be contestable. As a general rule, a widow takes no share in "the return." But some authorities seem to hold that, if there are no heirs by blood alive, the widow would take the whole estate to the exclusion of the Fisc. In the present case, the Crown certainly did not press its claim against the appellant. However this may be, there is no reason why, when seeking to displace the attachment, Allahdia Khan should not have asserted his own title as residuary as well as hers as widow, the latter depending on proof of a marriage which has been called in question; nor is there any reason why afterwards, if he had a perfect title to three-fourths of the estate, he should have allowed her by mutation of names to get possession of the whole without taking the ordinary steps to assert that title before the Collector. And this conduct is made the more inexplicable by what he has put forward in this suit as his case; for, if it be true that, as he has contended on this record, the widow had never been entitled to more than the small Fatimi dower of Rs. 260, and had released her claim for that to her husband on his death-bed, it follows that she had no possible claim for a lien on the estate for dower; and again, if it be true, as he has also contended, that he had been recognised as a member of the family in the suit brought in 1832 by Hydur Ali against his step-mother, and had ever since been so recognised, his title as such was far less likely to be disputed by the widow when she was making common cause with him against the attachment than it is now after so many years of adverse possession.

No satisfactory explanation of his inaction has been given. A witness indeed, and a respectable witness, Mahomed Zahoor, has been called, who states, amongst other things, that a few days after the death of Hydur Ali Khan he made an ineffectual attempt to effect a compromise between Abdool Ali Khan and the appellant.

The second of the letters produced by this witness (the only one of the two letters which seems to have any bearing on the case), being dated as late as April 1864, obviously refers to a much later and equally ineffectual attempt at compromise soon after the institution of this suit.

But let it be granted that an earlier attempt was ineffectually made immediately after the death of Hydur Ali Khan, and therefore before the widow had obtained possession of the estate—what is the natural inference from that fact? Why, that if the claim were well founded, it would not have been so summarily rejected by the widow, who was dependent in some measure upon the respondent and his nephew for the proof of the disputed marriage, and that, if rejected, it would have been at once asserted by him by intervention in the proceedings for mutation of names or by a regular suit. If, therefore, there was such a negotiation for compromise in 1852, it seems probable that it was based rather on an attempt to extort money from the widow by a threat of a claim than by the assertion of a *bonâ fide* claim which was certainly as capable of being proved then as it is now.

Their Lordships will now proceed to consider the direct evidence which the respondent has adduced in support of his title. He examined his mooktear and nephew, Abdool Ali Khan, who, of course, have deposed to the pedigree as pleaded, but that witness, as the next in succession to the estate, is apparently *dominus litis*, and has almost equally with his uncle committed himself by his acts and conduct in 1852.

Another witness, Abdool Kadir Khan, the dealer in embroidered cloth, was examined. He states that he is of the same caste, and distantly related to the family, but his precise connexion with it is not shown.

The next class of witnesses are the six who are examined under commission at Hoshyarpore, in the Punjab. Of these, five depose to a pedigree produced by the first of them, which is in some respects inaccurate since it represents Hydur Ali as the nephew, and not the son of Wajid Ali. The sixth speaks to another pedigree, which, though accurate in the last-mentioned particular, differs in some slight particulars from that scheduled to the plaint. All these witnesses are the cultivators or ryots settled in this village. They none of them profess to have any connexion with Hydur Ali Khan or the respondent, except that they are of the same caste or brotherhood, a term of the widest import, which in one part of the record is admitted to embrace almost all Affghans. The family seems undoubtly to have been Affghans by race, who migrated eastwards from the village inhabited by these witnesses; the time of this emigration is left uncertain. Wajid Ali, who died in

1822, had before his death settled and become a landed proprietor in Zillah Ghazeepore, though he would seem at one time to have wandered as far south as Hyderabad.

It may be true, as stated by the Sudder Court, that trustworthy evidence concerning the pedigree might be more likely to be procured from the original *habitat* of the family than from Benares or Ghazeepore; but the particular witnesses examined of Hoshyapore do not even state that Bheekum or any of his alleged descendants were known by them as inhabitants of that place, and give no details concerning the family by which their means of knowledge may be tested.

Their Lordships, therefore, concur with the Zillah Judge in thinking this testimony worthless. Nor has the Supreme Court attached much value to it.

If the case of the respondent had rested on the evidence already considered, it can hardly be supposed that the Sudder Court would have disturbed the finding of the Zillah Judge, or held that the respondent had established his title. The learned Judges themselves say: "We do not ourselves "attach much value to the oral testimony on "either side."

Now, if the evidence on both sides is untrustworthy, the plaintiff, on whom lies the burden of proof, must fail. It is clear that the judgment of the Sudder Court, so far as it is unfavorable to the finding of the Zillah Court, proceeds entirely on the materials which have now to be considered. These are the documents and depositions said to have been filed in the suit of Hydur Ali and his step-mother, and to be records or copies of records in the Court of Ghazeepore.

The short history of that suit is this: Some years after the death of Wajid Ali Khan, and apparently in or about 1832, his widow, Raba Begum, contested the legitimacy of Hydur Ali Khan, who, if his son, was his son by a different wife. Hydur Ali Khan brought his suit, in which the principal issues were his right as an acknowledged son to share in Wajid Ali's estate, and the right of Raba Begum to a large dower claimed by her. The cause was first tried and decided in his favor by the Civil Judge of Ghazeepore on the 31st of December 1834, was appealed, remanded by the Sudder Court, re-tried, and finally decided in the plaintiff's favor by the Principal Sudder Ameen, who has been a witness in this cause, on the 26th of December 1838.

The following are the documents which have been, as it were, imported from the record of this former suit and made part of the record in this suit.

The first is an alleged copy of a petition said to have been presented by Hydur Ali Khan, without date. The second was a copy of the deposition of Allahdia Khan. The third was a copy of the deposition of Noor Mahomed Khan. The fourth was the final judgment of the 26th of November 1838. The fifth was a copy of the deposition of Makhanna Bebee or Begum, said to have been the mother-in-law of Waris Ali, which was filed at the last moment in the Lower Court. These were brought into the Lower Court, but the Sudder Court saw fit to admit the following further documents: A copy of the deposition of Khyrun, a slave girl who had been a witness for Raba Begum, but was cross-examined on the part of Hydur Ali Khan; a letter, said to have been addressed to Allahdia Khan and Abdool Ali Khan: the first by Raba Begum at the time of Wajid Ali's death, with a postscript by another party; a letter from Raba Begum to Noor Mahomed Khan, of the 20th of May 1823: the list of the papers filed in that suit, and the decree of the Zillah Court of Ghazeepore, dated 31st December 1834.

The questions that arise on all these documents are, can they be used at all as evidence in this suit against the appellant, and, if so, to what extent can they be so used, and what is the effect of them? As to that there is a preliminary question, namely, whether they have been sufficiently shown to be what they purport to be. The Sudder Court in its judgment seems to assume that they were proved to be what they purport to be, and were for all purposes legitimate evidence against the appellant. To the first of these documents it is now admitted by that judgment some suspicion attaches. The learned Judges say of their doubts concerning it, that those doubts cannot be positively answered, but that they (the Judges) cannot, therefore, confidently conclude the document to be a forgery. This is obviously an incorrect mode of disposing of the question, which was not whether the document was a forgery, but whether it had been proved to be a genuine document. The proof which is sufficient to establish the latter proposition may well be far short of that which was necessary to establish the former, and the defect of proof must of course fall on the party who propounds the document. The paper, as set out in the record, does not bear those marks of authentication which the Judges of the Sudder Courts state that they found upon it.

Their Lordships, however, are willing to assume that such marks were there. Notwithstanding this assumption, however, and considering the objections taken to the paper by the learned Judges themselves, the absence of Hydur Ali's name, the absence of any order passed upon it, and the want of any extrinsic evidence to show that it really was presented to Hydur Ali Khan, their Lordships have come to the conclusion that the Zillah Judge was right in treating it as of no value, and that it must be excluded from consideration.

Their Lordships have come to the same conclusion concerning the letters attributed to Raba Begum, on which it may further be remarked that the judgment of the Sudder Court in no way proceeds. The two judgments prove nothing, and are useful only as showing, as they undoubtedly do, that Allahdia Khan and Noor Mahomed Khan were examined as witnesses for the plaintiff in that suit.

There remain then the depositions, particularly those of the witnesses last mentioned. The Sudder Court, their Lordships think, has given too much importance in their judgment to those depositions. They obviously are not evidence of the facts stated therein, against the present appellant. They were taken in a suit to which she was not a party, upon issues wholly different from the issue raised in this suit; and she has had no opportunity of cross-examining the deponents. Nor do they seem to their Lordships to fall within the rule according to which declarations by a deceased party are admissible on a question of pedigree, or to constitute admissions binding on her deceased husband, whose heiress the appellant claims to be. The most that can be said is, that he produced these persons as witnesses and caused them to be examined upon his behalf upon issues upon which the pedigrees of the family and their relationship to it were not in question.

He cannot, therefore, their Lordships think, be taken to have made an admission binding on his heir of everything which these witnesses collaterally stated. The utmost which these depositions can be said to show is, that the alleged descent of Hydur Ali Khan and the respondent from Bheekum as a common ancestor is not a new story invented for the purposes of this suit, and that Hydur Ali may even to some extent have sanctioned the putting forward of that story by his witnesses. The depositions of the two women on cross-examination do not carry the case further. Admitting that these depositions to the extent which is stated may afford some slight corroboration of the direct evidence given for the respondents, their Lordships have come to the conclusion that, even with that corroboration, the evidence for him fails to meet the heavy burden of proof imposed upon him, not only by the nature of the case, but by the strong presumption arising from his acts and conduct already adverted to.

Their Lordships think it of the utmost importance that those who have thus sanctioned a long possession should not be allowed lightly to disturb it, or to escape from those legitimate inferences and presumptions which on a conflict of evidence arise from their own acts and conduct.

They may further remark that, according to the Mahomedan law, there may be a renunciation of the right to inherit, and that such a renunciation need not be express but may be implied from the ceasing or desisting from prosecuting a claim maintainable against another. Their Lordships do not say that in this case the point was not taken in the Court below, the acts and omissions of the respondent can be taken to afford an implication of actual renunciation; but they do say that, having before them a case in which there is very weak and suspicious evidence in favor of the title, and evidence on the other side conflicting with it, which is not of a stronger character, notwithstanding the apparent respectability of some of the witnesses called for the defendant, they have to choose between the case for the plaintiff corroborated merely by those slight inferences which arise from the depositions already considered; and the case for the defendant corroborated by the very strong presumptions arising from the conduct and acts of the respondent.

They have already stated that, in their opinion, the Sudder Court has given more effect than ought to be given to the proceedings in the suit of 1832; they think that that Court has not given sufficient weight to the presumptions arising from the respondent's conduct. And, therefore, though unwilling, even when there is a conflict between the two Courts below, to disturb the final finding on an issue of fact, they feel bound to say that in their judgment the respondent has failed to establish the title upon which he sued, and that therefore the Zillah Judge was right in dismissing the suit.

The result will be that their Lordships will humbly advise Her Majesty to allow this appeal to reverse the decree of the Sudder Court, and to order that in lieu thereof a decree may be made dismissing the appeal from the decree of the Zillah Judge to that Court with costs. The appellant must also have the costs of the appeal.

The 21st December 1871.

Present:

Sir James W. Colvile, Sir Montague Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Mahomedan Law — Dower — Hypothecation of Estate — Right of Widow in Possession — Decree—Set-off (of Unascertained Sums)—Amount—Presumption.

*Consolidated Appeals from the High Court at Calcutta.**

Mussamut Bebee Bachun and others

versus

Sheikh Hamid Hossein and others.

Moulvie Abdool Azeez and others

versus

Sheikh Hamid Hossein and others.

The hypothecation of an estate for dower is a right that does not arise under the Mahomedan law as the consequence of the gift of dower.

The right of a widow in possession is founded on her power, as a creditor for her dower, to hold the property of her husband, of which she has lawfully and without force or fraud obtained possession, until her debt is satisfied, with the liability to account to those entitled to the property subject to the claim for the profits received.

Setting-off one unascertained sum against another is a mode of settlement which, if suggested to the parties as a compromise, may, with their assent, be a fit end of a litigation, but cannot properly be made the basis of a decree between hostile litigants.

As to the amount of dower in this case, the question was, whether it was fixed at 40,000 rupees and one gold mohur, as alleged by the widow, or at 500 dirrums, under the Mahomedan law, as contended for by the respondents. The respondents, however, after the husband's death, became aware of the widow's claim for dower; and although they opposed the widow's claim to possession, yet, after she had obtained possession, they took no steps for ten years to interfere with her possession, thereby rendering the proof of the agreed dower more difficult, and perhaps relying upon that very difficulty. The PRIVY COUNCIL, therefore, treating this conduct of the respondents as indicating not only a consciousness on their part that the dower had been fixed at a considerable amount, as inferred by the High Court, but also a consciousness on their part that what the appellant asserted to be the amount was a true and proper amount, were of opinion that there was reasonable evidence to support the appellant's case to the dower she claimed.

THE principal questions in these appeals arise from a claim made by the appellant, as the widow of Sheikh Villayut Ally, a Mahomedan, to a dower of 40,000 rupees and one gold mohur, and a further claim on her part to retain possession of lands belonging to her late husband until her dower is satisfied.

Other claims have been made by the parties in these suits, some of which have been included in the present appeals, and to which it will be necessary hereafter to advert.

The appellant and Sheikh Villayut Ally, who both appear to have belonged to wealthy Mahomedan families in Behar, were married in 1820.

The husband died in March 1851, without issue, leaving the appellant his only widow.

It is not now disputed that, on his death without issue, the appellant became entitled as co-sharer to one-fourth share of her husband's estate, and that the other three-fourths descended upon Mussamut Raheebun, a sister of Villayut Ally, who died shortly after her brother, leaving the present respondents her heirs.

In April 1851 proceedings were instituted by the appellant in the Collectorate Courts to obtain the entry of her name in the Register in place of her husband's. She alleged in her petition that she was in possession by right of inheritance, and also *on account of her dower.* Objection was made on the part of the respondents; but it did not prevail; and the lands were registered by the Collector in the name of the appellant "without specification of share."

An appeal was made on behalf of the respondents to the Commissioner, who affirmed the decision of the Collector, declaring in his order that, if the objectors (the respondents) had any claim, they were at liberty to find their remedy by suing in the Civil Court.

The order of the Commissioner bears date on the 11th March 1852.

These proceedings relating to the possession of the lands are material not only to show that the appellant obtained the insertion of her name and possession soon after her husband's death, but principally because it is clear from them that she claimed to hold not merely her one-fourth share, to which she was entitled as co-sharer with the heirs, but the entire estate "on account of her dower."

The respondents, who were parties (objectors) in these proceedings, notwithstanding that they had the fullest notice of the appellant's pretension to hold the estate for her dower, took no step to dispute her claim, or to disturb her possession of the entire estate, from the date of the above proceedings until the commencement of the present suits, a period of nearly ten years.

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* From the judgment of Steer and L. S. Jackson, JJ., 24th December 1868.

On the 31st December 1862, both the suits, which are the subject of these appeals, were commenced, one by the respondents as the heirs of Mussamut Raheebun (deceased,) sister and heiress of Villayut Ally, against the appellant (the widow) to recover three shares of the estate, admitting her right as widow to one-fourth share. The other was a suit by the appellant against the respondents to establish her claim to dower, on the alleged ground that her claim to dower might otherwise be barred by the law of limitation.

The appellant in both suits asserted that the dower agreed to be given on her marriage was the sum of 40,000 rupees and one gold mohur, and she claimed to hold the estate until this dower was paid; whilst the respondents alleged that, in the family of Villayut Ally, the dower was laways fixed at 500 dirrums, and that this was the agreed amount of dower on this marriage.

The claim of Mussamut Bachun to hold the property to satisfy her dower cannot be founded upon an original hypothecation of the estate for her dower,—for such a right does not arise by the Mahomedan law as a consequence of the gift of dower, nor was there any agreement on the part of the husband to pledge his estate for the dower. But the appellant, having obtained actual and lawful possession of the estates under a claim to hold them as heir and for her dower, their Lordships are of opinion that she is entitled to retain that possession until her dower is satisfied, and that the respondents cannot recover the possession of their shares unless that satisfaction has taken place.

It is not necessary to say whether this right of the widow in possession is a lien in the strict sense of the term, although no doubt the right is so stated in a judgment of the High Court in a case of Ahmed Hossein *v.* Mussamut Khodeejee (4 Weekly Reporter, Civil Rulings, 368). Whatever the right may be called, it appears to be founded on the power of the widow, as a creditor for her dower, to hold the property of her husband, of which she has lawfully, and without force or fraud, obtained possession, until her debt is satisfied, with the liability to account to those entitled to the property subject to the claim for the profits received. This seems to have been the ground on which the claim of the widow to retain the possession was put in Ameeroon-Nissa and others *v.* Moorad-oon-Nissa and others (6 Moore's Indian Cases, 211). Whether the dower in this case has been discharged out of the proceeds of the estate, must, of course, depend on the determination of the principal question in the cause—What is the amount of the dower?

The question raised in the second issue in the dower suit was, whether the dower was fixed at 40,000 rupees and one gold mohur, as alleged by the widow, or at 500 dirrums, under the Mahomedan law, as contended for by the respondents.

In the possession suit, the issue (4th) was, whether Villayut Ally owed Mussamut Bachun 40,000 rupees and one gold mohur, for dower or not.

After a great deal of evidence had been given in the suits, the Principal Sudder Ameen held that the appellant had not made out that the dower was fixed at 40,000 rupees; and he also held that the statement of the respondents that the dower was fixed at 500 dirrums, "was conjectural."

On the appeal the Judges of the High Court were of opinion that they could not declare that the appellant was entitled to demand "the immense sum of dowry which she claims;" but they say,—"In a Mahomedan marriage between contracting parties of rank and influence, there must be of course some dowry, and it was probably a handsome one."

They also say: "The omission of the defendants to sue for their share of the inheritance indicates a consciousness on their part that Bachun had a claim of dower to be satisfied from the estate; and as the amount of dower was doubtless considerable, though we cannot declare what the exact amount was, we think that, under the circumstances of the case, it will be just and equitable to order that the defendants receive no mesne profits, except what has accrued since the institution of their suit. With this modification we confirm the judgment of the Lower Court in this case, with costs against Bachun."

Their Lordships are unable to consider this judgment of the High Court as a final or satisfactory determination of the main question in the suit. The learned Judges, whilst holding that the evidence did not satisfy them that the dower was fixed at 40,000 rupees, declare that it "was probably a handsome one," and that the conduct of the respondents indicates that it was "doubtless considerable." It appears to their Lordships that the widow, on the view taken by the High Court, was, at all events, entitled to a proper dower, to be ascertained according to Mahomedan law. But no attempt was made to arrive at what would be the proper dower, nor was any account taken of the proceeds of the estate. It is obvious, therefore, that the Court has set off one unascertained sum against another unascertained sum. It seems to their Lordships that this mode of settlement, if suggested to the parties as a compromise, might perhaps have been, with their assent, a fit end of the litigation; but they think it cannot properly be made the basis of a decree between hostile litigants, and therefore that the decree so founded ought not to stand in its present shape.

Their Lordships, in this state of things, have thought it right to look carefully at the evidence, to see whether they can safely arrive at a conclusion which would prevent the necessity of renewed litigation; and whilst fully alive to the importance and propriety of their ordinary rule, not to interfere, unless upon very clear grounds, with the findings upon questions of fact, where the Courts of First Instance and of Appeal have been in accord, they think this case comes before them under exceptional circumstances, there being in truth no explicit finding upon the question of the amount of dower.

The appellant called nine witnesses who were present at the marriage ceremony in 1820, and these persons say that the dower agreed to be given was a deferred dower of 40,000 rupees. About an equal number of witnesses called by the respondents, some of whom also say they were present at the marriage, state that the dower was fixed at 500 dirrums. It is clear from the evidence that Villayut and Bachun were both "in opulence from the time of their fathers," and it is consequently more probable that a high sum was fixed than such a low sum as 500 dirrums; indeed, the learned Judges of the High Court came to this opinion. Their Lordships would have hesitated long before holding that the appellant had established her right to the dower she claimed, if the proof had rested only on the oral testimony of the contract; but they think that that testimony receives very strong support and corroboration from the evidence given of what was usual in the district, and also from the conduct of the respondents themselves.

The evidence of what was customary principally came from the respondents' witnesses, and its truth may therefore be relied on. It shows that, in the province of Behar, and in the caste of Sheiks, 40,000 rupees was amongst wealthy people the usual dower. This amount was not invariable, but it was a very common and usual sum, and numerous instances are cited by the witnesses. One witness, Sheikh Shahamut Ally, says:—"In the caste of Sheiks in the Province of Behar and in Mahoonee, the custom is usually 40,000 rupees and one gold mohur, and the custom of inconsiderable dowers is of recent date."

It was pointed out by the learned Counsel for the respondents that, in some instances, this large amount of dower was fixed in marriages between persons who, apparently, were not wealthy; but this circumstance rather tends to corroborate the evidence that it was a usual and well-known dower than to rebut it.

Three cases, also coming from Behar, were referred to from the reports of the Sudder Dewanny Adawlut, where this sum of 40,000 rupees was the amount of dower. These instances cannot, of course, be regarded as evidence in the cause; but as matter of history, they are consistent with the testimony of the witnesses.

Their Lordships must not be understood to decide that the evidence of what was customary in the district would be sufficient in itself to fix the amount of dower, for if there had been no evidence of an agreed amount, it would have been necessary to make enquiries into the usual amount of dower in the family of the appellant; but it is impossible not to see that this sum of 40,000 rupees was a most usual amount to be fixed, and that fact gives probability to the statements of the witnesses for the appellant, who proved that such was, in fact, the dower agreed upon on this marriage.

Their Lordships are also disposed to attribute great weight to the presumptions which naturally arise from the conduct of the respondents. It is plain that, from the pleadings in the Collector's Court, and from other transactions, they became aware shortly after Villayut's death of the claim for dower, and, although they opposed the widow's claim to possession, showing they were alive to their rights, yet after she had obtained it they took no step for ten years to interfere with her possession.

The proper inference from this conduct is, that they were aware that she had a claim to a large dower, certainly to an amount far beyond the insignificant sum of 500 dirrums, which they now set up, and which, of course, must have been discharged long ago, and that they acquiesced in her holding the property for that larger dower. Knowing what her claim was, if they had wished to dispute it and to have the real amount ascertained, they might at any time have instituted a suit to obtain the possession of their shares of the estate, if the dower should appear to have been discharged. But they delayed doing so for ten years, thereby rendering the proof of the agreed dower more difficult, and perhaps relying upon that very difficulty.

Whilst the Judges of the High Court treat this conduct of the respondents as indicating a consciousness on their part that the dower had been fixed at a considerable amount, they do not seem to have drawn the further inference which we think may be fairly done, that it is also indicative of a consciousness on their parts that what the appellant asserted to be the amount was the true and proper amount; for if that were not so, it might reasonably be expected that they would have taken proceedings at an earlier period to dispute her claim.

In the result their Lordships have come to the conclusion that there was an agreed amount of dower on the marriage; and they are satisfied, concurring so far with the Courts of India, that the amount of dower set up by the respondents has been disproved.

Their Lordships further think, for the reasons given, that there is reasonable evidence to support the case of the appellant to the dower she claims.

The appellant also objected to the decree in the suit for possession, because certain tenements alleged to be her private property (in addition to the two tenements found by the Courts below to belong to her) ought to have been declared to be hers. But no evidence could be referred to by the appellant's Counsel in support of this contention, and there seems to be no ground for impeaching the concurrent decrees of the two Courts on this point.

Their Lordships will humbly report to Her Majesty that the appeals should be allowed in both suits, so far as they relate to the claim for dower; that the decrees under appeal should be reversed; and that it should be declared in both suits that the dower agreed to be given on the marriage was the deferred dower of 40,000 rupees and one gold mohur.

With regard to the suit for possession, their Lordships have considered whether they ought to advise Her Majesty to direct an account to be taken in that suit; but, considering the way in which the litigation has been conducted, that no account has ever been asked for by the respondents, and that mesne profits were not even claimed in the suit, they think it will be more convenient to follow the course taken in the case already cited from 6 Moore's Indian Appeals, p. 211; and to advise Her Majesty that that suit, so far as it prays possession, should be dismissed as against the appellant, without prejudice to any suit that may be instituted by the respondents for an account and administration of Villayut Ally's estate, consistently with the above declaration as to the appellant's dower.

Their Lordships are further of opinion that the order to be made in the appeal should, as far as possible, provide against the re-opening of any of the questions which have been litigated in these suits; the order, therefore, which they will humbly recommend Her Majesty to make will be the following:—

That the appeal be allowed, and that the decrees under appeal be reversed, and the following decree be made in both suits:—

That it be declared that the dower agreed to be given on the marriage of the appellant with Sheikh Villayut Ally, deceased, was the deferred dower of 40,000 rupees and one gold mohur; and that the appellant, being in the possession of the estates of the said Villayut Ally, is entitled to retain such possession until the whole of what is due to her in respect of such dower has been paid and satisfied.

That it be further declared that the whole of the property claimed in the suit wherein the respondents are plaintiffs, with the exception of Mouzah Poondareek and Mouzah Kurareea, and the sum of 300 rupees in the decree of the Principal Sudder Ameen mentioned, belonged to and formed part of the estate of Sheikh Villayut Ally deceased; and that the respondents, as the representatives of Mussumat Raheebun deceased, are entitled to three-fourths of the said property, subject to the claim thereon of the said appellant in respect of her before-mentioned dower.

That it be ordered that the suit of the said respondents, so far as it seeks to recover possession of the shares of the said estate, do stand dismissed as against the appellant, but without prejudice to any suit that may hereafter be instituted by them for an account and administration of the estate of Villayat Ally, or to enforce their rights therein consistently with the above declarations.

That the costs of both the said two suits in the Zillah and High Courts should be apportioned between the parties, according to the practice of those Courts in cases wherein a litigant is only partially successful; and that the costs (if any) which have been paid by the appellant under the decrees under appeal should be re-paid to her.

That the causes be remitted to the High Court, with directions to carry out this order.

The appellant having failed as to part of the subjects of her appeal, no costs will be given in this appeal.

The 21st December 1871.

Present:

Sir James W. Colvile, Sir Montague Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Minors — Duty of Guardians — Compromise — Burden of Proof.

*On Appeal from the High Court at Calcutta.**

Baboo Lekraj Roy

versus

Baboo Mahtab Chund and others.

It is undoubtedly the duty of guardians scrupulously to regard the interests of minors in dealing with their estates; and the Court will, when necessary, enforce the performance of this duty. But the interests of infants would seriously suffer, if a notion were to prevail that guardians were bound for their own security to contest all claims against an infant's estate, whether well or ill founded; and such a notion might prevail if the compromise of a claim of debt confirmed by a decree of a Court were to be set aside after 16 years without distinct proof of fraud.

In this case the burden of proving his allegations that the suit was fictitious, and the compromise of it fraudulent and collusive, lay upon the plaintiff; and an element in that proof, without which his case amounted to nothing, was the non-existence of a debt. But as the lower Courts fell into an error in point of law in assuming that the burden of proof of the debt lay upon the defendant, the PRIVY COUNCIL reversed their decisions and dismissed the suit with costs.

THE principal facts of this case are as follows:—

Salamut Roy, a merchant and banker, employed Laljee Mull as the principal manager of his business. On the death of Salamut Roy, Laljee Mull continued to manage the business, which was carried on in the name of Surbeshurry, the widow, and Lekraj Roy, the infant son of Salamut Roy. Laljee Mull adopted Mahtab Chand, the infant son of his brother, Inderjeet Mull, and appointed, by will, Inderjeet Mull and Gunga Pershaud, a gomastah in his service, the guardians of his adopted son. Laljee Mull died in August 1845, and on the 26th September 1845 a certificate, under Act 20 of 1841, was duly granted to the guardians, notwithstanding the opposition of Surbeshurry.

In January 1846, Surbeshurry, as the mother and guardian of Lekraj Roy, instituted a suit against Inderjeet Mull and Gunga Pershaud to recover from the estate of Laljee Mull the sum of 176,152 rupees 7 annas 4 pie, being the amount of alleged defalcations or misappropriations on the part of Laljee Mull. After various proceedings had taken place in this suit, and witnesses had been examined on both sides, it was settled by a "Ruffanamah," or deed of compromise, whereby it was agreed that 74,000 rupees should be paid by the defendants in instalments. This "Ruffanamah" was filed on the records of the Court on the 11th of January 1847 and confirmed by a decree.

Mahtab Chand came of age in October 1861, and on the 3rd January 1863 commenced the present suit against Lekraj Roy, the son of Surbeshurry (who had died in 1850), to recover from him all that had been paid, together with interest thereon, under the above deed of compromise, amounting to 68,758 rupees 15 annas 6 pie, on the ground that the suit of 1846 was a fictitious one, and that the compromise of it was fraudulent and collusive between Surbeshurry and the guardians of Mahtab Chand.

Judgment was given in the plaintiff's favor, to the full amount of this demand, in the Zillah Court; and that judgment was subsequently affirmed in the High Court. Against this judgment the defendant appeals.

There is no allegation of fraud against the defendant, who, at the time of the transaction which is impeached, was a child of 10 years' old. The plaintiff took upon himself the burden of establishing fraud and collusion on the part of the defendant's mother, and his own guardians, one of whom was his natural father. It was contended that, inasmuch as the guardians were dealing with the property of an infant, it was incumbent on the defendant to show that such dealing was for the infant's benefit; and the case of Hunooman Persaud Panday *v.* Mussamut Babooee Munraj Koonweree (6 Moore's Indian Appeals, 393), followed by Lalla Bunseedhur *v.* Koonwur Bendeseree Dutt Singh (10 Moore's Indian Appeals, p. 454), was referred to in support of this proposition. But it is to be observed that, in the latter case, fraud on the part of the guardians was clearly established, and that in the former the question turned on the power of guardians to charge an infants' estate by way of loan or mortgage, whereas no such power is here in question, inasmuch as it was the manifest duty of the guardians, who were also administrators of the estate, (having received a certificate in pursuance of Act XX of 1841), to pay all just debts of the testator.

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* From the judgment of Morgan and Shumboonauth Pundit, JJ., 5th January 1865.

Their Lordships have carefully examined the evidence on the part of the plaintiff, and are unable to find in it anything amounting to proof, that either the institution of the suit or the compromise was fraudulent or collusive. Although the greater part of the proceedings in that suit have been destroyed, it is sufficiently plain from what remains that it was to all appearance a contested suit, and that it had proceeded to the point of depositions being taken on both sides before it was compromised under a decree of the Court. The evidence by which the plaintiff seeks to set aside that decree which had been in force for sixteen years is that Gunga Pershaud filled the double character of guardian of the plaintiff and gomastah to Surbeshurry, that Inderjeet Mull was a man of weak understanding, under the influence of Gunga Pershaud, and that it was publicly known at the time that the settlement was unjust. The latter description of evidence was inadmissible, while the former could at the most raise a certain amount of suspicion, not approaching to proof, or even presumption, of the *mala fides* of Gunga Pershaud, while, on the other hand, there is a strong presumption against Inderjeet Mull entering into a conspiracy for the purpose of defrauding his own son.

Their Lordships have further examined the evidence of the defendant, with a view to ascertain whether it supplies the defect of proof on behalf of the plaintiff. It undoubtedly appeared that the defendant absented himself in order to escape examination, that he withheld the account-books in his possession until peremptorily required to produce them, and abstained, without explaining why, from calling some persons still alive who are described as forming an assembly of arbitrators, to whom the accounts of Laljee Mull were submitted before the compromise in the former suit. It is further stated by the Judge of the Zillah Court that the accounts when produced disclosed upon the face of them only a balance of about 18,000 rupees as due from Laljee Mull, upon which two observations arise—first, that, whatever the defalcations of Laljee Mull may have been, they would not necessarily have appeared on the mere inspection of the books; and, secondly, that if a defalcation to the above amount appeared on Laljee Mull's own showing, the defendant would be entitled to retain at the least that amount. We do not dwell on the deposition of the witness called by Gunga Pershaud, apparently with the view of contradicting the plaintiff's case, which was that Inderjeet Mull was a tool in his (Gunga's) hands, and of exonerating himself by throwing the whole responsibility of the transaction upon Inderjeet. Although the plaintiff, if he had proved a case of fraud, might have been justly entitled to contend that it was not answered by that of the defendant, still their Lordships cannot regard the case of the defendant as supplying that proof of fraud which the plaintiff failed to adduce, and without which the compromise of 1847 could not be set aside. It is undoubtedly the duty of guardians scrupulously to regard the interests of minors in dealing with their estates, and the Court will, when necessary, enforce the performance of this duty. But the interests of infants would seriously suffer if a notion were to prevail that guardians were bound for their own security to contest all claims against an infant's estate, whether well or ill founded; and such a notion might prevail if the compromise of a claim of debt confirmed by a decree of a Court were to be set aside after sixteen years without distinct proof of fraud.

Their Lordships fully subscribe to the rule which has been more than once laid down, that a very strong case on the part of the appellant is required to induce them to set aside the finding of two Courts on a question of fact. In this case, however, they are of opinion that the Judge of the Zillah Court fell into an error in point of law, in assuming that the burden of proof of the debt lay upon the defendant. The burden of proving his allegations that the suit was fictitious and the compromise fraudulent and collusive, lay, upon the plaintiff; and an element in that proof, without which his case amounted to nothing, was the non-existence of a debt. It rested, therefore, with him to give, at all events, some *primâ facie* evidence of this before the burden of proof was shifted to the defendants. Inasmuch as this error seems to have influenced the decision of both the Indian Courts, who, in the opinion of their Lordships, have given undue weight to the non-appearance of the defendant (a mere child at the time of the transaction in question), and to his reluctance to produce the books, their Lordships consider that they are not infringing the rule above referred to by deciding in favor of the appellants.

On these grounds their Lordships will humbly report to Her Majesty that the decrees of the High Court and of the Zillah Court ought to be reversed, and that in lieu thereof a decree ought to be made dismissing the respondent's suit with costs, and their Lordships will direct that the appellants have the costs of this appeal.

The 8th January 1872.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Enhancement—Rent—Notice—Dismissal—Appeal—Act VIII of 1869, *B. C., s.* 102.

Case No. 888 of 1871.

Special Appeal from a decision passed by the Judge of Tipperah, dated the 10*th April* 1871, *affirming a decision of the Moonsiff of Toohgeebaggrah, dated the* 20*th January* 1871.

Golack Chunder Dutt (Plaintiff) *Appellant,*

versus

Meah Rajah Mijee (Defendant) *Respondent.*

Baboo Doorga Mohun Doss for Appellant.

Baboo Huree Mohun Chuckerbutty for Respondent.

In this case the Judge wrongly dismissed plaintiff's suit, on the ground that no notice had been served on defendant, mistaking the nature of the suit, which was not one for enhancement, but to recover rents at rates previously settled, no notice being required in the latter case. But as the value of the suit was under Rs. 100, the High Court could not interfere, there being no appeal to it under Act VIII of 1869 B. C. s. 102.

Glover, J.—A PRELIMINARY objection has been taken by the special respondent's pleader that, under Section 102 Act VIII of 1869, B. C., there is no appeal from the Judge's order.

That Section lays down that there shall be no appeal in suits under the Act, the value of which does not exceed Rs. 100, where the right to enhance or vary the rent of a ryot has not been determined, and it is contended that the Judge has decided no such right in the present case.

It appears that there is a long standing dispute between these parties as to the amount of rent payable; and the plaintiff got an *ex parte* decree for the rent of half of the year 1275, at the rate of Rs. 52-7-4. This decree he endeavored to use as estopping the defendant from setting up a defence in the present suit, which is for rent due in the year 1277.

The Judge held that the former decree was not an estoppel, and then finding that no notice had been served on the defendant, dismissed the plaintiff's suit. It seems clear that the Judge must have misunderstood the nature of the plaintiff's suit, which was not one for enhancement, but to recover rent at rates previously settled. In such a suit "notice" would not be required; and were we in a position to hear the appeal, we should decide that the Judge was wrong.

But Section 102 of the Rent Law seems to us to bar an interference. It cannot be said that the Judge has decided any question of right to enhance or vary the defendant's rent. He has refused to go into that question, because the preliminary step of serving notice had not been taken, and so the value of the suit being under Rs. 100, there is, it seems to us, no appeal to this Court.

The 10th January 1872.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Adverse Possession for 12 *years — Limitation — Section* 20 *Act XIV of* 1859—*Decree for Possession not executed.*

Case No. 835 of 1871.

Special Appeal from a decision passed by the Additional Subordinate Judge of Mymensingh, dated the 28*th April* 1871, *reversing a decision of the Moonsiff of Baseelpore, dated the* 23*rd August* 1870.

Ameeroonissa Begum (Defendant) *Appellant,*

versus

Amir Khan (Plaintiff) *Respondent.*

Baboo Debendro Narain Bose for Appellant.

Moonshee Mahomed Yusoof for Respondent.

A having obtained a decree for possession against B, and, notwithstanding that decree, B remained in wholly undisturbed possession for 12 years, without acknowledging A's title, B was considered as having acquired a good title by his 12 years' possession, A's decree obtained intermediately having become null under Section 20 Act XIV of 1859.

The principle adopted in this country appears to be that the period of possession which is sufficient to bar the remedy is also sufficient to transfer the right.

Markby, J.—THIS appeal relates to a share in certain land, possession of which the plaintiff in this suit seeks to recover. The plaintiff has shewn that he was in possession of it from 1856 to 1868 for a full period of twelve years, claiming to hold it under a purchase from certain persons whom he alleged to be the owners.

It appears that in 1859 a suit was brought by the present defendant against the present plaintiff to recover possession of this very identical land, and that the present plaintiff set up as a defence in that suit the purchase on the strength of which he has all along claimed to hold, but failed, and a decree was given against him.

It is found by the lower Courts that, notwithstanding this decree, the plaintiff remained in undisturbed possession of the property until the year 1868 when the defendant induced the tenants to give *kubooleuts* to her and acknowledge her as the owner, since which time she has been collecting the rents.

The Lower Appellate Court has held that under these circumstances the plaintiff has a good title to the property by reason of his 12 years' possession.

Upon the argument of this appeal, it is not denied that 12 years' uninterrupted possession will give a good title to land in accordance with the decision in the case of Gunga Gobind Mundul *vs.* the Collector of the Twenty-four Pergunnahs and others, 7 W. R., P. C., page 21 ; but it is contended that the prosecution of the suit in 1859, and the decree obtained therein, was an interruption, and that after that decree the plaintiff would not get a title until at least 12 years had elapsed from the date of the decree.

It is somewhat puzzling to find such a curious state of things as a party obtaining a decree for possession and then making no use of it. But as under Section 20 Act XIV of 1859 that decree cannot now be executed and has in fact become absolutely null, and as plaintiff did, notwithstanding the decree, remain in possession wholly undisturbed, and further as there is no suggestion that the title of the defendant was in any way whatever acknowledged by the plaintiff, the allegation being that the defendant actually obtained possession under the decree, which allegation is found to be false, I think the plaintiff must be considered as having acquired a good title by his 12 years' possession. Had the situation of the parties been reversed and the defendant had, instead of obtaining recognition of her title by the tenants, brought the suit to recover possession, she must have failed, inasmuch as her cause of action clearly had not arisen within 12 years ; and the principle which has been adopted in this country, and which I think is a most salutary one, appears to be that the period of possession which is sufficient to bar the remedy is also sufficient to transfer the right.

I, therefore, think that the decision of the lower Appellate Court upon this point was right in law, and that this appeal ought to be dismissed with costs.

Bayley, J.—I concur.

The 11th January 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble G. Loch, *Judge*.

Burmah Timber Trade—Tainzahs (Effect of)—Construction—"Received"—"Entered."

In the Matter of

The Burmah Company, Limited, *Petitioner*,

versus

R. Snadden, *Opposite Party*.

Mr. W. A. Montriou for Petitioner.

The Advocate-General for Opposite Party.

According to the timber trade in Burmah, the holding of what are called *tainzahs* does not give possession of the timber ; and where the parties in a contract use the word "received" and do not think fit to use the word "entered," they must be taken to have intended the word "received" to have the meaning of having obtained possession of the goods and not merely of having entered and got *tainzahs* for them.

Couch, C. J.—THE parties to this suit, it appears, were well acquainted with the nature of this trade and the practice of entering the timber and receiving what are called *tainzahs* for it. With this knowledge they entered into the agreement of the 31st August 1867, and in that they say that "the timber "that has arrived *and been received* by each "of the contracting parties is to be retained "by them as their respective property abso-"lutely, provided always that the logs "already received do not exceed the share or "moiety now agreed on." Now I think that, if the parties had intended that this was to mean timber which had been *entered*, and a *tainzah* granted for it, they would have used that word in their contract instead of the word "received." They are, as I have said, parties not entering into the contract in ignorance of the circumstances; and when we find the word "received" in the contract, I do not think a Court is justified in holding that that meant "entered" merely. The word must receive its ordinary meaning, and we must consider that it means the timber which was received by the parties. And that that was understood at the time this plaint was filed as the meaning, appears from the language of the plaint itself; for, after setting out the contract, the plaint goes on to say that "the first defendant, who had by "the terms of the deed the management for "the effectual carrying out of the agreement, "jointly with Mr. Hannay, first plaintiff's "agent, had, at the time the said deed was "entered into, and had since, *obtained deli-"very* of 367 logs of timber" not entered and got *tainsahs* for them, but had obtained delivery of them.

Then the case proceeds to trial, and in his decision the learned Recorder says that the first defendant has been unable to obtain possession by reason of various prohibitory orders and injunctions. I do not think it matters what the reason was. It was incumbent upon the plaintiffs to show that the defendant had received the timber with which they sought to charge him; and the Recorder appears to think, and indeed it is plain from the way in which he deals with the case, that there was no evidence before him, nor had any been offered, of a receipt by the defendant Snadden of the timber. Then the Recorder deals with the case in a manner which, to my mind, shows not only that he had not such evidence, but that he did not even think that he could treat the entering the timber and obtaining a *tainsah* as *primâ facie* evidence of possession, because he says that "the finding on the third head is dependent on the interpretation I have already noticed to be put on the word 'received,'" and he takes upon himself to say that, taking all the circumstances of the case into consideration, "the only sense in "which the word 'received' can be construed "as against the plaintiffs is that the timber had "been entered at Kadoe, inasmuch as, by "entering such timber, first defendant put "it out of the plaintiff's power to obtain "possession, as they would otherwise have "done, of the timber for themselves. Now it appears to me that in doing this he was really taking upon himself to alter the contract which these parties had made. He had no right, especially when they must have known perfectly well the nature of the trade, and what was done with regard to entering the timber, to substitute the word "entered" for the word "received" in the contract. He ought to have put the ordinary construction upon the word "received," and if there was no evidence in the case to satisfy him that the timber had been received, he ought not to have decided in favor of the plaintiffs.

Then it is argued that the leaving of the *tainsahs* was in fact the possession of the timber, or that it was such evidence as threw upon the defendant the *onus* of explaining it and showing that he had not possession. I think that is not so; and the nature of these *tainsahs* is shown by the judgment of the Court in the case to which I have been referred, and which judgment to my mind shows that the possession of the *tainsahs* does not give possession of the timber. The judgment in that case was the judgment of Mr. Justice Trevor and Mr. Justice Glover. They say "the lower Court found (1) that there was no "mortgage of the timber, (2) that the plain-"tiffs never had possession of the 170 logs, "and that the *tainsahs* gave them no special "rights against them, and (3) that, although "the defendant's conduct was suspicious, "there was no sufficient proof that the pur-"chase was *malâ fide* and with notice." Then having disposed of the first question with regard to their being a mortgage of the timber, the judgment proceeds: "Then, as to the "*tainsahs*, had they the effect of giving abso-"lute possession of the 176 logs to the bor-"rowers, and, if not that, did they give any "rights to the parties holding them and "operate as an equitable lien on the timber "which they represented until the appellant's "claims were satisfied;" and after stating that the Judge below had found as a fact that the *tainsahs* were for a time in appellant's possession, they say,—"We think that the "evidence, although not so clear as it might "have been had the parties been properly "examined, is sufficient to prove more than "this, and that the balance of testimony "inclines in favor of the appellant's story "that the certificates were made over to them "and remained in their hands till their "interview with the borrowers, when the "woman Mah Bhmah snatched them from "Kymet Nee. But granting that this per-"son had possession of the *tainsahs*, and "was improperly deprived of them, we do "not think that these documents gave him "any actual possession of the timber. They "were endorsed, and, therefore, by the custom "of the country, the holder could not sell "the property they represented; they, in "short, appear to us to have been merely a "security for the original debt, an equitable "lien which prevented the owner of the "timber from parting with it to third parties, "except on the understanding that it was so "burthened."

The Court say that ***tainsahs*** do not give possession of the timber, and in fact they would not. The endorsement may transfer the property, but the possession is not in the party holding the ***tainsah***. He has got a right of property, and he may have that kind of possession, possibly, which goes with the property, and which is in many cases quite distinct from the actual possession; and where the parties in this contract used the word "received," and did not think fit, which they might have done if they had so intended, to use the word "entered," I think that they intended it to have the meaning of having obtained possession of the goods, and not merely of having entered and got ***tainsahs*** for them. Many circumstances might intervene which would prevent their obtaining possession of the goods and disposing of them; and as the learned Advocate-General observed, make it extremely inequitable that they should be charged with the value of them.

I see no ground for admitting the review; and it appears to me that it must have been owing to the ability of the learned Counsel, and the strenuousness with which he argued the matter, that the late Mr. Justice Norman was induced to issue the rule. The rule must be discharged with costs; fees 100 rupees.

Loch, J.—I concur.

The 11th January 1872.

Present:

The Hon'ble F. B. Kemp and W. Ainslie, *Judges.*

Putnee Talook—Setting aside Sale—Regulation VIII, 1819*—Joint Sharers—Estoppel—Section 7 Act VIII of* 1859*—Registration—Appointment of Sezawal—Legal Tender—Fraud and Collusion.*

Cases Nos. 177 to 180 of 1871.

Special Appeals from a decision passed by the Officiating Judge of Midnapore, dated the 18*th November* 1870, *affirming a decision of the Subordinate Judge of that district, dated the* 7*th August* 1869.

Ram Churn Bundopadhya (Defendant) *Appellant,*

versus

Sreemutty Dropo Moyee Dossee and others (Plaintiffs) *Respondents.*

Mr. Woodroffe and *Baboos Sreenath Doss* and *Hem Chunder Banerjee* for Appellant.

Mr. R. T. Allan and *Baboos Romesh Chunder Mitter, Bhowanee Churn Dutt, Ashootosh Dhur,* and *Kamala Kant Sein* for Respondents.

Held by Kemp, J., that, where, as in this case, four suits are brought with the common object of setting aside the sale of a *putnee talook* by four joint tenants, two of whom are not estopped under Section 7 Act VIII of 1859, this Court cannot in equity declare the sale to be good or bad in part, but must decide as to whether the sale is to stand or fall for the whole *talook.*

Per Ainslie, J.—But if one of the joint tenants in a former suit claimed a 2-anna, instead of a 4-anna share, she cannot now be allowed to supplement her claim or take interests in the *putnee* which she could not have enforced independently of the sale.

Per Kemp, J.—On the death of a registered putneedar, a zemindar is not bound to recognize any one as his tenant without registration in his *sheristah*; nor is he prevented from putting in a *sezawal* to collect the rents until a declaration of the rights of the deceased putneedar's heirs.

A tender to stay a sale under Regulation VIII. 1819 must be of the whole of the zemindar's demand and without any condition as to its being kept in deposit by the collector.

Per Ainslie, J.—It can be only on the ground that a sale is carried out in respect of arrears not really due, that fraud and collusion can be imputed.

Kemp, J.—These are four special appeals from the decision of the Officiating Judge of Midnapore, Mr. A. G. R. Bainbridge, dated the 18th November 1870, confirming a decision of the Subordinate Judge of that Zillah, dated the 7th of August 1869. It is admitted that one and the same decision will govern the four appeals.

The suit involves the question whether a sale of a ***putnee talook*** under the provisions of Regulation VIII of 1819 is to be set aside or not. There are four plaintiffs who claim to have separate interests in the said talook, and the common object of their suits is to have the sale set aside. The talook in question was purchased in 1855-56 by Tarinee Dey in execution of judgment for a debt due to her deceased husband. The purchaser, Tarinee, caused her name to be registered in the ***sheristah*** of the zemindar, the defendant below, respondent in this Court, and remained in possession of the ***putnee talook*** until she died. Her death took place in February 1866 and at that time the talook was admittedly in arrears.

The zemindar defendant, on the 7th September 1866, deputed a ***sezawal*** to attach and manage the talook, on the ground that arrears of rent were due and that the successors of the deceased proprietor Tarinee Dey had not attorned to him.

A summary suit was instituted by the zemindar, against Thakoor Moyee as heiress of Tarinee Dey, to enforce payment of the arrears due, amounting to Rs. 1,583. These proceedings, it appears, were struck off the file for default. A subsequent suit was instituted against the same party,—namely, Thakoor Moyee,—under the provisions of Act X of 1859, to recover the same arrears, and the zemindar obtained a decree in confession of judgment. About the same time, one Prosunno Koomaree, the widow of one Ram Kanye Mytee, instituted proceedings under the provisions of Section 27 of Act X of 1859 to enforce registration of her name in the zemindaree *serishtah*. She alleged that the talook in question had been purchased by her husband in the name only of Tarinee Dey; that her husband was the beneficial owner, and that she, Prosunno Koomaree, as widow and heiress, was entitled to the whole talook.

These proceedings were opposed by the zemindar as well as by Thakoor Moyee, who insisted that Tarinee Dey was the recorded as well as the beneficial owner of the property, and eventually the application was rejected. This order was confirmed in appeal on the 27th March 1867.

Three regular suits were then instituted against the zemindar in conjunction with Thakoor Moyee, one by Prosunno Koomaree, in which she lowered her claim, abandoning the title previously set up to the whole talook, and alleging that her husband Ram Kanye Mytee and his brothers were joint and the tenure ancestral property, and not self-acquired; she claimed only a moiety.

The second suit was brought by Dropo Moyee under the same title, but claiming only a two-anna share.

The third was brought by Kripa Sindoo Paul in which he set forth the same title for his vendors, Luckhee Prya and Parbutee, and claimed, under two purchases from these two ladies, a four-anna share in the said talook.

The defence in the three suits was substantially a common one to the effect that the talook was not the ancestral property of the brothers, but the self-acquired property of Tarinee, through whom Thakoor Moyee was exclusively entitled. Pending the trial of these suits, the zemindar again took summary proceedings against Thakoor Moyee for arrears of rent due for the years 1866-67, amounting to Rs. 1,052, but they were struck off for default.

The result of the three regular suits was that on appeal it was decided that the talook, was the ancestral property of Ram Pershad Mytee alone, and had descended in the ordinary line; consequently, Prosunno Koomaree took nothing, and the four daughters of Ram Pershad Mytee, including Thakoor Moyee, were declared to be entitled each to four annas.

The talook was then lotted for sale for the arrears of rent due to the zemindar, when Prosunno Koomaree, Dropo Moyee, and Chundee Churn Ghose assignee of Kripa Sindoo Paul, the party referred to above, appeared before the Collector, and tendered what they considered to be the proportions of the arrear respectively due by them. The zemindar refused to accept these tenders, and the Collector rejected their applications.

The sale came on, and the same parties, it is alleged, again applied to the Collector, tendering the entire arrear; but this application was also rejected, because the zemindar refused to accept tender, and because the biddings at the sale had already commenced. The sale took place, and the zemindar defendant became the purchaser for Rs. 7,550 which is admitted to be an adequate consideration.

After the sale, Luckhee Prya and Parbutee sold their additional two-anna shares, obtained by the aforesaid litigation, to Sreemunt Lall Misser.

The proceeds of the sale of the putnee were drawn out by Thakoor Moyee, after satisfying the two judgments obtained by the zemindar against her.

The present four suits were then instituted,—

No. 1 by Sreemunt Lall Misser,
„ 2 by Chundee Churn Ghose,
„ 3 and 4 by Dropo Moyee,

against the zemindar and Thakoor Moyee, to set aside the sale and to recover possession of the shares which the respective plaintiffs claimed to represent.

In the suit of Sreemunt Lall Misser, the sale was impeached for fraud and collusion. The zemindar and Thakoor Moyee made the same defence. The pleas in bar were, 1st, undervaluation; 2nd, estoppel; and on the merits a denial of any fraud or collusion and the averment that the zemindar had only exercised his legal rights.

In the suit of Chundee Churn Ghose, the case of the plaintiff was substantially the same; the zemindar answered much to the same effect as in the suit of Sreemunt Lall Misser, omitting the plea of estoppel. Thakoor Moyee did not defend this suit.

In the first suit by Dropo Moyee, she recited in her plaint the decree which she had obtained against the defendants in the previous suit referred to above for two annas of the tenure, and alleged that before she could execute her decree the defendants fraudulently brought the whole tenure to sale. Her suit sought to set aside the sale as fraudulent and to recover possession of the subject-matter of her decree with mesne profits. The zemindar appeared, and omitting the plea of estoppel in other respects, raised the same defence.

In the second suit by Dropo Moyee, the plaint recited the previous litigation and the effect thereof, and she sought to establish her title to the remaining two annas to which she was declared entitled by the said litigation, to set aside the sale as fraudulent, and to recover possession of the said share with mesne profits. The zemindar alone appeared, and made the same defence as in the suit of Sreemunt Lall Misser.

The Judge observes that the questions for trial were briefly these :—

1st.—Whether the suits, as brought, could be sustained.

2nd.—Whether the sale was good.

3rd.—The nature of the relief, if any, to be given.

The Judge tried all the suits together, a course which had been pursued by the Subordinate Judge.

With reference to the plea of undervaluation, the Judge held that there was nothing in it, as the principle upon which the suit was valued was not questioned by the defendant in the previous suit, and because in the present cases the sale price paid by the zemindar was not a safe test of the value of the *putnee.*

As to the plea of estoppel, the Judge makes the following remarks. The words of the Section relied upon, namely Section 7 Act VIII of 1859, are :—" If a plaintiff relinquish or omit to sue for any portion of his claim," which, it is insisted, Dropo Moyee as well as Luckhee Priya and Parbuttee, in respect of the subject-matter of their sale to Sreemunt Lall Misser, have done, because their title to four annas each, as daughters of Ram Pershad Mytee, vested on the death of Tarinee Dey, and consequently existed at the time when the previous suits for two annas only by Dropo Moyee and by Kripa Sindhoo Paul in their rights and to which they were parties, were instituted. " I think," says the Judge, " that the proper test to apply to the " solution of the question is whether the " claims in the present suits are founded on " causes of action distinct from that which " formed the foundation of the former suits." Applying this test, the Judge observes that " the cause of action in the former suits was " Ram Pershad Mytee's title to a moiety of " the *putnee,* whereas the foundation of the " present suits is the title to the other " moiety since judicially declared."

The Judge, overruling the pleas in bar, proceeded to consider the cases on their merits. The Judge found that no disputes arose until after the death of Tarinee Dey which occurred in February 1866 ; that the tenure was then in arrears ; that rival claimants to the tenure started up on the death of Tarinee, and that the zemindar had an indefeasible right to hold the entire tenure answerable for the arrears. The Judge holds that it was indifferent to the zemindar who the putneedars eventually entitled after the death of Tarinee Dey, might be, that in case of non-payment of rent the zemindar's remedy was by summary proceedings under the provisions of Regulation VIII of 1819, and that the mere devolution of the tenure by the death of the former tenant involved only a descent of the tenure in the state in which it was held at the time, and not a transfer or purchase, therefore it did not entitle him to demand the fees for registration prescribed by Regulation VIII of 1819, and on failure, to send a *sezawal* to attach and hold possession.

The deputation of the *sezawal,* observes the Judge, deprived the putneedars of their power to collect subsequent arrears, and says the Judge, if it were necessary to go so far he was inclined to think that the effect of this act on the part of the zemindar was to absolve the putneedars from liability for rent thenceforward until the *sezawal* was withdrawn, and that, if that be so, the sale might be set aside on this ground alone, but the conduct of the zemindar in other respects was considered by the Judge to have been tainted with fraud, inasmuch as though he was cognizant of the litigation going on to which he was a party, he persisted in looking to Thakoor Moyee alone for the rent, suing her alone and ignoring the other claimants of the *putnee.*

The Judge sums up thus:—" When there- " fore I find the zemindar omitting to enforce " his legal remedies, going out of his way to " make common cause with one of several "rival claimants, illegally taking possession "of the tenure, and, after the title of the "other claimants is finally declared against "him by Court, bringing the tenure to sale "while in his possession and purchasing it "himself, what am I to infer from that course "of conduct? surely that he intended the "result of his own acts, in other words, that "the sale was a contrivance to defeat the "rival claimants."

The sale was reversed and set aside, and it was declared that the plaintiffs, respondents below, were entitled to possession of the undivided tenure and to an account *in solido* of collections and profits realized out of it, in order that they may eventually receive as mesne profits what they could have reasonably received as undivided putneedars in possession but for the wrongful acts of the opposite parties.

This decree was declared not to prejudice Thakoor Moyee as co-sharer in the putnee to the extent of four annas. In regard to the refund of the purchase-money, the Judge observes that he has not omitted to consider this question; he observes "that as none of "it has reached the hands of the plaintiffs, "and it has all been drawn out by one or "other of the parties who have been found "to have been acting in collusion throughout," he leaves "them to adjust this matter between "them how they may."

The main points noticed in special appeal are:—

1st. That the vendees of Luckhee Prya and Parbutee are estopped, and cannot bring the present suit under the provisions of Section 7 Act VIII of 1859.

2nd. That the zemindar was not bound to recognize the present plaintiffs as his *putnee talookdars* or to receive rent from them.

3rd. That the existence of an arrear being admitted, the deputation of a *sezawal* was strictly legal, and the sale of the *putnee*, which took place for an admitted arrear after deducting the collections made by the *sezawal*, was a good sale, and cannot be set aside.

4th. That none of the facts or circumstances mentioned in the decision of the Court below can render the sale liable to be impeached on the ground of fraud; that all the acts of the zemindar were done openly and publicly in the presence of the plaintiff and in exercise of the undoubted legal rights of the zemindar.

5th. That the Judge was wrong in assuming collusion between the zemindar and Thakoor Moyee.

6th. That in setting aside the sale, the Judge ought to have made an order for the refund of the purchase-money to the special appellant, the zemindar.

With regard to the first ground, it was contended by Mr. Woodroffe, who appeared for the special appellant, that the subject-matter of the previous suits and that of the present suits was substantially the same; that the title in the present plaintiffs existed before the previous litigation and did not become vested in them for the first time by the decree in the former suits; that the plaintiffs, therefore, ought to have put forward their strongest title and shown their whole hand in the former suits; that not having done so they are estopped from bringing the present suits under the provisions of Section 7 Act VIII of 1859.

I have carefully considered this plea. It is clear that in the case, at all events, of the suits of Chundee Churn Ghose and of Dropo Moyee, the plea of estoppel was not set up in the Court below. Now, as the four present suits are brought with the common object of setting aside the sale of a putnee in which all the plaintiffs have either by inheritance or purchase a joint title, and two of those plaintiffs are clearly not estopped under the provisions of Section 7, this Court could not in equity declare the sale to be good or bad in part, but must come to a decision as to whether the sale is to stand or fall for the whole talook. This plea which is somewhat technical and was overruled on the other grounds by the Judge, I would also overrule.

On the second ground, I am of opinion that the zemindar was not bound in law to recognize the plaintiffs as his tenants until the latter took steps on the death of the registered tenant Tarinee Dey to cause the registration of their names on the zemindar's rent-roll. They did not do so, nor did they attorn to him; and even after the close of the former litigation which resulted in a declaration that they had a joint title in the putnee, they took no proceedings whatever for the above purpose, nor do they appear to have intervened in the summary suits brought by the zemindar against Thakoor Moyee alone.

On the third ground, it is admitted that an arrear existed on the death of Tarinee Dey, the registered proprietor. The deputation of a *sezawal* which took place before the rights of the present plaintiffs were declared, and in the presence of an existing arrear, is not such an irregularity as, in my opinion, to justify me in declaring a sale which has been conducted in due and legal form, to be null and void. There is nothing in my opinion which limits the rights of a zemindar to put in a *sezawal* to collect, provided that an arrear be due, of which there can be no doubt in the present case.

On the third and fourth grounds, I am clearly of opinion that the sale cannot be impeached on the ground of fraud or collusion. Arrears of rent were admittedly due to the zemindar. It is not shown that the proceedings connected with the sale were illegal or even informal. The collections made by the *sezawal* were credited, and the sale took place for the balance in arrear, the first tender by the plaintiffs, or rather by some of them, of what they considerd to represent their respective fractional interests in the balance due was not a proper tender, and was one which the zemindar and the Collector were justified in rejecting. Then, it is said, that a legal tender of the whole arrear was made by the joint-proprietors, but such I find, on referring to the proceedings, was not the case. The tender was not an unconditional one; the Collector was asked to hold the money tendered in deposit; he was to act in the capacity of a stake-holder. Such a tender was not a legal tender, such as the zemindar was bound to accept. The sale having been regularly conducted, the price paid being admittedly an adequate one, and there being no proof of any fraud or collusion on the part of the zemindar in conjunction with Thakoor Moyee, I must hold the sale to be a good and valid one.

It is unnecessary to consider the fifth ground.

The four appeals are decreed, and the decisions of the Judge reversed with costs and interest at the rate of 6 per cent. payable by the respondents.

Ainslie, J.—This is a suit to set aside a sale of a *putnee* tenure on the ground of fraud and collusion between the zemindar and the person treated by him as representative of Tarinee Dey, the late registered *putneedar*, namely, Mussamut Thakoor Moyee.

Ram Pershad Mytee had two wives; by one, the aforesaid Tarinee Dey, he had one daughter, Thakoor Moyee; by the other, he had three daughters, Dropo Moyee, Parbutee, and Luckhee Prya.

This Ram Pershad had a brother, Soophul Ram, who died, leaving a son, Ram Kanye, who left a widow, Prosunno Koomaree.

After the death of Tarinee Dey, no fresh registration was made in the zemindar's books, but Thakoor Moyee admittedly entered into possession as sole heiress to her mother and was treated by the zemindar as the party entitled to the *putnee;* in March 1866 he proceeded against her alone, under Regulation VIII of 1819, to recover arrears of rent then due, and the 17th April 1866 was fixed for holding a sale. This, however, never was held in consequence of some irregularity in the proceedings. At this time no other claimants of the *putnee* came forward.

On the 7th September 1866, the zemindar put in a *sezawal,* and on the 15th idem applied for a sale of the tenure. This application was again infructuous, but again no claimant other than Thakoor Moyee appeared on the scene.

In November 1866, the zemindar brought a suit against Thakoor Moyee, and on the 31st December 1866 he obtained a decree against her for certain arrears of rent.

Prosunno Koomaree then applied, under Section 27 Act X of 1859, to get her name registered as sole owner of the *putnee* on the ground that her husband Ram Kanye had purchased it under the name of Tarinee Dey. Thakoor Moyee resisted this claim (the other three daughters of Ram Pershad remaining silent), and it was rejected on 30th January 1867, and on appeal by Prosunno Koomaree this order was confirmed on 27th March 1867. While this appeal was undecided, namely, on the 27th February 1867, one of the other daughters, Luckhee Prya, began to assert a title, by effecting a sale of a 2-anna share of the putnee to one Kripa Sindhoo, who, on the 6th April following, bought up another share of 2 annas from another daughter, Parbutee.

At this time, these ladies alleged the property to be ancestral, and that 8 annas had descended to Prosunno Koomaree, and 8 annas in equal shares to the four daughters of Ram Pershad.

On the 30th April 1867, Kripa Sindhoo brought a suit against Thakoor Moyee and her half sisters to establish his right to 4 annas of the *putnee* under the aforesaid purchases.

On 28th May following, Prosunno Koomaree, abandoning her previous claim to the whole as purchased *benamee* by her husband in the name of Tarinee Dey, brought a suit to recover half the *putnee* as ancestral estate, devolving in equal shares on Ram Pershad and his brother, and in this suit made the zemindar a party.

And on the 4th June, Dropo Moyee instituted a suit for 2 annas. So that at this time all the persons claiming adversely to Thakoor Moyee agreed in alleging that the property was ancestral, and that Ram Pershad was only entitled to one-half of it and that they were entitled in various proportions to the other half.

While these suits were pending the zemindar again proceeded against Thakoor Moyee under Regulation VIII of 1819, but nothing came of it.

On the 17th December 1867, the three suits were disposed off in the Court of first instance by decrees in favor of the plaintiffs, but on the 18th March 1868 the decree in favor of Prosunno Koomaree was reversed in appeal on the ground that the property was not ancestral, the other two decrees were confirmed, the Appellate Court holding that Parbutee's purchase was not effected out of her *streedhun* but with funds belonging to the family.

Meanwhile, the zemindar had brought another suit for arrears of rent against Thakoor Moyee, in which he gave credit for certain sums collected by the *sezawal*, and this suit resulted on 11th May 1868 in a decree in his favor.

All this time, Kripa Sindhoo and Dropo Moyee had made no attempt to register themselves in the zemindar's *serishtah* as successors to Tarinee Dey, and the claim of Prosunno Koomaree, the only person who did make such an attempt, has been finally dismissed.

While this appeal was pending, the zemindar again proceeded under Regulation VIII of 1819, and this time the proceedings resulted in a sale which was held on 13th April 1868.

Before this sale, *viz.*, on 5th April, Chundee Churn Ghose, who had bought Kripa Sindhoo's decree, and Prosunno Koomaree tendered what they alleged to be their quotas of the arrears due ; this tender was not accepted, but subsequently after the bidding had commenced, they tendered the full amount due to be held in deposit, but the zemindar refused to withdraw his claim, and the Collector held that, at that stage of the proceedings, he had no power to stop the sale. The *putnee* was bought in by the zemindar for Rs. 7,775, which, it is admitted, was a fair price, and the surplus sale proceeds were drawn out by Thakoor Moyee.

After this sale was completed, Luckhee Prya and Parbutee, on the strength of the judgment of the Appellate Court in the former suits, each sold a 2-anna share to Sreemunt Lall Misser, and hereupon commenced the present litigation.

Sreemunt Lall sues to set aside the sale and obtain possession of the 4 annas to which he maintains his vendors are entitled under the finding of the Court in the former suits to the effect that Tarinee Dey had not purchased the *putnee* out of her *streedhun*. He represents what may be called the new title of Parbutee and Luckhee Prya.

Chundee Churn Ghose sues to set aside the sale and recover on the old title of Parbutee and Luckhee Prya, and Dropo Moyee brings two suits, one on the new title, and the other on the old title.

It appears to me that the third suit, that is, the suit by Dropo Moyee on the new title, is barred by Section 7 Act VIII of 1859. Her cause of action, whether in respect of a 2-anna share, or in respect of a 4-anna share was the same, namely, the occupation by Thakoor Moyee of the entire putnee on the death of Tarinee Dey. Dropo Moyee's title can in no sense be said to be founded on the decree in the first litigation, though apparently that decree disclosed to her for the first time that she had a larger interest than she thought. But the case of Moonshee Buzloor Ruheem, VIII Weekly Reporter, Privy Council Rulings, page 11, settles that it is immaterial whether the omission to claim the whole that she was entitled to was the result of intention or of mistake. She might have claimed the 4 annas in her first suit, and did not do so, and cannot be allowed to supplement her claim now.

Mr. Allan contended that the cause of action in the present suit differs from that in the former suit, inasmuch as that was a suit to recover possession of a share of the putnee from Thakoor Moyee, and this is a suit to set aside the sale against the zemindar. But Dropo Moyee never was in possession, and has to establish her title to the 2 annas, as well as the invalidity of the sale. It may well be that the sale is liable to be set aside when questioned by a person having a legal title to question it; but it does not at all follow that a person, without a legal title, can question it. This suit goes somewhat further than the former suit in asking for a cancelment of the sale held by the Collector, but it includes and is founded upon a claim, which is the very claim that might have been and was not included in the first suit, and as to which Thakoor Moyee is now represented by the zemindar, the purchaser of the putnee; and until that claim is decreed, no order can be made as to the sale. It may be that we cannot determine in one suit that the sale was illegal and come to any other finding in the other suits on that point, or that we cannot say that the sale was bad in part and good in part; but granting that we must declare generally, if we come to such a conclusion, that the sale was improperly held, it does not at all follow that interests in the *putnee*, which is declared to be still in existence, are to be taken by persons who independently of the sale could not have enforced their rights.

In my opinion, Dropo Moyee's suit for the additional 2 annas must fail.

Mr. Woodroffe contended that the suit of Sreemunt Lall Misser, assignee of the "new titles" of Parbuttee and Luckhee Prya, must fail on the same grounds. But I do not think we can go so far as this. Those ladies transferred their rights, each in a 2-anna share, to Kripa Sindhoo at a time, when doubtless they thought that they were only entitled to 2 annas; but they did not in terms sell their entire interests in the estate of Ram Pershad, and it would not have been possible for Kripa Sindhoo to have gone into Court and claimed 8 annas (4 annas for each lady's share) on a bill of sale which distinctly conveyed to him only 4 annas.

The questions of illegality and fraud now remain to be considered.

1st.—As to the appointment of a *sezawal*. It is admitted that the *sezawal* was not appointed under Section 7 Regulation VIII of 1819, and Section 18 has been repealed by Act X of 1859. But, on the other hand, the record shows that arrears had been running on constantly from the death of Tarinee Dey, and no attempt has been made to prove that there was no arrear due at the date of the sale, or that such arrear, if any, was the result of the *sezawal's* interference.

Under Section 14 Regulation VIII of 1819, Clause 1, the sale of a *putnee* tenure in arrear is to be made without reserve, if the balance claimed by the zemindar shall remain unpaid on the day fixed for sale; and under Clause 2 if a talookdar contests the zemindar's demand, he may apply for a summary investigation, and the zemindar shall be called upon to produce his *kubooleut* and other proofs. If possible, the summary enquiry is to be completed before the day fixed for sale; but if the case be still pending, the lot shall be called up in its turn, notwithstanding the suit; and if the zemindar insist on his demand, the sale shall be made on his responsibility, nor shall it be stayed, or the summary suit allowed to proceed, unless the amount claimed be lodged in cash or in Government securities, or in notes of the Bank of Bengal, by the talookdar contesting the demand; and if such deposit be not made, the alleged defaulter will have no remedy but by a regular action for damages and for a reversal of the sale.

Now, assuming that the present plaintiffs had a right as talookdars to contest the zemindar's demand in a summary suit, and in such suit to make a deposit in the Collector's hands as a matter of fact, they did nothing of the kind. They did not contest the amount of the demand; their contention was that the rent was not claimable from Thakoor Moyee only. But even had they contested the amount of the demand, it was too late to do so on the day of sale. Section 14 Clause 2 says the application for summary enquiry shall be made within the period of notice, and by Clauses 2 and 3 Section 8 the notices are to the effect that, if the amount demanded be not paid before the 1st Joist, or the 1st Aghun, as the case may be, the sales will be held on those days. Thus, it is quite clear that a tender of the amount said to be in arrears to be held in deposit was not a sufficient tender for the purpose of staying the sale. Before the sale and while the *putnee* is still in the hands of the *putneedar*, against whom a default is alleged, it is for the zemindar to establish the existence of the balance. But if the *putneedar* allows his right to call for a summary investigation to lapse, and has to fall back on a regular suit, the *onus* of starting the case falls on him, and he has to give at least *primâ facie* proof that the *sezawal's* collections have satisfied the demand. The Judge has, though not very positively, held that the mere fact that a *sezawal* has been illegally appointed is sufficient to absolve the putneedars from liability for rents during the term of his appointment; he does not rest his decree on this ground. No doubt, the Courts will call upon a zemindar, who has so acted, to prove with strictness the actual amount of collections, if said to be less than the demand for rent, when it comes to his turn to put forward his proof, but the respondents have not pointed out any case going so far as to lay down that there is any necessary presumption from the facts of an illegal appointment of a *sezwal* that the rents have been collected in full, so as to throw the *onus* of proof on the defendant zemindar.

As to the fraud and collusion alleged, I fail to see on what evidence it is to be established.

There were, as admitted by the Judge, arrears due at the time of Tarinee Dey's death about the reality of which it is impossible to raise any question. It would appear from the proceedings (and nothing to the contrary is even alleged) that from that time forward the estate was in a chronic state of arrears. It is true that, after Tarinee's death, no change was made in the zemindar's books by the substitution of any fresh name for hers; but on the other hand, it is equally true that Thakoor Moyee did in fact succeed to the entire *putnee* as the separate estate of her mother, and it does not appear that, up to the date of the sale by the Collector, execution had been sued out on the decrees in favor of Kripa Sindhoo and Dropo Moyee. Up to that time the only person in receipt of the rents as *putneedar* was Thakoor Moyee, and the zemindar was not bound to notice the title of those who had indeed obtained a decree in the Courts, but had not proceeded to act on that decree: the only person who had attempted to obtain registration in the zemindar's *serishtah*, namely, Prosunno Koomaree, turned out to have no title at all. Then, again, it is admitted that the price at which the zemindar bought in the *putnee* was its full value.

There seems to be no ground whatever for believing that the sale was a contrivance to defeat rival claimants, if by defeating them is meant defrauding them. If the zemindar could legally exercise any influence over the occupation of the land, there was no reason why he should not do so, or why he should leave the *putnee* to be occupied by the rival claimants, instead of leaving them to share in the sale proceeds. It can be only on the ground that the sale was carried out in respect of arrears, which were really not due, that fraud and collusion can be imputed, and there is no evidence whatever to support such an imputation.

I am consequently of opinion that the decrees of the Courts below should be reversed and the suits be dismissed, these appeals being decreed with costs.

The 12th January 1872.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Hindoo Law—Inheritance—Daughter—Brother's Grandson—Maintenance—Separate Property—Reversion to Donor.

Miscellaneous Appeals from an order passed by the Judge of Cuttack, dated the 12th May 1871.

Case No. 259 of 1871.

Chowdhry Hureehur Pershad Doss Puhraj (Objector) *Appellant,*

versus

Gocoolanund Doss Mohapattur (Petitioner) *Respondent.*

Case No. 319 of 1871.

Chowdhry Hureehur Pershad Doss Puhraj (Petitioner) *Appellant,*

versus

Gocoolanund Doss Mohapattur (Opposite Party) *Respondent.*

Baboos Obhoy Churn Bose and *Motee Lall Mookerjee* for Appellant.

Baboos Chunder Madhub Ghose and *Nil Madhub Sein* for Respondent.

Under the Hindoo law, the daughter of a deceased member of a family, to whom a separate property was awarded for maintenance, is a superior heir to a brother's grandson.

There seems no authority for the proposition that on the death of junior members of a family, to whom certain properties were awarded for maintenance, not only the property so awarded, but the profits made upon it by the donee, revert to the donor.

Jackson, J.—IN this case three persons applied for a certificate under Act XXVII of 1860 to collect the debts of one Hulodhur Doss Mohapattur. One of these persons alleged himself to be the adopted son of the deceased, another alleged herself to be his daughter, and the third, Chowdhry Hureehur Pershad Doss, the grandson of the brother of the deceased, in applying for a certificate, stated that he was entitled to it as the deceased had left no heir. He also put in a petition of objection to the grant of a certificate to the alleged adopted son, stating, amongst other things, that, as there was no heir and as the deceased had obtained a certain portion of the zemindaries by way of maintenance, according to the custom of the family the profits made by him from that share would revert to the elder branch of the family on the death of Hulodhur Doss.

The Judge seems to have first decided the claim of Hureehur Pershad Dass, and he found that, undoubtedly, whether the alleged adopted son had been adopted or not, there was a superior heir to Chowdhry Hureehur Pershad in the daughter of the deceased.

Before this Court Chowdhry Hureehur Pershad Doss objects to this decision on the ground: 1st, that the Mitackshara law prevails in the family, that the family was joint, and therefore that the daughter was not a superior heir to himself.

It appears, however, on the statements of the objector himself, that the family was not joint but that a separate property was made over for the maintenance of the deceased. There is no allegation that the family was joint, and it follows, therefore, that the daughter is a superior heir to Chowdhry Hureehur Pershad Doss.

Then it is said a family custom was set up by the Chowdhry to the effect, that the profits or savings made from the revenues of properties made over to members of the family for their maintenance reverted, on the death of such members, to the persons who awarded the property for their maintenance.

It is very clear, however, on reading the objection on this point, and looking to the petition of the objector, that this was not his petition at all, and it was not urged before the Judge in the Court below. The *koolachar* alluded to was that certain properties were awarded for maintenance to junior members of the family, and from this the objector deduced the proposition that, on their death without heirs, not only the property so awarded but the profits made upon it by the donee should also revert to the donor. There seems to be nothing to support this proposition, and we see no grounds to interfere with the order passed by the Judge.

We dismiss the appeals with costs.

The 12th January 1872.

Present:

The Hon'ble. G. Loch and W. Ainslie,
Judges.

Decree for Costs—Finality—Construction—

Case No. 258 of 1871.

Miscellaneous Appeal from an order passed by the Officiating Subordinate Judge of Patna, dated the 25th March 1871.

Baboo Juggur Nath Singh (Decree-holder)
Appellant,

versus

Afzul Khan (Judgment-debtor) *Respondent.*

Mr. R. E. Twidale and *Baboo Nil Madhub Sein* for Appellant.

Moonshee Mahomed Yusoof for Respondent.

The decision of the Subordinate Judge, confirmed on appeal by the High Court, as to the amount of costs under a decree, was held to be final, the Officiating Subordinate Judge not being entitled to put an entirely new construction upon the decree after the case had been disposed of by the former Subordinate Judge.

Loch, J.—It appears to us that the judgment of the lower Court now appealed against must be set aside. It is clear that the amount of costs as entered in the schedule of the various decrees, whether rightly or wrongly calculated, has been entered distinctly as the sum for which the debtor is liable, and a great deal of contention has been going on up to the present date as to the amount for which the debtor was liable. It appears that the question came up before the Subordinate Judge on the 6th May 1869, and he then rightly or wrongly put a construction upon the words of the decree, which construction was adverse to the judgment-debtors and favorable to the judgment-creditor. An appeal was preferred from that order to the High Court, and in that appeal the debtors had an opportunity of entering upon this question and asking the Court to rectify what is now said to have been the error of the Subordinate Judge as to the construction he had put upon the decree. The only point, however, that they raised before the Court was as regards their joint or several liability, and the Court determined that question. No other point having been raised by them at the time, it must be considered that the judgment of the Subordinate Judge of the 6th May 1869 is final. The judgment of the Acting Subordinate Judge from which the present appeal has been preferred has put an entirely new construction upon the decree, which we think he was not entitled to do after the case had been disposed of by the former Subordinate Judge in May 1869, from whose orders an appeal had been preferred and dismissed by this Court in March 1870. We, therefore, set aside the order of the Subordinate Judge and decree this appeal with costs, sixteen Rupees being allowed for pleader's fees.

The 9th January 1872.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Mahomedan Endowment—Stamp Duty—Optional Stamp—Principal and Surety—Acquittal of Principal in Criminal Court—Liability of Sureties—Laches of Creditor—Fraud—Connivance.

Case No. 84 of 1871.

Regular Appeal from a decision passed by the Second Subordinate Judge of Hooghly, dated the 27th January 1871.

Syud Keramut Ali, Mutwallee (Plaintiff) *Appellant,*

versus

Moonshee Abdool Wahab and others (Defendants) *Respondents.*

Messrs. W. A. Montriou and *R. E. Twidale* and *Baboo Sham Lall Mitter* for Appellant.

Baboos Mohesh Chunder Chowdhry and *Kalee Mohun Doss* for Respondents.

Suit by the *mutwallee* of the Hooghly *Imambarah*, against the treasurer of that endowment and his sureties, under a security bond executed on an optional stamp of 8 rupees for a sum of Rs. 17,280-5-6 alleged to have been misappropriated by the treasurer, who had been committed to, but acquitted by, the Sessions Court,

HELD.—

(1) That the acquittal of the principal in a Criminal Court is no bar to a civil action against the sureties.

(2) That no larger sum can be recovered under Section 14 Act XXXVI of 1860 upon a bond executed on an optional stamp than that optional stamp covers, and that no amount of penalty can make up the deficiency in the stamp.

(3) That although there was gross neglect on the part of the *mutwalee* in the supervision and examination of his cash balances, yet as there was no evidence of fraud or mutual connivance at the delinquency of the treasurer, the former was entitled to recover from the sureties the sum which the stamp used on the security bond would cover, *viz.* Rs. 1,000 with costs in proportion and interest.

Kemp, J.—THERE are three appeals in this case. The first by Moulvee Keramut Ali, the plaintiff below; the second by Baboo Kristo Mohun Bose, who appears to have been security for Moonshee Abdool Wahab the treasurer of the Hooghly *imambarah*, a property which is in the charge of the plaintiff Syud Keramut Ali as *mutwallee*. The third appeal is that of Moonshee Abdool Wahab who appears in *formâ pauperis*.

The suit is brought by the plaintiff against Moonshee Abdool Wahab, the treasurer, against one set of sureties, namely, Junab Ali Chowdhry, Nusseerutoonnissa Bibee, Ashrutoonnissa Bibee, and Basbera Bibee, the heirs of Moonshee Golam Ali. There is also the defendant Nehalooddeen Mahomed, the husband of Ameeroonnissa Bibee, one of the sureties for Abdool Wahab, and then there is also the Hindoo, defendant Kristo Mohun Bose, who was also one of the sureties for Abdool Wahab.

The suit was to recover, as against the said defendants, a sum of Rs. 17,280-5-annas 6 pie which, it is alleged, the defendant Abdool Wahab misappropriated while he was employed as treasurer of the *imambarah*. The plaint alleges that on the 22nd of November 1860 the defendant Abdool Wahab was appointed treasurer of the *imambarah*, on the security of Ameeroonnissa Bibee and Moonshee Golam Ali who is now represented by his heirs; that on examining the *Tubbeel* or cash balances on the 6th of March 1869, it was discovered that Abdool Wahab had misappropriated the aforesaid sum of Rs. 17,280 5-annas, that a criminal prosecution was instituted against him, and that he was committed to the Sessions Court; that although he was acquitted by that Court, still he, the treasurer, and his sureties and the estate of his sureties were, according to the conditions of the security bond, liable under the law for the money so misappropriated; that as the defendant Abdool Wahab did not repay the said money, a fifteeen days' notice was served upon the sureties, and they also not having paid the money, the present suit was instituted. The cause of action is said to have arisen on the day on which the *mutwallee* examined the cash balance and discovered a defalcation to the above extent. There is then a very important postscript to the plaint to the effect that the surety, Moonshee Golam Ali mentioned above, was the retained pleader of the plaintiff, Syud Keramut Ali; that the surety Kristo Mohun Bose was the Serishtadar of the Commissioner of Nuddea, and that Moonshee Nehalooddeen, the husband of the surety Ameeroonissa, was the Serishtadar of the *mutwallee*; that the *mutwalee* always consulted these parties in matters connected with the Courts and law points; that the plaintiff had always suggested to them that the security bond ought to have been engrossed upon a stamp sufficient to cover any loss which the trust, that is to say, the *imambarah*, might sustain by the defalcations or misappropriations of the treasurer, and that the sureties, although possessed of legal knowledge, had wilfully and fraudulently induced the plaintiff, the *mutwallee*, to engross the security bond on a stamp of 8 rupees, alleging that that stamp was of sufficient value to cover any amount of defalcations or misappropriations which might eventually be discovered against the treasurer; and the plaintiff winds up this important postscript by requesting the Court to accept from him the penalty in respect of the deficiency in the stamp of the security bond, in proportion to the amount claimed, namely, Rs. 17,280-5 annas 6 gundahs.

There is also an account given at the foot of the plaint. It appears that the accounts of this *imambarah* are divided into three heads. There is the *Wuqf-rojnamcha*, that is to say, the diary connected with the endowment; then there is the *Kharis Towliut* book which we suppose refers to estates which are not endowed, but which belong to the endowment in some way or other. Then the third book is the *Amanut* book which refers apparently to sums which from time time were drawn from the Collector's Cutcherry to carry on the expenses of the trust.

The schedule at the foot of the plaint divides the liability of the treasurer in this way: Under the first head of accounts, Rs. 41,636-9 annas 7 gundahs 8 cowries down to the 3rd March 1869; under the second head of accounts down to the 24th February 1869, Rs. 4,016-8 annas 10 gundahs 8 cowries, and under the third head of accounts, the *Amanut* book down to the 16th of February 1869, Rs. 3,148-8 annas 8 gundahs 1 cowree, or a total of Rs. 48,801-5 annas 9 gundahs 8 cowies.

It is alleged that out of the aforesaid sum of 48,801 rupees, we omit fractions. Abdool Wahab, on examination of the accounts and of the cash balance, on the 6th of March 1869, accounted for the sum of Rs. 31,561, leaving a balance unaccounted for of Rs.17,240 to which must be added a small item of 40 rupees on account of short credits making the total amount due by the treasurer Rs 17,280.

The defence of Nehalooddeen was to the effect that Ameeroonnissa, the wife of the said Nehalooddeen, died on the 10th of December 1865; that the conditions of the security bond were no longer in force after her death, and with reference to the stamp question, which is a very important one in this case, because the defence was that, as the deed was engrossed upon a stamp of 8 rupees, an optional stamp, the plaintiff was not entitled to recover any sum in excess of what that stamp of 8 rupees would cover. It is also urged that the plaintiff well knowing that the principal defendant Abdool Wahab would not have in his custody any larger sums than what would be required for the current expenses of the *imambarvh*, caused the security bond knowingly and deliberately to be engrossed on a stamp of 8 rupees, and that the allegation of the plaintiff that the defendant Nehalooddeen, in conjunction with Gholam Ali and Kristo Mohun Bose, with the view to deceive the plaintiff, had advised him to have the bond engrossed on a stamp of Rs. 8 only, was false.

The heirs of Golam Ali make much the same defence, and here it may be well to state that they have not appealed to this Court.

The written statement on the part of Kristo Mohun Bose, the Hindoo surety, who, we may observe, has appealed to this Court, urged that the plaintiff's claim was barred by the Statute of Limitation, why, it is not said. *2nd*,—That unless the defendant Abdool Wahab was found guilty and liable, no suit could be maintained against the sureties, and further that as he has been found innocent by the Sessions Court, the present suit was untenable. Then follows the important plea with reference to the stamp and the amount which can be recovered by the plaintiff under that stamp, supposing misappropriation to be proved as against the principal defendant Abdool Wahab. There is also a denial of any conversation with the plaintiff with reference to the amount of stamp to be used, and it is also averred that from a convertsation with the plaintiff, the surety Kristo Mohun Bose was given to understand that Abdool Wahab would never leave in his custody any large sum of money, and accordingly he, Kristo Mohun Bose, agreed to become surety considering his liability to extend to 1,000 rupees, and no more.

The Subordinate Judge finds that the suit is not barred; that the plaintiff's cause of action arose on the 6th of March 1869, and the suit was brought on the 30th April 1870. The plea of limitation was not urged in this Court, and therefore it is not necessary to take any further notice of it.

On the second issue, namely, whether Abdool Wahab having been acquitted by the Sessions Court, the plaintiff can again sue the defendant and his sureties in the Civil Court, the finding of the lower Court was also against the sureties, and on this point, the decision of which we think was perfectly correct, no appeal has been made to this Court.

On the question whether Abdool Wahab had misappropriated funds committed to his charge, the Subordinate Judge found that it was admitted that Abdool Wahab was appointed as *khajanchee* of the *imambarah*, and this fact was not traversed by Abdool Wahab. He also found that it had been admitted by Abdool Wahab that the *kisab* drawn up on the 6th of March 1869, when the misappropriation was discovered by the *mutwallee*, was signed and admitted by him, Abdool Wahab. The Subordinate Judge also found that the *jumma khuruch* books and other accounts filed in the case were admitted to have been kept by Abdool Wahab, and he also found on the evidence that it was clearly established that Abdool Wahab in his capacity of treasurer of the *imambarah* had misappropriated the sum stated in the plaint. Then he found that there were two chests in the treasury of the *imambarah* that the key of one chest was in the custody of the plaintiff, the *mutwallee*, and the key of the other chest in the custody of Abdool Wahab, and that the misappropriations were made from the monies kept in the chest of which the defendant had the key; that the sums received from the Collectorate and which were not required for immediate current expenses were deposited in the big chest, and that this chest was never opened except in the presence of the defendant, and that in the *bijok* or memoranda kept in the chest, and in the defendant's writing, such sums as were taken from that chest, were deducted and the *bijok* replaced in the chest; that after the *mutwallee's* suspicions had been aroused by the conduct of the treasurer, an examination of the cash balances took place when it was found, according to the memoranda written by Abdool Wahab himself of what ought to have been the cash balances, that there was a deficiency to the amount of 17,280 rupees. He, therefore, as already stated. found that it was clearly proved that Abdool Wahab had been guilty of misappropriation to that extent. He also found that according to the terms of the security bond, the sureties were liable for any misappropriations or for any defalcations of Abdool Wahab during his incumbency as treasurer. With reference to the question of the amount which the plaintiff was entitled to recover as against the sureties. he was of opinion that the plaintiff was not entitled to recover any sum above what the stamp covered, namely, the stamp of 8 rupees. It appears that the predecessor of the present Subordinate Judge had permitted the plaintiff to pay in the penalty; but on a protest made on the part of the sureties, the judgment of the Court was reserved on that point, namely, whether the plaintiff could recover more under the stamp than what the stamp covers. The Subordinate Judge says that on perusing the 13th and 14th Sections of Act XXXVI of 1860 together, which Act was in force when the security bond in question was executed, he held it to be illegal for a Civil Court to pass an order for the recovery of a sum in excess of the amount which may be received on the strength of the document engrossed on an optional stamp which in this case is of 8 rupees; that Clause 6 Section 13 of the aforesaid Act provided that when documents are engrossed on insufficiently stamped or on unstamped paper, the sum paid as penalty is to make up the deficiency in stamp; but in the same manner there does not appear to be any provision to the effect that when, in respect of a document engrossed on an optional stamp under the following Section 14, the insufficiency is to be made up or amended by the penalty received.

Taking this view of the case, the decretal order was to this effect: that the plaintiff's claim be decreed, with costs, against the defendant No. 1 Abdool Wahab, and that the amount of 1,000 rupees, out of the amount claimed, be decreed with costs as against the sureties defendants as well as against the heirs of such of the sureties as are dead. The plaintiff to recover proportionate costs with interest at 6 per cent per annum as against the sureties and the sureties to recover from the plaintiff costs with interest in proportion to the amount of claim dismissed.

As already observed, there are three appeals. We shall take the appeal of the plaintiff first. The plaintiff, Syud Keramut Ali, is of course dissatisfied with that portion of the decision of the Subordinate Judge which saddles the sureties with liability to the extent only of 1,000 rupees.

Mr. Montriou, who was heard for the plaintiff, urged that if the defalcation is made out in the opinion of the Court as against the treasurer, there would be a failure of justice if the provisions of the Stamp Act alone prevented his client from recovering from the sureties the whole of the sum which the Court might find to have been embezzled by the treasurer; that the security bond is not objected to in as far as the execution of that bond and the terms of it are concerned; and that it was admitted in evidence in the case without objection. He therefore strongly urged upon the Court that this Court ought not in equity to allow itself to be crippled in its decision or to refrain from giving full effect to the terms of the security bond, in spite of the provisions of the stamp law; that the plaintiff having paid in the penalty which in this case amounted to 20 times what would have been the proper stamp, the Government revenue has been protected; that there has in this case been no attempt or intention on the part of the plaintiff to evade the Stamp law; and that it was only in cases of deliberate attempts to evade that law that the Court ought to visit upon the plaintiff the severe loss which his client will sustain in this case, if after paying in the penalty which amounts to more than the sum decreed by the Court, namely, Rs. 1,000, he, the plaintiff, is to be deprived of the difference between Rs. 1,000 and the sum of Rs. 17,280 which the lower Court has found the treasurer to have embezzled.

On the other hand, it was contended that the document in question, namely, the security bond, comes within the provisions of Act XXXVI of 1860. It was also contended, and correctly so, that no specific amount is mentioned in the security bond; that there was a conflict of evidence in this case, the plaintiff and his witnesses having deposed that no amount was agreed upon, whereas on the other hand the sureties in their written statement, and their witnesses in their evidence, have deposed that the liability of the treasurer and his sureties was a restricted liability, that he was only the nominal treasurer, that for some years he was not entrusted, although he held the appointment of treasurer, with the whole of the funds of the *imambarah;* that the sole key of one chest was kept admittedly by the *mutwallee* and the sole key of the other chest by the treasurer, and there was no sufficient evidence establishing the fact that the sums alleged to have been embezzled were embezzled from the monies in the immediate custody of Abdool Wahab. However of this part of the case we shall treat more fully when we come to the cross appeal of the surety Kristo Mohun Bose on the question of the liability of the treasurer.

With reference to the stamp question, we concur with the decision of the lower Court on this point. It is admitted that the Stamp Law then in operation was Act XXXVI of 1860. It is also admitted that this security bond did not pecify any particular sum. Under Section 14 of the aforesaid Act, it is enacted that "no larger sum shall be recoverable in any Court of Justice by reason of "any deed, instrument, or writing for which "an optional stamp is indicated to be proper "by the said schedule, than the largest sum for "which, if specially stated in a deed, instrument, or writing of the same denomination, "the stamp actually used under the option "so given, would be of sufficient value. And "no such deed, instrument, or writing shall "be held by any Court of Justice to be valid "in respect to any sum of money larger than "that for which the stamp on the said deed, "instrument, or writing would be sufficient."

Now, as already observed, this security bond did not specify any fixed sum for which the sureties were to be liable, and it was therefore executed on an optional stamp of 8 rupees, and under the law already quoted no sum could be recovered under that deed beyond what that optional stamp of 8 rupees would cover. Section 13 refers to documents executed on unstamped or insufficiently stamped paper from accident, ignorance, inadvertence, mistake, or other unavoidable cause. Now, this is a document which is not executed on unstamped paper, nor can it be said to be a document insufficiently stamped from accident, ignorance, inadvertence, or mistake. There can be no doubt that the document is one which is admitted to have expressed the intention of the parties who executed that document, and if it had been intended that the liability of the sureties, with reference to this treasurer's misappropriations was to extend to the sum of Rs. 17,820 or to any sum larger or smaller than that, the document would have been engrossed on a stamp sufficient for that purpose, and it is also remarkable that Abdool Wahab, the treasurer, was appointed on a salary of only 30 rupees a month. It is also admitted that he had not complete dominion over the whole of the funds appertaining to the *imambarah*, and for some time his security was considered wholly inadequate by the *mutwallee* himself who appears to have called upon him to furnish additional security when the appellant Kristo Mohun Bose came forward and became security for the treasurer. Now, this conduct of the *mutwallee* alone shows that the security first tendered by the treasurer was in his opinion sufficient only to protect the plaintiff up to a certain extent, and that it did not make the sureties liable for an unlimited sum or even for so large a sum as that which is now claimed by the plaintiff. Under these circumstances, it is impossible to suppose for a moment that the *mutwallee*, the plaintiff, acted in ignorance or by inadvertance or mistake in having the security bond which he subsequently took from Kristo Mohun Bose engrossed on an optional stamp of 8 rupees.

It is very true that in this case the result will be that although a large sum has been found deficient in the accounts of the *imambarah* rendered by the treasurer, and although the plaintiff has paid in a large penalty to make up the deficiency in the stamp, he will only recover what the stamp, namely the 8 rupees stamp, will cover; but the terms of the law appear to us to be imperative. If parties will knowingly and without mistake, ignorance, or misadvertence, execute documents on an optional stamp, they can only recover such a sum as that optional stamp covers; no larger sum than that can be recovered in any Court of Justice under the provisions of Section 14 Act XXXVI of 1860. We, therefore, think that the decision of the Subordinate Judge on the stamp question is correct.

In the course of the argument, much was said on behalf of the sureties by their pleader in respect of the gross neglect of the plaintiff in this case, and we must say that this argument has not been addressed to us without reason. It is admitted by the plaintiff himself that the treasurer, Abdool Wahab, was for some time not entrusted with full dominion over the monies appertaining to the *imambarah*, that he was doubtful as to the adequacy of the security first tendered by Abdool Wahab, and that he called upon him for fresh securities, and yet we find the *mutwallee* for a period of nearly eight years taking no steps whatever to examine his cash balance. We find him submitting monthly, quarterly, and annual statements to the local authorities who are entrusted with superintendence over this endowment to the effect that the cash balance was correct, that the accounts were correct, and that there was no defalcation. It was only when a large sum of money was brought from the Collectorate on a particular occasion that the suspicions of the *mutwallee* were aroused, and after eight years he for the first time examined in person his cash balance. Now although there is no express stipulation in the security bond that the sureties are to be absolved from all liability if the principal neglects to exercise a proper supervision over the treasurer, yet we think that in this case it cannot be said that the *mutwallee* has not been guilty of gross neglect in looking after the affairs of the trust committed to his charge. Had he exercised proper supervision and examined his cash balance as he was bound to do before submitting his accounts to the Collector and certifying to the correctness of his cash balance, this large defalcation would not have happened. We reserved our judgment in this case as we wished to consider whether, looking to this gross neglect on the part of the *mutwallee*, we should not in equity think it our duty to absolve the sureties altogether. We have not been able to find any cases of our Court bearing upon this question; and feeling it to be a dangerous precedent to lay down that because a principal, in this case the *mutwallee*, had neglected his duties of supervision, the sureties were to be entirely absolved, we endeavoured, as already observed, to find cases in which this question had been considered, but we have not been able to find any bearing exactly upon this point. There is a work on the principles of the law of Scotland by Erskine in which we find at page 885 the following remarks :—"After the obligation "is entered into, there are still duties of su-"perintendence imposed on the creditor, the "neglect of which will liberate the cautioner "if they are such as are expressly stipulated "in the agreement; even where there is no "infringement of an express stipulation, "gross neglect on the part of the creditor, "or knowledge on his part that irregularities "are committed, will be sufficient to liberate "the cautioner. But the case must be "brought up to one of gross negligence or "of positive sanction by the principal to the "improper actings of the officer." And in Story's Equity Jurisprudence, Volume I, Section 805, it is said "that in order to re-"lease sureties from liability, the negligence "must amount to a virtual connivance at the "delinquency or must be so gross as to "amount to actual shutting the eyes to the "fraud about to be committed; that it is now "regarded as settled law that there must be "something which amounts to fraud to en-"able the security to say that he is released "from his contract."

Now, as already stated, although in this case we think that there has been gross neglect on the part of the *mutwallee*, there is no evidence, nor do we wish to impute to him in any way fraud or virtual connivance at the delinquency of the treasurer. We therefore, with reference to the appeal of the plaintiff, think that he is entitled to recover from the sureties, as found by the Subordinate Judge, the sum which the stamp used on the security bond will cover, namely, 1,000 rupees, with costs of the lower Court in proportion bearing interest at 6 per cent. The excess costs to be paid by the said plaintiff.

With reference to the appeal of the sureties in the matter of the liability of Abdool Wahab, the principal defendant, which has been also raised in this Court, we concur entirely with the Subordinate Judge in holding that Abdool Wahab has misappropriated the sum claimed. The accounts which are on the record are his accounts; they were never disputed by him in argument below, nor has he in this Court, although heard in the matter of his application to appeal *in formâ pauperis*, been able to point out through his pleader that these accounts are not correct. There is also the fact that on the day on which the *mutwallee* examined the cash balances, namely, on the 6th of March 1869, a written memorandum drawn up by the defendant Abdool Wahab and signed by him exhibiting what ought to have been the cash balances was submitted by himself to the *mutwallee*, and that on examining the cash balances, it was found that the sum of Rs. 17,280 was deficient according to the terms of that memorandum. It is also in evidence, which evidence we see no reason to doubt, that Abdool Wahab admitted the defalcations and that he asked for time to make the sum good; that he was allowed to go to Calcutta with the view of raising this money, and thus to enable him to pay up that deficiency, and that he failed to do so.

We, therefore, on a careful consideration of the evidence in the case which was read to us in great detail and commented upon by both sides, come to the same conclusion as the Subordinate Judge did, that Abdool Wahab in his capacity of treasurer did misappropriate the amount claimed by the plaintiff. The decree as against him will therefore stand, and his application to appeal *in formâ pauperis* will be rejected.

The cross-appeal of the sureties with reference to the non-liability of Abdool Wahab and themselves must be dismissed, but the liability of the sureties will extend, as shown above, to such sum only as the stamp of 8 rupees will cover, namely to 1,000 rupees.

Each of the parties will bear their own costs in this Court, and the appeals of all parties are dismissed.

The 15th January 1872.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Execution of Joint Decree—Application by one Decree-holder—Act VIII of 1859, *s.* 207—*No Appeal.*

Case No. 320 of 1871.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Jessore, dated the 8*th July* 1871.

Gooroo Doss Roy (Decree-holder) *Appellant,*

versus

Ram Runginee Dossia (Objector) *Respondent.*

Baboos Ashootosh Dhur and *Hem Chunder Banerjee* for Appellant.

Baboos Sham Lall Mitter and *Mohendro Lall Seal* for Respondent.

No appeal lies from an order of a lower Court refusing an application by one decree-holder under Section 207 Act VIII of 1859 to execute the whole of a joint decree to the exclusion of his co-decree-holder.

Mitter, J.—This is an appeal by a decree-holder against his co-decree-holder, and the question raised before the lower Court was, whether the appellant is entitled, by virtue of a certain power of attorney alleged to have been executed by the respondent, to execute the whole of a joint decree passed in their favor to the exclusion of the latter.

The lower Court has rejected the prayer of the appellant under the discretion vested in it by the 207th Section of Act VIII of 1859. Hence the present appeal.

We are of opinion that the order of the lower Court is not open to appeal. Section 364 Act VIII of 1859 says, "No appeal shall lie from any order passed after decree and relating to the execution thereof except as is hereinbefore expressly provided." Had this Section been still in force as law, the correctness of our opinion would have been beyond all dispute, there being no express provision in any part of Act VIII, authorizing an appeal of this description. It has been contended, however, that this omission has been supplied by Section 11 Act XXIII of 1861 which says,—

All questions regarding the amount of any "mesne profits or interest, &c. as well as "all questions relating to sums alleged to "have been paid in satisfaction of the decree "and *any other questions arising between "the parties to the suit in which the de- "cree was passed and relating to the exe- "cution of the decree* shall be determined "by order of the Court executing the de- "cree and not by a separate suit and shall "be open to appeal."

We are of opinion that this contention is without any valid foundation. In the first place, it is clear, that the question which the lower Court was called upon to try is not a question "*arising between the parties to the suit*" within the meaning of the above Section. The appellant and the respondent were both co-plaintiffs in the suit in which the decree was passed, and, as such, were never arrayed as *parties to that suit* in the proper sense of the expression. In fact they together formed but one of the parties, the others being represented by the defendants against whom the decree was passed.

Nor can it be said to be a question "*relating to the execution of the decree.*" It is a question of conflicting title between two persons holding a joint decree, and therefore a question wholly beyond the scope of the original litigation in which that decree was made. The judgment-debtors are in no way interested in its solution, and although they have been made parties to this appeal, there seems to be no reason whatever why they should be dragged before the Court merely to give a colour to the proceeding. Such a question, it is clear, could neither have been raised nor determined in the suit in which the decree was passed, for the two co-plaintiffs could not have been permitted, by any rule of procedure that we are aware of, to interplead with one another. Indeed, the very nature of the question shows that it is the proper subject of a fresh suit between the decree-holders themselves and between them only; and we are therefore unable to see how the appellant can ask us to determine it as a question relating to the execution of the decree, when all that we are in a position to do is to execute that decree as it stands, that is to say, as a joint decree which contains no specification whatever of the relative rights of the persons in whose favor it was passed. The word "other" standing immediately before the words "questions arising between the parties to the suit, &c." in Section 11 Act XXIII of 1861, clearly shows that the questions referred to must be similar in character to those which are specifically mentioned in the earlier part of the Section, or in other words, that they should be questions necessarily involved in the execution of the decree and arising between the decree-holder or decree-holders on one side, and the person or persons against whom the decree is passed, on the other.

Section 207 Act VIII of 1859 says, it is true, that a Court of execution can, if it thinks fit, allow one of several decree-holders to execute the whole decree; but it also says that "it shall in such case pass such order as it may deem necessary for protecting the interests of the other decree-holders." This proviso has not been, in any respect, altered or modified by Section 11 Act XXIII of 1861, and it leaves no doubt whatever in our mind, that a question of conflicting title between persons holding a joint decree is not one which can be raised before, or determined by, a Court of execution.

For the above reasons, we dismiss this appeal with costs assessed at 2 gold mohurs.

The 15th January 1872.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Partition—Regulation XIX. 1814—*Lakheraj Lands.*

Case No. 52 of 1871.

Miscellaneous Appeal from an order passed by the Officiating Subordinate Judge of Patna, dated the 28th January 1871.

Janokee Bibee and another (Decree-holders) *Appellants,*

versus

Luchmun Pershad and another (Judgment-debtors) *Respondents.*

Messrs. R. T. Allan and *R. E. Twidale,* and *Baboo Unnoda Pershad Banerjee* for Appellants.

Messrs. J. T. Woodroffe and *C. Gregory,* and *Baboos Mohesh Chunder Chowdhry, Romesh Chunder Mitter, Taruck Nath Sein, Mohinee Mohun Roy,* and *Rughoo Buns Sahoy* for Respondents.

Though a partition of a lakheraj tenure cannot be effected under the provisions of Regulation XIX. 1814, yet a Civil Court, in effecting such a partition, may well be guided by the rules laid down in that Regulation so far as they are applicable.

Loch, J.—WHEN this case was before us on 5th July last, we proposed to make an order remanding the case and directing the lower Court to make a partition according to the provisions of the Butwara Law, Regulation XIX. 1814. At that time it was proposed and consented to by all parties, that Baboo Mohesh Chunder Chowdhry should act as arbitrator and settle the dispute between the parties amicably. Baboo Mohesh Chunder having now informed the Court that he has been unable to make any settlement, the case came before us again this day for the purpose of having our proposed order made out. Mr. Woodroffe for the respondent objects to any reference to the Butwara Law as likely to cause confusion, and points out that the land in dispute being lakheraj, the provisions of Regulation XIX. 1814 are not applicable; and, if applied, the Court might, in executing the decree, alter its terms, for it limits the decree-holder to one-third of the land in dispute; that as each of the co-sharers was entitled to a third of each field, it would be impossible to make compact blocks as contemplated by the provisions of Regulation XIX. 1814.

The suit was for the partition of the tenure, which being lakheraj could not be partitioned by the Collector under the provisions of Regulation XIX. 1814. The decree declares the plaintiff's right to a third of the property, and orders a partition to be made. The words of the decree are: "The suit be decreed. In execution of this decree, a proper partition being made by a Civil Court Ameen according to the condition and rent and good and bad land, one-third share of the disputed land ("arasy") will be placed in the separate possession of the plaintiff and the costs of the plaintiff will be charged to the defendant." The Subordinate Judge considers that every field should be divided into three parts of which the decree-holder should take one; but though in reality the decree-holder is entitled to a third of each filed, yet this would be a most inconvenient mode of making a partition and would defeat the purpose for which the suit was instituted and the decree was made. Looking at the nature of the suit and the position of the parties and the wording of the decree, it is clear that the decree-holder is entitled to a third of the property and not merely to a third of the land. It would scarcely have been necessary to make the elaborate enquiry directed to be made by the decree, if the intention of the Court was to give the plaintiff merely a third of the land. It is true that the word *arasy* is made use of in the decree, but that word does not, we take it, limit the operation of the decree as is now sought to be done. The object of the decree was to have the estate divided into three parts of equal value, of which the plaintiff was to have one. In making such a partition, it was never intended that all the good lands should go into one share, and the bad lands into another, but that good, bad, or indifferent should be shared equally by all the co-sharers, and each share should be as compact as possible. Now Regulation XIX. 1814 lays down rules by which partitions of this kind can most conveniently be carried out, and we think that a Civil Court in effecting a partition can take no better guide than the rules laid down in that law, as far as they are applicable to the property sought to be partitioned, and it was for this reason and to this extent that this Court referred to that law in its proposed order, nor do we now see any reason why we should abstain from directing the attention of the Court below to the provisions of that law, as laying down suitable rules for making a partition of landed property, to be followed as far as applicable to the property in question, the great object of the decree being to give the plaintiff a third share of the property equal in extent and value to each of the thirds which remain in the hands of the other proprietors, defendants in this case, against whom the decree has been made. We, accordingly, reverse the order of the lower Court, and direct the Subordinate Judge to make a partition according to the terms of the decree, and in making this partition he will be guided by the provisions of Regulation XIX. 1814, so far as they may be applicable, and will endeavour to make each share as compact as possible, each having its due proportion of the various kinds of land; that if it in any way facilitate the partition, the Subordinate Judge may divide the property into three portions of which the decree-holder may be allowed to select one, the other two remaining in the joint possession of the defendants. No fresh measurement need be made as no objection to the correctness of that already made by the Ameen has been raised, though it may be necessary to make a further local investigation as to the quality of the lands. The costs of this case must be borne by the defendants.

The 16th January 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Joint Hindoo Family — Contract by the Head — Joint Tenure—Enhancement of Rent.

Case No. 784 of 1871 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Dinagepore, dated the 18*th April* 1871. *modifying a decision of the Deputy Collector of Maldah, dated the* 31*st January* 1871.

Hemayetoollah Chowdhry (one of the Defendants) *Appellant,*

versus

Nil Kanth Mullick and others (Plaintiffs) *Respondents.*

Baboo Rajendro Nath Bose for Appellant.

Baboos Taruck Nath Sein and *Kalee Prosuno Dutt* for Respondents.

Every member of a joint family is not bound by an agreement made by the head of that family. The rent of a joint undivided tenure cannot be enhanced on the strength of an *ekrar* executed by one of the co-parceners.

Mitter, J.—We are of opinion that the decisions of the lower Courts, so far as they award arrears of rent at an enhanced rate, ought to be reversed.

The *ekrar* executed by Enayetoollah is not binding against the other defendants.

The Deputy Collector, whose opinion is affirmed by the Judge, says :—" With reference to the second issue, it does not require " any comment at length to show that the custom of the country, as well as many precedents, make every one of a joint family bound " to the stipulation given by the head of that " family." We are not aware that such a custom does exist, either amongst Hindoos or amongst Mahomedans, nor is there the slightest evidence adduced by the plaintiff to prove its existence. As for the decisions, the Judge has not referred to any, nor has the pleader, who appeared before us to support the judgment, been able to find out any decision of this Court which lays down such a rule. It is clear, therefore, that the *ekrar* cannot be binding against the defendant Hemayetoollah or his representatives ; and as it is admitted by the plaintiff that the tenure in question is a joint undivided tenure, in which Hemayetoollah has an interest, we do not see how plaintiff can recover arrears of rent at enhanced rates on the pleadings in this case. Enayetoollah is of course bound by that ekrar, but he is so bound only to the extent of his share ; and as the plaintiff is not seeking enhanced rents on account of his share the extent of which has not been proved, we cannot allow the rent of the joint tenure to be enhanced on the ground of such an ekrar.

In this view, we modify the decree of the lower Court ; the plaintiff's claim for enhanced rent at the rate of one anna per rupee being dismissed.

The 16th January 1872.

Present :

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Case No. 334 of 1871.

Execution of Decrees of Revenue Courts—Section 3 *Act III of* 1870 *B. C.*

Miscellaneous Appeal from an order passed by the Subordinate Judge of Rungpore, dated the 28th July 1871.

Muddun Mohun Biswas (Decree-holder) *Appellant,*

versus

Puddo Monee Dossee (Judgment-debtor) *Respondent.*

Baboo Bhowanee Churn Dutt for Appellant.

Baboo Oopendro Chunder Bose for Respondent.

The object of Section 3 Act III of 1870 B. C. is that a person against whom a decree is passed shall not be harassed by two sets of proceedings in execution, simultaneously carried on in two different Courts.

Mitter, J.—This case is governed by the decision of this Court in Miscellaneous Appeal 198 of 1871. It is true there was a process of attachment issued in the year 1868, but there is nothing whatever on the record to show that that attachment was in force at the time when Act III of 1870 B. C. came into operation, and the case therefore falls within the provisions of the 3rd Section of that Act which says :—" All decrees in which " an order for the attachment of property " has not, at the time of the commencement " of this Act, been issued, and all decrees " which shall after the commencement of " this Act be made in any suit now pending " in the Revenue Courts, shall be transferred " to the Civil Court." We must put a reasonable construction upon these words, and we think that the only object which the Legislature had in passing the Section was that the person against whom the decree is passed should not be harassed by two sets of proceedings in execution simultaneously carried on in two different Courts. In this case there is no ground for supposing that the judgment-debtor will be subjected to any such inconvenience, and we therefore feel no hesitation in saying that it is a case which falls within the express provisions of the Section above referred to.

We reverse the order of the Lower Court, and direct that Court to proceed with the application for execution. Costs to be assessed at one gold-mohur.

The 16th January 1872.

Present:

The Hon'ble H. V. Bayley and Dwarknath Mitter, *Judges.*

Mahomedan Law—Inheritance—Sister.

Case No. 849 of 1871.

Special Appeal from a decision passed by the Judicial Commissioner of Julpygooree, dated the 10th April 1871, *affirming a decision of the Moonsiff of that district, dated the 21st January* 1871.

Boolinisharee Bibee (Plaintiff) *Appellant,*

versus

Bukaoollah and others (Defendants) *Respondents.*

Baboo Bykuntnath Paul for Appellant.

Baboo Kishen Dyal Roy for Respondents.

Under the Mahomedan law, a sister is entitled to obtain a share of the estate left by her deceased brother.

Mitter, J.—We are of opinion that the objection taken by the special appellant, with reference to the share claimed by her, as one of the heirs of her father, is without any valid foundation. The original dispossession took place in the year 1854; and although Luchoo, one of the plaintiff's co-heirs, subsequently recovered a decree for a portion of the property, the plaintiff cannot derive any benefit from that decree when the Lower Appellate Court has distinctly found that she was never in joint possession with Luchoo, and that no proof was given by her to show that the suit was brought on behalf of Luchoo, as well as on behalf of herself.

There remains then the question of the plaintiff's claim for a share of the property left by her brother.

In regard to this question, we observe that the very decree, on which the plaintiff relies, shows that Luchoo parted with an 8 annas share out of the 10 annas which belonged to Abeer Mahomed. It is not attempted to be shown that Luchoo took out execution of the 8 annas which he sold to Burkutoollah, and that 8 annas share therefore must be excluded from our consideration.

The only other question which remains is as to the interest of the plaintiff in the 2 annas share for which Luchoo got a decree. The defendants claim this 2 annas share under conveyances executed in their favor by some of the representatives of Luchoo. The Lower Appellate Court has rejected this portion of the plaintiff's claim, on the ground that the plaintiff has given no evidence to show that she was in any way entitled to claim any thing from her brother Luchoo. The relationship between the plaintiff and Luchoo is not disputed, and consequently that the plaintiff, as one of the sisters of the deceased Luchoo, is entitled under the Mahomedan law to obtain a share of the estate left by him. It was not at all necessary for the plaintiff to prove the law applicable to the case; and as the plaintiff claims a share in the 2 annas which remained to Luchoo out of the 10 annas recovered under the decree of 1273, and as Luchoo died in the year 1275, no question of limitation can properly rise with reference to this portion of the plaintiff's claim.

We, therefore, remand the case to the Lower Appellate Court, with directions to determine what share, out of the 2 annas in question, the plaintiff is entitled to as one of the heirs of her deceased brother Luchoo.

The appellant will pay the costs of this appeal.

The 16th January 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Jurisdiction—Foreign Territory—Forcible carrying off of an Elephant.

Case No. 611 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Luckimpore, dated the 4th February 1871, *reversing a decision of the Moonsiff of Dibrooghur, dated the 9th September* 1870.

Shaikh Bhedoo Foudy (Plaintiff) *Appellant,*

versus

Bicha Banka Singh (Defendant) *Respondent.*

Baboo Sreenath Banerjee for Appellant.

No one for Respondent.

HELD that the Moonsiff of Dibrooghur had no jurisdiction in a suit to recover an elephant alleged to have been forcibly carried away by the defendant from Kaampani, where the defendant ordinarily resides; but that plaintiff may apply to the Political Agent for redress.

Bayley, J.—We think the Lower Appellate Court is quite right in holding that the Moonsiff had no jurisdiction in this case.

The suit was to recover possession of an elephant valued at Rs. 1,000, alleged to have been forcibly carried away from the plaintiff by the defendant, and retained in his possession.

The defendant pleaded that the cause of action in this case arose at, and that he was a resident of, Kerampani, which was admittedly out of the Moonsiff's jurisdiction.

Under the circumstances stated above, it is clear that according to the provisions of the Civil Procedure Code, the suit will not lie before the Moonsiff. It is true that the Political Agent, on being first applied to by the plaintiff, stated that the claim was one of a civil nature, and cognizable by a Civil Court, but that was before the trial of the case, and before the question of jurisdiction depending upon the provisions of the Civil Procedure Code had been investigated either by the lower Courts or by this Court.

Under these circumstances, we uphold the decision of the Lower Appellate Court. The plaintiff, if so advised, may take a copy of this judgment and apply to the Political Agent having political power over the place from which the elephant was taken, and where the defendant ordinarily resides.

The 16th January 1872.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Dismissal of Suit—Non-attendance of Plaintiff—Issue of Process against absent Witnesses—Proof of material Witnesses—Adjournment—Costs.

Case No. 182 of 1871.

Regular Appeal from a decision passed by the Judge of East Burdwan, dated the 12th May 1871.

Pearee Mohun Bose (Plaintiff) *Appellant,*

versus

Hurish Chunder Ghose and others (Defendants) *Respondents.*

Baboos Unnoda Pershad Banerjee, Mohesh Chunder Chowdhry, and *Taruck Nath Sein* for Appellant.

Baboos Romesh Chunder Mitter and *Motee Lall Mookerjee* for Respondents.

The dismissal of a suit for the plaintiff's non-attendance is a highly penal matter, and the punishment ought not to be inflicted, unless after a distinct order to attend and upon proof that the plaintiff has deliberately disobeyed the Court's orders.

Instead also of dismissing plaintiff's suit on account of his pleader's inability on the day of trial to prove which of his absent witnesses, against whom he had applied for further processes to be issued, were material, the proper course for the Judge was to allow the plaintiff a certain time to produce evidence upon this point, upon payment by him of all the defendant's costs of the adjournment.

Jackson, J.—THIS is an appeal from the decision of the Judge of East Burdwan in a suit brought by one Pearee Mohun Bose against Hurish Chunder Ghose and others to recover possession of rent-paying lands and *wasilat* valued at Rs. 5,472-15-12. The Judge has not gone into the merits of the case, but on the 10th of May, on the day which was fixed for the examination of the witnesses in the case, he dismissed the plaintiff's suit: 1*st*, on the ground that he had directed the plaintiff to be present in Court for examination on that day, whereas the plaintiff had absented himself; and, 2*nd*, that the plaintiff's vakeel was not prepared with proper proof to enable the Court to enforce the attendance of the large mass of witnesses whom he had cited to prove his case; and *lastly*, that he the Judge did not believe the evidence of the only one witness who was examined for the plaintiff, and that the plaintiff's vakeel was unable to point out the material documentary evidence put in on behalf of his client.

The appeal to this Court refers to each of these points.

There has been no attempt to go into the case; indeed it is admitted by the vakeel for the appellant that he is unable to prove the plaintiff's case upon the record as it stands.

The first point to which his argument was directed was, that the plaintiff was not aware that his presence was necessary on the 10th of May for examination.

Upon this point, we find that this suit was instituted on the 12th of September 1870 and that there were delays from time to time up to the 23rd of March, by which time the written statements of both parties were filed.

On the 23rd of March, the Judge took up the case and fixed the 10th of April as the day for fixing the issues in the case, and on the same day he also required the plaintiff to attend for examination on the 10th of April.

On the 10th of April, the issues were settled, and it appears from the record that the plaintiff was present in Court with his pleader, but was not examined.

On the same day, the Judge passed an order to the effect that the issues having been recorded in the presence of the vakeels of both parties, it be ordered that the case come on for hearing on the 10th of May, both parties being present with all their witnesses on that date, as the case will be continuously heard from the 10th till it is concluded.

On the 10th of May, the Judge called upon the plaintiff for examination and the plaintiff was absent. It was alleged before the Judge, and it is again now said in appeal before this Court, that there was no direct order for the plaintiff's personal attendance on the 10th of May. The Judge says that in his order of the 10th April given out in open Court in the presence of the plaintiff, both parties were ordered to be present in Court on this day as "their examination would be "requisite. The defendant is present, the "plaintiff is absent, and when the order was "given," says the Judge, "I remember the "plaintiff, in answer to the defendant's pleader, "stating that he was then present and did "not intend to run away."

The Judge appears upon this to have come to the conclusion that the plaintiff had, notwithstanding the order of the Court to him to be present, deliberately kept way. It is of course quite possible that the plaintiff did purposely keep away upon that day, but the question is, whether the order passed by the Judge on the 10th of April was sufficiently explicit, so that the plaintiff must have known that his personal presence was actually required on that day. The words "both parties being present with all their witnesses on that date" do not necessarily imply that both parties must be personally present for examination. If the Judge had added to that order the words "as their examination would be requisite," then there could have been no doubt upon the subject; but in the absence of any words distinctly stating that their personal presence was required for the purpose of their examination on the day of the trial, the plaintiff is entitled to any doubt which may possibily have arisen upon the point. The plaintiff saying to the defendant's pleader that he did not intend to run away does not in any way show certainly that he knew that his personal attendance was required on the 10th of May for examination. The dismissal of a suit for the non-attendance of the plaintiff is a highly penal matter, and such punishment should not be inflicted, unless it is quite certain that the plaintiff has deliberately disobeyed the orders of the Court. The order to attend must be distinct, otherwise the Section ought not to be put in force. We think that the order in this case was not sufficiently distinct. The order was for his attendance on the 10th of April, when the issues were to be settled, and it is possible that he may have thought that his examination would be necessary before the issues would be settled, and there is no distinct order for his personal attendance on the 10th of May to be examined.

The next question is, as to whether the plaintiff's suit should have been dismissed because his vakeel was unable on the 10th of May to prove which of his witnesses were material in order that he might call upon the Court to serve proclamations and warrants against the absent witnesses.

We think that the Judge is quite right in being very strict in enforcing the rules upon this subject. There is no doubt that there is very great laxity in the Courts upon it. In this case, it does at first sight appear as if the plaintiff was citing numerous witnesses to prove his case, whom he did not actually require, if we may judge from the fact that out of five of his witnesses who did attend he at once said that he would not examine four. It appears also that he was citing a very large number of witnesses, more than 60 in number, and therefore it was, under the circumstances, all the more important that the Judge should call upon the plaintiff's pleader to show which, out of this large number, were material, in order that unnecessary witnesses might not be harassed by being obliged to attend, and only those who were required to prove the case should be forced to attend. The plaintiff also appears in this case, as the Judge has very properly pointed out, to have most signally neglected to issue summonses for the attendance of his witnesses in proper time. On the 10th of April, he was ordered to take measures to produce his witnesses on the 10th of May, and he appears to have done nothing whatever until the 25th or 26th of April, and even then not to have given the diet-money for the witnesses until the 29th of April. The result was that there being a very large number of witnesses to serve, the *peadahs* were unable to serve them between the 1st of May and the 10th; still it does appear that on the 10th of May the plaintiff did ask that measures should be taken to enforce the attendance of the absent witnesses, and it also appears that certain other summons had been issued on the part of the plaintiff to Nuddea which had not on that date been returned. Of course, we agree with the Judge that it was the duty of the plaintiff to require the Court to issue these summons on the Nuddea District in proper time, so that they could have been returned by the day fixed for the trial. The Judge states that, on the 10th of May, the plaintiff's vakeel asked for further processes against his witnesses who were absent, but that he was unable to point out which of these witnesses were material. It seems to us that the proper course under the circumstances would have been for the Judge to give a day or two's time for the vakeel to produce evidence upon this point. We do not wish to say that the Judge might not have been in strict law perhaps right even in dismissing the suit on the default of the plaintiff; but we should hesitate before carrying out the law in all its strictness in this matter, more especially when the Judge admits that parties had been extremely lax even in his Court in the mode of transacting business, and even in this very case it seems that there have been numerous adjournments from time to time which were quite unnecessary. We think it would have been better, if the Judge had given a certain time to allow the plaintiff to prove which of his witnesses were material, and then to issue proper orders as regards these witnesses, and the Judge at the same time, previous to adjourning the case on this application of the plaintiff, could have required the plaintiff to pay to the defendant all the expenses consequent upon such adjournment, for instance, all the expenses to which the defendant had been put in summoning his witnesses and paying for them during their attendance.

With reference to the remarks of the Judge as regards the one witness whom he has examined, we think that his evidence, taken as it was, by itself can hardly bear out the Judge's remarks. There is nothing to show upon that evidence that this person is a getter up of cases, using these words in an offensive sense, namely, as a fabricator of false cases. It is quite possible that, if he had been a *gomashtah* of the plaintiff, he may have had to institute a large number of cases, and it is certainly somewhat remarkable that he has had to institute charges of highway robbery against the defendant. It is impossible, upon his statement standing alone, to say whether his evidence is to be wholly discredited or not.

As it is admitted that this case cannot proceed to trial before us, we think the proper course is to remand the case to the Judge, with directions that he will call upon the plaintiff to pay in to the defendant all the expenses which he was put to on the trial of the case on the 10th of May, namely, for the attendance of his witnesses, within a fortnight from the date of the Judge's order, and that upon his paying in those expenses of the adjournment and his satisfying the Judge within a reasonable time that the witnesses upon whom he requires the Court to serve proclamations and warrants are material, and that they have really been absconding and absenting themselves, so that summons cannot be served upon them, he will take further measures to enforce their attendance. Perhaps the best plan would be that, upon being satisfied upon the above points, the Judge should fix another day for the hearing of the case, and require both parties to produce their witnesses upon that day.

Under the circumstances of this case, as there can be no doubt that the appellant was in fault in the lower Court, we shall require the appellant to pay all the costs of this appeal.

The 16th January 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Butwara—Rent—Intervenor—Burden of Proof—Evidence.

Case No. 934 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Rajshahye, dated the 11th May 1871, *reversing a decision of the Moonsiff of Serajgunge, dated the 23rd January* 1871.

Hur Chunder Chuckerbutty and others (Plaintiffs) *Appellants,*

versus

Meer Mukrum Ali and another (Defendants) *Respondents.*

Baboo Nullit Chunder Sein for Appellants.

Baboo Chunder Madhub Ghose for Respondents.

In a suit for rent of a share alleged by plaintiff to have fallen to him consequent on a *butwara* effected by the Collector under Regulation XIX, 1814, the lower Appellate Court dismissed the suit because plaintiff could not file any *jumma-wasil-bakee* or any *kubooleut* either before or after the *butwara*. HELD in special appeal that, before dismissing the suit, the lower Appellate Court was bound to put the intervenor to the proof that the land appertained to the share which he got from his vendor, who obtained it by inheritance from one of the shareholders, and to have noticed plaintiffs' evidence that the share fell to him under the *butwara*, and that defendant had paid rent to the shareholders before the *butwara*, it being no defence to the intervenor that he was not invited to attend the *butwara*.

Bayley, J.—WE think this case must be remanded to the lower Appellate Court for re-trial with reference to the remarks hereinafter made.

The plaintiff sued the ryot defendant for arrears of rent for four years from 1274 to 1277. It is urged that the defendant was a ryot in the share which appertained to plaintiff in consequence of a *butwara* effected by the Collector under Regulation XIX of 1814.

The defendant No. 2 appeared as intervenor, and stated that the ryot was his ryot and had no connection with plaintiffs' share.

The first Court found that as the defendant No. 2 was unable to prove the coparceny or his predecessor's possession by any reliable documentary evidence, the plaintiff was entitled to recover the rent in dispute from defendant No. 1.

The lower Appellate Court held that the intervenor defendant was not a party to the *butwara*, and that as the plaintiff could not file any *jumma-wassil-bakee* paper, or any *kubooleut* either before or after the *butwara*, nor could establish by evidence that any arrear was due to him, his suit was liable to be dismissed. The lower Appellate Court accordingly dismissed the plaintiff's suit.

In special appeal, it is contended before us that, before dismissing the plaintiff's suit, the lower Appellate Court was bound to put the intervenor to the proof that the land appertained to the one anna share which he stated he got from Bhugwan Chunder Banerjee, who obtained the same by inheritance from one of the shareholders; and as the plaintiff had adduced evidence to prove that the one anna share fell to him under the *butwara*, and the defendant No. 1 ryot paid rent to the shareholders before the *butwara*, the lower Appellate Court was wrong in not noticing that evidence.

We think this contention is sound. There is evidence on the record of witnesses who stated that before the *butwara* all the shareholders received rents from the ryot defendant, that the ryot defendant held land within the one anna share of the plaintiff, and that the intervenor defendant had nothing whatever to do with the land.

It is argued that the intervenor defendant was not invited to appear at the *butwara*, and was not therefore bound by the rights defined to the plaintiff under that *butwara*. But, in our opinion, as he claims to derive his title from one who inherited from one of the shareholders, he must be held responsible for his negligence in not appearing at the *butwara* which is a process done publicly and with due notification. But without expressing any final decision on this point which is not necessary for the purposes of this case, the lower Appellate Court should have decided how far the defendant ryot held land and paid rent of the mehal in which the plaintiff holds a one anna share. The Subordinate Judge, however, does nothing of the kind. He merely throws out plaintiff's case on the ground that he does not produce the *jumma-wassil-bakee* papers, &c. The case must, therefore, be remanded to the Subordinate Judge with directions that he do remit it to the first Court for trial of the following issues.

1stly.—Whether up to the time of the *butwara*, the ryot defendant held lands and attorned to the joint-sharers of the Mehal, and,

2ndly.—Whether the intervenor defendant was at any time up to the date of suit in *bonâ fide* receipt and enjoyment of the rent sued for by the plaintiff.

In deciding the second issue as to the *bonâ fide* character of the intervenor's pleas, it will be the duty of the lower Court to investigate the reason of the non-appearance of the intervenor or those through whom he derives title at the *butwara*.

The parties will be at liberty to give such additional evidence as they think fit, and the Court will thereupon pass the proper orders.

The 18th January 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Case No. 1158 of 1871, under Act X of 1859.

Minor—Suit by Mother—No Certificate—Guardian—Section 3 Act XL of 1858.

Special Appeal from a decision passed by the Officiating Judge of Rungpore, dated the 12th June 1871, reversing a decision of the Deputy Collector of that district, dated the 29th June 1870.

Goono Monee Debia (Plaintiff) *Appellant,*

versus

Ram Kumol Sandle (Defendant) *Respondent.*

Baboo Issur Chunder Chuckerbutty for Appellant.

No one for Respondent.

When a Court of first instance allows a mother to institute a suit on behalf of her minor son, the Judge on appeal has no reason to dismiss the suit on the technical ground that no certificate had been granted to her under Section 8 Act XL of 1858.

It is not necessary for the mother to describe herself as guardian in the plaint, when the suit is evidently brought by her as mother of her minor son.

Mitter, J.—THIS was a suit instituted by the plaintiff on behalf of her minor son for the recovery of certain monies and papers alleged to be due from the defendant, who was employed as a *gomashta* for collecting rents in the minor's estate. An objection was raised in the first Court that the plaintiff had no right to maintain the action, no certificate having been granted to her under the provisions of Section 8 Act XL of 1858. This objection, however, was overruled, and the plaintiff was allowed to carry on the suit on behalf of the minor; and a decree was ultimately passed by the Court of first instance.

The Judge has reversed the decision of the first Court upon the ground that the plaintiff ought to have obtained a certificate under Act XL of 1858, and that she failed to produce such certificate, notwithstanding that two month's time was granted to her by a previous order. The Judge further adds, that the suit was brought by the plaintiff on her own behalf, and not on behalf of her minor son. This last remark of the Judge appears to us to be erroneous. It is true that the word "guardian" is not used in the plaint, but the suit is evidently brought by the plaintiff as mother of her adopted son who is a minor. There remains then the other question as to whether the Judge was right in dismissing the suit upon the ground that a certificate under Act XL of 1858 was not produced by the plaintiff. We think that the Judge erred in entering into that question, which is one no way affecting the merits of the case. The proviso in Section 8 Act XL of 1858, distinctly says, that "when the "property is of small value, or for any other "sufficient reason, any Court having juris-"diction may allow any relative of a minor "to institute or defend a suit on his behalf "although a certificate of administration has "not been granted to such relative."

The Court of first instance being a Court of competent jurisdiction within the meaning of the above words of the Act, did, in the exercise of the discretion thereby vested in it, allow the plaintiff to institute this suit on behalf of the minor. And we see no reason whatever why the Judge should have on appeal taken up an objection of this kind which has no bearing whatever upon the merits of the case, and dismissed the suit altogether on that technical ground. The permission was given by a Court of competent jurisdiction, and that permission once given was quite sufficient for the purposes of this suit.

For the above reasons, we reverse the decision of the Judge, and remand this case to him for trial on the merits. Costs to abide the result.

The 19th January 1872.

Present:

The Hon'ble H. V. Bayley and W. Markby,
Judges.

Permanent Settlement—Suit for Declaration of Right to—Defect of Parties—Alluvial Land—Limitation—Temporary Settlements—Sharer—Malikana—Proprietary rights.

Case No. 871 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Mymensingh, dated the 27th April 1871, *modifying a decision of the Moonsiff of Madargunge, dated the 18th May* 1870.

Kristo Chunder Sundyal (Defendant)
Appellant,

versus

Kashee Kishore Roy Chowdry and another
(Plaintiffs) *Respondents.*

Baboo Kalee Mohun Doss for Appellant.

Baboos Sreenath Doss and *Issur Chunder Doss* for Respondents.

A suit for a declaration of plaintiff's right to a share in the settlement of an accretion will lie without the Government being made a party to it.

The period of limitation which bars the claim to a settlement does not begin to run so long as the proprietary right of the zemindar is formally recognised by the Revenue Authorities (*e. g.* by temporary settlements), and no permanent settlement is made with any other person.

The payment of *malikana* is not the only method in which a proprietary right can be recognized. But the keeping of the *malikana* in deposit, as in this case, for the benefit of the recorded proprietors generally, is a sufficient recognition of a sharer's proprietary right.

Markby, J.—THE facts, as far as I have been able to gather them in this case from the statement of the pleaders, are as follows:—In the year 1835, certain land held by the zemindars of Roghoorampore was resumed by Government as not comprised within the limits of their permanently settled estate; the land being in fact a recent alluvial formation. After the resumption, the land in question remained under *Khas* collection until 1842, when a temporary settlement was made with persons who had no previous interest in the property. Subsequent temporary settlements of a similar character were made until the year 1867, when a permanent settlement was made with the defendant in this suit, who is the owner of an 8-anna share of the zemindaree. In each of these temporary settlements, a calculation was made of *malikana* at 10 per cent. on the jumma due to Government, and the sum so arrived at remained in deposit in the Collectorate Treasury to the credit of the Maliks. When the permanent settlement was made with the defendant, this sum was at his request applied in satisfaction of the Government claim for revenue under the settlement.

The plaintiffs now sue to have it declared that they, as owners of an 8-anna share in the zemindaree are entitled to a share in that settlement.

The lower Appellate Court has given the plaintiffs a declaration that they are entitled to a 4-anna share only.

The defendant has appealed, and the points which he has urged are: that the suit is barred by limitation; that there was no evidence that this land formed as an accretion to the main land; that, on the contrary, it was resumed by Government as an island, and that the Government had therefore a right to make a settlement with any one they pleased; that no such suit as the present would lie; and that at any rate the Government ought to be made a party to the suit.

With regard to the two last points, I think they are easily disposed of. Without going minutely through the language of the Regulations, I think it quite clear that it has been the invariable practice in this country to allow a person, who alleges that he is entitled to a permanent settlement, to come into the Civil Court to obtain a declaration of that right, and that the Government has invariably recognized the right so declared by making or altering the permanent settlement accordingly. The Government, moreover, has no sort of interest in such a suit, the remedies which they have making it almost entirely a matter of indifference to them with whom the settlement is concluded. And though under some circumstances it might be convenient to make the Government a party to the suit, and though this has been sometimes done, it is by no means, as far as I can discover, the invariable practice to do so. I think, therefore, that we ought to hold that the suit will lie, and the omission to make the Government a party is not a ground for dismissing the suit.

With regard to the second objection that there was no evidence that this land formed as an accretion, and that it was resumed by Government as an island, so that they had the right to make a settlement with whom they pleased, I think the judgment of the lower Appellate Court is satisfactory upon that point. I think the reasoning is perfectly sound, and, as far as I have seen, fully justified by the facts that the Government have all along treated this, not as land which they had an absolute right to dispose of as they pleased, but as land over which the zemindars of the neighbouring zemindaree had a prior right of settlement. This can only have been on the ground that the land in question was an accretion to their estate.

The remaining objection, which is that this suit is barred by limitation, is one which is not altogether free from difficulty. Had this been *res integra* I should have had some doubt whether, under the circumstances of this case, the zemindars of this zemindaree had not altogether lost their right to demand from the Government that a settlement should be made with them. It appears that in the year 1851 a notice was issued to them to come in and take a settlement, and that Shumboo Chunder, the father of the present plaintiffs, appeared as the representative of the Maliks on that occasion, but that he refused on their behalf to take a settlement at the jumma fixed. Now the proprietors of this zemindaree were no doubt entitled to this accretion, but subject nevertheless to assessment of revenue under Regulation II of 1819 and the other Regulations in force; and looking to the general tenor of the Regulations upon this subject, especially to Regulation VIII of 1793, Section 44, and Regulation XIX of 1793, Section 8, I should have been inclined to think that the zemindars having once refused a settlement, their right was gone; but the tenor of the decisions, and the practice of the Revenue Authorities, appear to be otherwise. As far as I can ascertain, the practice has been to recognize the right of the zemindar to come in and claim a settlement of any accretion to his estate as in no way interfered with so long as only temporary settlements are made with other parties, provided always that the proprietary right of the original zemindars had been recognized. Several cases to this effect are collected in Thomson on Limitation, 2nd Edition, page 154. The decision of Norman and Seton-Karr, JJ. in VII Weekly Reporter, 465, is distinguishable. That relates to the resumption of land held under an invalid *lakheraj* tenure; which stands on a wholly different ground from land which has been added by accretion to a parent estate. The zemindar of an estate, to which there is an accretion, is by Regulation XI of 1825, Section 4, Clause 1, the proprietor of that accretion. But the holder of an invalid *lakheraj* tenure has not, as I understand the decisions, any proprietary right in the land after it is resumed (see the decision of Mr. Justice Bayley in X Weekly Reporter, 296).

Moreover, I think, there is authority, which we ought not now to dispute, for holding that this right is not barred by lapse of time so long as it is formally and distinctly recognised by the Revenue Authorities when making the temporary settlements. No doubt such temporary settlements interfere in some measure with the full enjoyments of the zemindar's rights, but both here and in the Courts of the North-Western Provinces (see Thomson, *ubi supra*), it has been held that the period of limitation which bars the claim to a settlement does not begin to run so long as the proprietary right of the zemindar is recognised, and no permanent settlement is made with any other person, and it seems to me sufficient in this case to say that we ought to follow the rule which has been so long acted on.

It was, however, contended in this case that as the *malikana* was never paid to the plaintiffs, but applied, in fact, to the benefit of the defendant, the proprietary right of the plaintiffs had not been recognised. But I do not think that the payment of *malikana* is the sole and exclusive method in which a proprietary right can be recognised. Why the *malikana* was applied exclusively for the benefit of the defendant, and why a settlement was made with him to the exclusion of the plaintiffs, does not appear. From the portion of the proceedings of the Revenue Authorities which has been read to us, it would appear that the plaintiffs and their predecessors have been recognised all along in the most formal manner as part proprietors in this zemindaree, and the *malikana* which was reserved has been kept in deposit for the benefit of the proprietors generally. I think this should be considered as a recognition of the plaintiff's proprietary right notwithstanding that the *malikana* was not ultimately paid to them.

These are the only objections which have been taken to the decision in the Court below; and as they have failed, I think this appeal should be dismissed with costs.

Bayley, J.—The plea that there is a defect of parties, because Government was not a party, is untenable, because the plaintiff's suit against the defendant here is one which can be decreed or dismissed without the right of Government being affected. Whoever is or becomes the recorded proprietor, will be answerable for the revenue, and in default the estate will be sold for the recovery of the arrears in the name of the recorded proprietor.

As to the land not being found to be an accretion to a parent estate, there is substantially, and on a view of the whole judgment, a finding of fact on evidence that the land in dispute is in contiguity to the parent mehal.

In regard to limitation, it is clearly laid down in Sir John Shore's Minute, on which the Permanent Settlement Regulations were based (5th Report, page 472), that *malikana* is the right of landlords who refused to take the original settlement. The settlements made subsequently of *towfeer* or alluvial land as part of a parent estate are merely supplementary settlements of the original permanent one. The principle on which *malikana* is due in the one case would apply to the other. But invalid *lakheraj* or rent-free land is on a differnt position. It is not part of a permanent settlement, that is, not part of the assets on which a zemindar engaged to pay revenue of 1793 to Government for his estate.

Ordinary *lakheraj* or rent-free on grants is in a separate category. There the Government on resumption takes the land as its absolute property, *i. e.* not belonging to a Government revenue paying estate, or forming assets of that estate. Government, it is true, settles with the ex-*lakherajdar* on a *malikana* of 50 per cent, but both the settlement and the *malikana* are in that case acts of its own free grace.

On the whole, I am of opinion that limitation does not apply to a right of a *malik* to engage, on the expiry of temporary settlements made of assessed alluvial land contiguous to the parent estate of such malik. At least I am aware of no law or ruling to that effect, and experience is to the contrary. Here, indeed, it is clear the *malikana* was kept as a deposit to the account of the recorded proprietors of the parent estate whoever they might be. It may be added that in every one of the *temporary* settlements before, the most clear and distinct reservation of the rights of the proprietors to come in and take the permanent settlement on expiry of the temporary settlements was recorded.

I would also dismiss the special appeal.

The 19th January 1872.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Mesne Profits—Ijaradar pending litigation as to Title—Ryots.

Case No. 122 of 1871.

Regular Appeal from a decision passed by the Additional Subordinate Judge of Mymensingh, dated the 13th March 1871.

Biddya Moyee Debia Chowdhrain (Plaintiff) *Appellant,*

versus

Ram Lall Misser and another (Defendants) *Respondents.*

Baboos Romesh Chunder Mitter and *Rash Beharee Ghose* for Appellant.

Baboos Nullit Chunder Sein and *Chunder Madhub Ghose* for Respondents.

A successful claimant in ejectment is entitled to claim mesne profits, not only against the defendant against whom he has obtained a decree for possession, but also against an *ijaradar* who has taken an *ijara* of the property pending the litigation, the position of a person who takes an *ijara* pending a litigation as to the title being wholly different from that of a ryot.

Markby, J.—THE case put before us in this regular appeal is as follows:—That one Gour Kishore Acharjee died leaving considerable landed property. He also left a widow Chundrabulee and a son Bhowanee Kishore. Bhowanee Kishore died leaving a widow, Bhoobun Moyee, and a dispute then arose as to the succession to Gour Kishore's estate which was claimed by one Ram Kishore as the adopted son of Gour Kishore, who, it was said, had given his widow a power of adoption in case of Bhowanee Kishore's death. Bhoobun Moyee being in possession, Ram Kishore brought a suit against her, which suit was dismissed, but on appeal the Sudder Court reversed this decision and gave the plaintiff a decree; this decree was however again set aside by the Privy Council, and the suit finally dismissed. After the decision by the Sudder Court, in Ram Kishore's favor and pending the appeal to the Privy Council, Ram Kishore took possession of the estate under his decree and in the year 1862 granted to Ram Lall Misser, the real defendant in this suit, an *ijara* of a portion of the property for three years, under which *ijara* Ram Lall Misser collected the rents from the ryots. In September 1865, Bhoobun Moyee having been successful in her appeal to the Privy Council, resumed possession of Gour Kishore's estate, and proceeded to recover against Ram Kishore various sums of money (we are not told how much) under an order of the Privy Council which is said to direct that mesne profits should be paid by Ram Kishore to Bhoobun Moyee for the period during which he held possession under the decree of the Sudder Court. Subsequently to this, Bhoobun Moyee died and the property reverted to Chundrabulee who, naturally enough, at once made it over to the person whom she alleged to be her adopted son, Ram Kishore. She also, as might be expected, was in no way desirous to recover mesne profits under the order of the Privy Council against Ram Kishore, and, accordingly, on the 2nd May 1870 she executed a document which is not before us, but which was translated in Court, and that document appeared to be a complete release to Ram Kishore of all claim whatsoever as against him in respect of the mesne profits of the estate whilst in his possession. Chundrabulee had, prior to this, already attempted to recover from Ram Lall Misser the rent which she alleged to be due from him under his *ijara* lease from April to September 1865, but unsuccessfully so, her suit being dismissed on the ground that no relation of landlord and tenant existed between her and Ram Lall Misser.

Immediately after the release to Ram Kishore,—namely, on the 3rd May 1870,—Chundrabulee brought the present suit to recover from Ram Lall Misser mesne profits from April to September 1865, in fact to establish the same claim which she had already made in another form.

The lower Court held (as I understand the judgment) that the claim of the plaintiff for mesne profits was completely satisfied by the proceedings against Ram Kishore.

With some hesitation I have come to the conclusion that the decision of the lower Court upon this point is wrong. I think if it should turn out upon enquiry (which enquiry has not yet been made) that Ram Lall Misser was in possession of the property for the period specified, and that he made collections during that period, he must account to the plaintiff for collections so made. I do not understand it to be contended that the order for payment of mesne profits made by the Privy Council was ever fully satisfied by actual payment; but that it was abandoned when it fell into the hands of Chundrabulee. And it seems to me clear that it was never the intention of Chundrabulee to abandon any rights which she might have against third parties, but only her claim under that particular order against Ram Kishore. The question, therefore, is whether a successful claimant in ejectment may claim mesne profits, not only against the defendant against whom he has obtained a decree for possession, but also against an *ijaradar* who has taken an *ijara* of the property pending the litigation. I think he can. I do not wish to say one word against the principle enunciated by Loch, J., in the case referred to (XII Weekly Reporter, 35), that ryots should not be harassed by proceedings against them for the recovery of mesne profits. But I think a person, who takes an *ijara* pending a litigation as to the title, stands in a wholly different position from a ryot, and I see nothing either just or equitable in allowing him to put into his pocket the collections which he has made whilst holding under that invalid title. Some suggestion of fraud was made on the part of the defendant. What fraud there could be in the attempt to establish this claim against the defendant, I am at a loss to conceive. I think the decision of the Subordinate Judge should be set aside, and the case must be remanded to him to enquire whether Ram Lall Misser was in possession of the property for the period specified, and whether he made or might have made collections during that period. If these issues be decided in favor of the plaintiff, then the defendant Ram Lall Misser will have to account to the plaintiff for such collections.

The defendant must pay the costs of this appeal.

Bayley, J.—I am of opinion that until we see clearly whether Ram Lall Misser has or has not appropriated the mesne profits sought to be recovered in this case, we cannot do justice in it. Ram Lall's case is that he was dispossessed for the period for which mesne profits are sought. If he was, he perhaps could not be liable. But this is not gone into or proved one way or the other.

Again, it is clear, that the plaintiff would ordinarily be entitled to what he would have been able ordinarily and reasonably to collect and appropriate, had he not been wrongfully dispossessed, and deprived of the means of doing so.

The 19th January 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Principal and Agent—Rent—Admission of Receipt by Agent—Payment to Principal—Issue.

Case No. 609 of 1871.

Special Appeal from a decision passed by the Officiating Judge of Rajshahye, dated the 14*th February* 1871, *affirming a decision of the Moonsiff of Pubna, dated the* 22*nd February* 1869.

Bykunt Nath Sandyal (Plaintiff) *Appellant,*

versus

Kalee Churn Paul and another (Defendants) *Respondents.*

Baboo Sreenath Doss for Appellant.

Baboos Debendro Narain Bose and *Gopal Lall Mitter* for Respondents.

Plaintiff having sued two mooktears for money received by them as rent due from plaintiff to their principals, and defendants having admitted receipt of the money, but alleged payment thereof to their principals, the real issue to be tried in the case was, whether the mooktears had actually paid to their principals the money which they had admitted to have received as rent from plaintiff.

Bayley, J.—We think this case must be remanded to the Lower Appellate Court inasmuch as the real point for decision has been overlooked by that Court.

The plaintiff sued two mooktears for money alleged to have been received by them on behalf of their principals as rent due from him (plaintiff) to the said principals, for which no credit had been given to him.

The answer of the defendants was, that they received the money due as rent from the plaintiff on account of their respective principals and made the sums over to those principals accordingly.

The simple issue, therefore, that arose in the case was, as to whether the mookteers had actually paid to their principals the money that they admitted they had received as rent from the plaintiff.

This issue has not at all been tried by the Lower Appellate Court. The Lower Appellate Court, after a remand by this Court on the 22nd April 1870, which merely held that the Civil Court had jurisdiction to entertain this suit, states "*there is no reason to suppose* "that the 9-anna zemindars, or that the proprietor of three-eighth of the remainder, have "not received the share of the rent which were "paid to the mookteers on their account." This is simply avoiding the trial of a point which is necessary to be tried on the only issue that arises in the case, and conjecturing that which has to be investigated and shown on the evidence and adjudicated.

The Lower Appellate Court also holds that the defendant, Kalee Churn Paul, cannot be called to account, inasmuch as the receipt given to the plaintiff distinctly recited that Dinobundhoo was the general mooktear for the zemindars, Binode Lall and Joy Soonduree, who sued the plaintiff, and that Kalee Churn was agent for the others. The Lower Appellate Court then goes on to find as a fact that the powers under which Dinobundhoo acted were the usual powers to receive money for his principal *on any account*, and that the Lower Appellate Court *supposed* was comprehensive enough to include the power of receiving the putnee rents. The Lower Appellate Court lastly thinks it probable that the plaintiff has suffered some wrong, but considers that he mistook his remedy in not appealing against the decision of the Revenue Court decreeing rents against him.

As stated above, we think that the judgment of the Lower Appellate Court is defective in that it did not show an investigation of the simple issue that arose out of the pleadings, *viz.*, whether the money admittedly received by the defendants from the plaintiff on account of rent due to their principals was actually paid or not by the said defendants to the said principals and credit given to the plaintiff, and we therefore remand the case to the Lower Appellate Court for the trial of the above issue. The Lower Appellate Court will bear in mind that it was not the principals of Kalee Churn who sued the plaintiff and got a decree against him, but it was the defendant Dinobundhoo whose principals sued and got a decree against the plaintiff.

Mitter, J.—I am of the same opinion. I think there are circumstances in this case which are sufficient to show that a cause of action has accrued to the plaintiff, and that the real issue to be decided is, whether the zemindars, whose mooktears the defendants are, have actually received the amounts paid by the plaintiff to those defendants, or have given credit to the plaintiff for the same. If this issue be determined against the defendants, they are liable in justice and equity to refund to the plaintiff the amount which they respectively received from him on behalf of their alleged principals.

The 19th January 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Wrongful Attachment—Damages—Costs.

Case No. 1088 of 1871.

Special Appeal from a decision passed by the Deputy Commissioner of Gowalparah, dated the 24th April 1871, *affirming a decision of the Sudder Moonsiff of that district, dated the 17th June* 1870.

Kangalee Chunder Shaha and another (Defendants) *Appellants,*

versus

Koonjessuree Nurtakee (Plaintiff) *Respondent.*

Baboo Issur Chunder Chuckerbutty for Appellants.

Baboo Gopal Lall Mitter for Respondent.

HELD that the lower Court was right in giving plaintiff a decree for the damages sustained by him in consequence of defendant's wrongful attachment, and in awarding half costs to plaintiff under the circumstances.

Mitter, J.—WE think there is no ground of special appeal in this case.

The only grounds urged before us are the 5th and the 6th. Neither of these grounds, however, appears to be tenable. As to the 5th ground, it is clear, from the facts found by the Court below that the plaintiff was prevented from using the shop in consequence of the wrongful attachment taken out by the defendant, and the lower Courts therefore were right in giving the plaintiff a decree for the damages sustained by him in consequence of such wrongful attachment.

The 6th ground relates to costs. We think the lower Court has exercised a right discretion in awarding half the costs to the plaintiff under the circumstances of the present case. It is quite clear that the defendant was the wrong-doer. The first Court distinctly finds that he knew very well that the property belonged to the plaintiff, and not to his judgment-debtor ; and if in spite of such knowledge he attached the property, the act was clearly an act of fraud, and the lower Court was therefore justified in exercising its discretion in the matter of costs in the way it has done.

We reject this special appeal with costs.

The 22nd January 1872.

Present :

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Error in Law—Evidence—Plaint in former suit —Question of right—Julkur.

Case No. 1040 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Rajshahye, dated the 29th June 1871, *affirming a decision of the Moonsiff of that district, dated the 27th March* 1871.

Kashee Chunder Mojoomdar and others (Defendants) *Appellants,*

versus

Seetul Chunder Tullapattur (Plaintiff) *Respondent.*

Mr. Woodroffe and *Baboo Mohinee Mohun Roy* for Appellants.

Baboo Bhyrub Chunder Banerjee for Respondent.

The Lower Appellate Court was held to have committed an error in law in admitting the plaint filed in the previous suit as evidence against the present defendant, and also in relying on a decision of 1867, which did not determine any question of right as between the present plaintiff and the present defendant with reference to a *julkur* in dispute.

Mitter, J.—We are of opinion that the Lower Appellate Court has misread the survey map produced by the plaintiff. There is nothing whatever in that map to show that the plaintiff is entitled to that portion of the *julkur* which is situated to the east of the perpendicular colored portion which represents the Kurutya river, that is, to the portion situated on the south of Mirzapore.

The Lower Appellate Court has also committed an error in law in admitting the plaint filed in the previous suit by Ruttun Gopal Bhadoree as evidence against the present defendant, as also in relying on the decision of the 22nd March 1867, which did not determine any question of right as between the present plaintiff and the present defendant with reference to the *julkur* in dispute.

In this view, we reverse that portion of the judgment of the Lower Appellate Court which refers to the julkur situated to the south of Mirzapore, and affirm the rest of the judgment which relates to the portion situated to the west of the perpendicular portion above referred to.

The appellant will be entitled to costs of this appeal.

The 22nd January 1872.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Jurisdiction—Suit for Enhancement—Land used for Building Purposes.

Case No. 728 of 1871 under Act X of 1859.

Special Appeal from a decision passed by the Officiating Judge of Jessore, dated the 22nd March 1871, *reversing a decision of the Deputy Collector of that district, dated the 28th July* 1870.

Ranee Doorga Soonduree Dossee (Plaintiff) *Appellant,*

versus

Bibee Omdadoonissa (Defendant) *Respondent.*

Baboos Ashootosh Dhur and *Debendro Chunder Ghose* for Appellant.

Mr. R. E. Twidale for Respondent.

Difference of opinion as to whether enhancement of rent can be had under Act X of 1859 on land situate in the middle of a town or bazaar and used entirely for building purposes, Glover J. holding that it cannot, and Mitter, J., *contra.*

Glover, J.—The question in this special appeal is whether enhancement of rent can be had under Act X of 1859 on land situate in the middle of a town or bazaar and used entirely for building purposes.

The Judge has held, on the authority of Kalee Mohun Chatterjee *vs.* Kalee Kishen Roy, XI Weekly Reporter, 183, that it cannot.

It is contended for the special appellant that the land was originally let as an ordinary ryotee tenure, and that the suit is for rent of the land and not for the rent of the houses. I do not know that this makes any difference, and no attempt has been made to distinguish between the two kinds of rent. I understand Act X of 1859 as referring to land in the state it is in when the suit is brought, and there have been many decisions of this Court to the effect that the provisions of the Act can only apply to land which is at the time used for agricultural or horticultural purposes; and if land originally leased out as an ordinary agricultural tenure, becomes afterwards covered with buildings in consequence of a town or bazaar growing up round about it, I apprehend that under the rulings of this Court it loses its agricultural character, and cannot form the subject of an enhancement suit under the Rent Law.

The case of Ram Churn Singh *vs.* Meadhun Durzee, VIII Weekly Reporter, 90, is not contrary to this view. That was a suit for house-rent, and it was held that where that rent included the ground-rent and the two could be clearly separated, a claim for the ground-rent might be cognizable under Act X of 1859. But this opinion was given very doubtfully, the words used being "would perhaps be cognizable."

The case of Kalee Kishen Biswas *vs.* Sreemuttee Jankee, page 250 of the same volume, is very clear on the point. It rules that the occupation intended by Act X is occupation for agricultural or horticultural cultivation.

The case of Ranee Surno Moyee *vs.* Blumhardt, IX Weekly Reporter, 552, which has been quoted by the special respondent's pleader, is not applicable, for there the land was leased expressely for building purposes which is not shown to be the case in the suit now before us.

But the case of Kalee Mohun Chatterjee *vs.* Kalee Kishen Roy is directly in point, and decides that Act X of 1859 does not apply to a suit for the enhancement of rent of land, which is situated in the midst of lands used for building purposes and on which the defendant's house is built.

And Khairoodeen Ahmed *vs.* Abdool Bakee, XI Weekly Reporter, 411, upholds a similar principle.

So does Church *vs.* Ram Tonoo Shaha, reported in page 547 of the same volume, as does also Ram Dhun Khan *vs.* Haradhun Paramanick in volume XII Weekly Reporter, 404.

There is no doubt the case of Bromo Moyee Bewah, XIV Weekly Reporter, 252, in which Mr. Justice Mitter held that there was nothing in Act X of 1859 to justify any distinction between suits for arrears of rent on account of lands used for agricultural purposes and suits for arrears on account of land used for the other purposes; but the decision which was that of the senior Judge, Mr. Justice Louis Jackson, was in accordance with the rulings I have already quoted.

It seems to me, therefore, that we ought in this case to follow the long current of decisions which hold that the rent of land used for building purposes cannot be enhanced by a suit under Act X of 1859.

We were much pressed to refer this case for the decision of a Full Bench; but as there has been, so far as I can discover, no conflict of decisions on the point, I do not think that we can do so.

The decision of the lower Appellate Court appears to me correct, and I would dismiss this special appeal with costs.

My attention has been drawn to the case of Tarinee Pershad Ghose *vs.* Bengal Indigo Company, II Weekly Reporter, Act X Rulings, 9; but with all respect for the opinion of my learned colleague, I cannot think that this is a case in point, but if it be, there can be no doubt that a contrary ruling has been laid down in all the later decisions.

Mitter, J.—I am extremely sorry to differ from my learned and honorable colleague.

This was a suit for arrears of rent at enhanced rates, the arrears being alleged to be due on account of a piece of land situated in the Jessore Bazaar. The lower Appellate Court, being under the impression that the suit was one for house-rent, has dismissed it upon the ground that the Revenue Court, in which it was instituted, had no jurisdiction to try it.

I am of opinion that the decision of the lower Appellate Court is erroneous in law, and ought, therefore, to be set aside.

That the suit is not one for house-rent does not appear to be disputed. It is true that there is a building upon the land in question, but this building, it is admitted on both sides, is the property of the defendant; nor is it for any rent alleged to be due on account of that building that the suit was brought. The case, therefore, falls within the express provisions of Clause 4 Section 23 Act X of 1859, which was the law in force at the time of its institution and which says,—

"All suits for arrears of rent *due on account of land* Kherajee or Lakheraj *shall be* cognizable by *the Collector of land revenue* and *shall not be* cognizable by any *other Court.*"

The present suit is, as I have explained above, a suit for arrears of rent "due *on account of land.*"—That the land is occupied by a building appears to me to be of no consequence whatever. It is nevertheless "*land,*" exactly in the same sense, as it would have been if it had been cultivated with indigo or paddy; and as the rent claimed is alleged to have issued from the land and not from the building which stands upon it, I am unable to see how it can be held that the suit was brought in a wrong Court, when the Legislature says in so many terms, that *all suits for arrears of rent due*

on account of land shall be brought in the Collector's Court, and in no other. No portion of the rent sued for is or is even alleged to be due on account of the building; for that building is, as I have already shown, the property of the defendant, and as such not subject to the payment of any rent to the plaintiff. Nor can the fact that the arrears sued for, are claimed at enhanced rates affect the character of the suit in any way whatever. It is to all intents and purposes a suit for arrears of rent as it is in name; and as it is also a suit for arrears of rent "***due on account of land,***" it seems to be beyond all question that it is capable of satisfying all the conditions required by Clause 4 Section 23 Act X of 1859.

That Clause, it should be borne in mind, applies to suits for arrears of rent not only against *ryots*, but against all classes of under-tenants. This point has been settled by the decision of the Privy Council in the case of Dhunput Singh *vs.* Gooman Singh (XI Moore, page 463).* That was a suit for arrears of rent at enhanced rates against a quasi-talookdar holding an intermediate position between the proprietor and the ryots, and an objection was taken that the Revenue Court in which it was brought had no jurisdiction to try it. Their Lordships, however, overruled the objection upon the ground that the Clause above referred to "contains provisions for all classes of under-tenants."

It has been argued that as the land is not used for agricultural or horticultural purposes, the suit was not cognizable by the Revenue Court. I confess that I am at a loss to find out any satisfactory reason to justify such a distinction. There is nothing whatever in the words of the Legislature to support it. On the contrary, as *land* must retain its character as *land* whether it is used for agricultural or for building purposes, the contention seems to be directly in the teeth of the plain and obvious meaning of those words. Why then are we to dismiss this suit on the ground of such a distinction? A suit for arrears of rent due on account of a piece of land occupied by a ryot's homestead is clearly governed by Clause 4, Section 23, Act X of 1859, and there are many ryots in this country who do not hold any other lands than those occupied by their homesteads. A *putneedar* who holds an entire *pergunnah* and never uses a single cottah of the lands comprised in his *putnee*, for agricultural or horticultural purposes, would have been liable to be sued under that Clause, if it had been still in force as law; and I see no reason, therefore, why the purpose for which the land is used should have anything to do with the jurisdiction conferred on the Revenue Courts by that Clause. Whatever may be the true definition of the word "ryot" as used in Act X of 1859, it is by no means necessary that he should be an actual cultivator. Section 6 says distinctly that a ryot who has "***held***" land for twelve years consecutively is entitled to a right of occupancy exactly in the same way as a ryot who has "***cultivated***" land for the same period; and as Clause 4, Section 23, applies to all cases in which the subject-matter of the lease is land, I do not see the slightest reason why the defendant in this case should be permitted to object to the jurisdiction of the Revenue Court, even though he may not be a ryot within the meaning of the Act. The land for which the rent is claimed is, it is true, situated within a bazar, and it is also true that it is occupied by a building and not used for horticultural or agricultural purposes. But it is nevertheless land in every sense of the term; and as the suit is, therefore, a suit for arrears of rent due on account of land, it was instituted in the only Court in which it could have been instituted at the time. There is nothing whatever in the Act which says that the land should not be situated in a town or in the vicinity of a town; nor is there anything in it to give the slightest support to the contention that the land should be used for a particular purpose or found in a particular condition at the time when the suit is brought before the Revenue Court can assume jurisdiction to try it. Suppose for instance that a ryot cultivates his land with paddy for one year and then erects a building upon it or allows it to remain uncultivated in the next year. A suit for arrears of rent due for the first year would certainly be governed by Clause 4, Section 23, Act X of 1859, and I see no reason whatever why the same Clause should not apply to a suit brought for the arrears of the next year.

It has been said that there are several decisions of this Court by which it has been held that suits for arrears of rent due on account of lands not used for horticultural or agricultural purposes are not governed by Act X of 1859. I have carefully read those decisions, but with the greatest deference to the learned Judges by whom they were passed, I feel myself bound to say that they are based upon an erroneous construction of the law. I wish to add further that there are some decisions to the contrary effect (see II Weekly Reporter, Act X Rulings, page 9, Gap Number, Act X, page 78, ditto page 102, ditto page 46, V Weekly Reporter, Act X, page 60, VIII Weekly Reporter, page 90), so that there is no ground whatever for saying that the question has been set at rest by a long and uniform current of decisions. Indeed, the point was only a few days ago referred to a Full Bench in Special Appeal No. 81 of 1871, though I regret to say that the reference fell through in consequence of the Judges sitting on the Full Bench having come to the conclusion that the question did not arise in that particular case.

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* 9 W. R., 8.

As however, the view taken by me is in conflict with that taken by some of the learned Judges of this Court, I would reverse the decision of the lower Appellate Court subject to the opinion of a Full Bench.

The 29th January 1872.

Present :

The Hon'ble F. B. Kemp and E. Jackson,
Judges.

Jurisdiction—Suit to enforce Specially Registered Mortgage Bond — Registration—Act XX of 1866 *Section 55.*

Case No. 190 of 1871.

Regular Appeal from a decision passed by the Subordinate Judge of Furreedpore, dated the 19*th May* 1871.

Ootshub Narain Chowdry and another
(Plaintiffs) *Appellants,*

versus

Chittra Recka Goopta and another
(Defendants) *Respondents.*

Baboos Sreenath Doss and *Bhugobutty Churn Ghose* for Appellants.

Baboo Grija Sunker Mojoomdar for Respondents.

Section 55 Act XX of 1866 is no bar to the jurisdiction of the Civil Courts in entertaining a suit for the enforcement of a lien on landed property mortgaged under a bond specially registered under that Act.

Kemp, J.—In this case, the plaint has been rejected under Section 32 of Act VIII of 1859. That Section enacts that "if, "upon the face of the plaint, or after ques- "tioning the plaintiff, it appear to the Court "that the subject-matter of the plaint does "not constitute a cause of action, or that the "right of action, is barred by lapse of "time, the Court shall reject the plaint. Pro- "vided that the Court may in any case al- "low the plaint to be amended, if it appear "proper to do so."

In this case the Subordinate Judge of Furreedpore, Baboo Kalee Kinkur Roy, has rejected the plaint on these grounds—his decision is a very short one : "To-day this "plaint was laid before the Court and was "inspected in the presence of plaintiff's plead- "er, Baboo Bishto Churn Roy. Now, when "a final decision is passed in execution of a "decree by a Court on the evidence adduced "by both parties under the authority given "to it by Section 55 Act XX of 1866, "there does not appear to exist any law "or practice for bringing a fresh suit against "such decision. As, therefore, the plaint "does not disclose any proper cause of "action, it is fit to be rejected under Section "32 of the Code of Civil Procedure. Or- "dered: That the plaint be rejected, the "plaintiffs bearing their own costs."

Against this order an appeal has been preferred on the ground—1st, that the lower Court is wrong in holding that the Civil Courts have no jurisdiction in entertaining a suit for the enforcement of a lien on landed property mortgaged under a bond specially registered under the Registration Law; and, 2nd, that Section 55 of Act XX of 1866 is no bar to the entertainment of the present suit.

There is much in this plaint which might be eliminated, and this the pleader for the appellants, Baboo Sreenath Doss, admits, but substantially the prayer of the plaint is to have the defendants, and more particularly the Goopta defendant, declared liable and her property liable to sale for the liquidation of the debt secured by the bond of the 9th Joistee 1274, that is to say, to make the property pledged liable for the debt. The bond was specially registered under the provisions of Section 52 Act XX of 1866. Now, Section 52 says, that "whenever the "parties to an obligation shall agree that "in the event of the obligation not being "duly satisfied, the amount secured thereby "may be recovered in a summary way, and "shall at the time of registering the said "obligation apply to the registering officer "to record the said agreement, the register- "ing officer, after making such enquiries as "he may think proper, shall record such "agreement at the foot of the endorsement "and certificate required by Sections 66 and 68, and such record shall be signed by him and by the obligor, and shall be copied into the Register Book No. 1, or No. 6, as the case may be, and shall be *primâ facie* evidence of the said agreement."

Then Section 53 goes on to say: "Within one year from the date on which the amount becomes payable, or where the amount is payable by instalments within one year from the date on which any instalment becomes payable, the obligee of any such obligation registered with such agreement as aforesaid, whether under the said Act No. XVI of 1864, or under this Act, may present a petition to any Court which would have had jurisdiction to try a regular suit on such obligation for the amount secured thereby, or for the instalment sought to be recovered." Then there is a provision as to the stamp which is to be used and as to the verification of statements. Then it is enacted that, "on production in Court of the obligation and of the said record signed as aforesaid, the petitioner shall be entitled to a decree for any sum not exceeding the sum mentioned in the petition, together with interest at the rate specified (if any) to the date of the decree, and a sum for costs to be fixed by the Court. Such decree may be enforced forthwith under the provisions for the enforcement of decrees contained in the Code of Civil Procedure."

Then Section 55 enacts: "After decree the Court may, under special circumstances, set aside the decree, and, if necessary, stay or set aside execution; but there shall be no appeal against any decree or order made under Sections 53, 54, or this Section," that is to say, Section 55.

It appears that the plaintiffs obtained, in the first instance, a decree on this special registered bond against both the defendants, Chittra Reeka Goopta and Ooma Kant Mojoomdar. The Goopta defendant prayed for a review of judgment, but her application was rejected, and the plaintiffs executed their decree under the provisions of the latter portion of Section 53. Upon this the Goopta defendant again appeared as an objector, and the Court released her from liability under the decree under the provisions of Section 55. The plaint goes on to say, that in dissatisfaction with that order, the plaintiffs appealed to the Zillah Judge, and the Judge rejected the appeal, holding that under the provisions of Section 55 no appeal would lie. The pleader for the appellants, Baboo Sreenath Doss, admits that this was a right decision, and that no appeal lies from an order under Section 55; but the main contention in this case is, whether, although under Section 55 the Goopta defendant has been released from liability under the decree, a regular suit will not lie for the purpose for which this suit has been mainly brought, stripping it of all surplusage, namely, to enforce the lien of the plaintiffs under the bond as against the property pledged.

As against the defendant, Ooma Kant Mojoomdar, it is clear that the Subordinate Judge was wrong in rejecting the plaint, because there has been no order with reference to him under Section 55 of Act XX of 1866. The pleader for the respondents is forced to admit that there are no rulings of this Court governing the present case, and that it is a new point; and the rulings quoted by him appear to us to have no application whatever to this case. The first is the case of Jugti Sahoo and another, reported in Volume VI, Weekly Reporter, page 121, Miscellaneous Rulings. In that suit, in which Mr. Justice L. S. Jackson was sitting alone, this point did not arise; he was pressed to give an opinion upon it, but distinctly refused to give one. The other case cited was that of Kristo Kishore Ghose *versus* Brojonath Mojoomdar, published in Volume VI, Weekly Reporter, page 11, Civil References, present Chief Justice Peacock and L. S. Jackson, J.; in which case those learned Judges held that, in applications to the Court under Section 53 Act XX of 1866, the Court ought not to summon the defendant, the intention of the Act being that the applicant should, merely on production of the obligation and the record duly signed, obtain a decree for the sum mentioned in the petition, or any less sum which may appear to be due, with interest and costs; and that it was competent to the Court, under Section 55, on a representation by the judgment-debtor after decree, to set aside the decree and stay or set aside execution.

Therefore, as admitted by the pleader for the respondents, there are really no decisions of this Court touching on this point.

It appears to us clear that the plaintiff is entitled to institute a regular suit, which he has done, to have the question tried, whether the property pledged in this bond is liable for the debt covered by the bond. All that Section 55 enacts is, that the Court may, under special circumstances, set aside the decree obtained in a summary way by proceedings under the provisions of Act XX of 1866, and those Sections of it which apply to specially registered bonds, and that there shall be no appeal against such orders; but Section 55 does not enact that a party shall not be entitled to bring a regular suit, as the plaintiffs have done in this case, to follow the property pledged to them and to make the said mortgaged property liable for the debt.

As against the defendant, Ooma Kant Mojoomdar, against whom the plaintiffs have obtained a money decree, there can be no doubt that they are entitled to bring a suit to follow and make the property pledged liable for the debt; and as against the other defendant, the female defendant, Chittra Reeka Goopta, although, under Section 55 of Act XX of 1866, she has, under special circumstances, been declared entitled to have the summary decree against her set aside and execution stayed, and although there is no appeal against such an order, there is nothing in the law to prevent the plaintiffs from bringing a regular suit to establish the fact that the Goopta defendant and her property are liable under the bond.

In this view of the case, we think that the Subordinate Judge was wrong in refusing to try this case.

We reverse his order and remand the case for him to try it on the merits. Costs to follow the result.

Jackson, J.—The Subordinate Judge in this case has rejected the plaint under Section 32 Act VIII of 1859, holding that it does not disclose any proper cause of action. I understand that he means by that to refer specially to the words of the plaint which ask the Court to set aside the miscellaneous orders passed under Section 55 of Act XX of 1866, and to have the present defendants declared liable under the former decree. So far, I think, there may be something in the order of the lower Court rejecting the plaint, on the ground that there is no cause of action. There may be no cause of action to set aside these orders, but it does not follow that the plaintiffs cannot now bring a suit to have the defendants, and the property pledged, declared liable under the bond. It may be a question hereafter how far the former decision may bind the parties, but I am unable to say that, as the case stands, there is no cause of action.

The orders passed under Section 55 Act XX of 1866, have, to my mind, the effect of altogether setting aside the decree which a person could, under the provisions of Section 53 of that Act, have obtained in a summary way. Section 55 allows the Court which is executing the decree to stay execution, or to set aside execution altogether, but it does not appear to me that the effect of this is to prevent the plaintiffs from seeking their remedy in a regular suit; and although there is no appeal against an order passed under Section 55, there is nothing in the Section to say that the party is precluded from urging his rights in a regular suit.

I, therefore, concur in reversing the order of the lower Court and remanding the case for trial on the merits.

The 29th January 1872.

Present:

The Hon'ble G. Loch and W. Ainslie, *Judges.*

Mesne Profits—Principle of Assessing—Difference between Zerayet and Bhowlie Lands—Produce and Value—Onus probandi.

Case No. 129 of 1871.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Tirhoot, dated the 11th February 1871.

Mussamut Rookumee Kooer and others (Judgment-debtors) *Appellants,*

versus

Ram Tuhul Roy and others (Decree-holders) *Respondents.*

Baboos Mohesh Chunder Chowdhry and *Abinash Chunder Banerjee* for Appellants.

Baboo Chunder Madhub Ghose and *Hem Chunder Banerjee* for Respondants.

The loss of the party wrongfully kept out of possession must generally be measured by the actual profits arising from the usufruct of the land during that time, on an occupation of the same character as that of the party wrongfully kept out of possession at the date of his ouster or of the last legal occupant whom the plaintiff claims to succeed to, if the plaintiff himself never entered into possession.

A difference in assessment should be made between *zerayet* and *bhowlie* lands, a deduction being allowed as to the former on account of expenses of cultivation.

As regards the produce and value of the lands in such cases, it is the duty of the judgment-debtor to produce his accounts and to prove what were the real assets of the property.

Loch, J.—The appeal before us arises out of a case in execution of a decree passed on the 30th July, 1867 by the lower Court, and confirmed in appeal by the High Court on the 26th May 1868.

The application for execution was made on the 22nd February 1869, and an Ameen was deputed to make the necessary enquiries as to the amount of mesne profits.

The Ameen's report was submitted on the 30th September 1869, and certain objections were raised to it by both parties; and the case was finally determined on the 11th May 1870 by the Subordinate Judge, Moulvie Syad Imdad Ali

He found that the amount of the assets was 27,957 rupees; that, deducting therefrom 2,269 rupees as the Government revenue, and 934 rupees payable by the one-anna shareholder, the appellants before us were liable in the sum of 24,754 rupees as mesne profits.

Several questions have been raised in appeal before us:

First.—As to the principle upon which these mesne profits are to be assessed.

Secondly.—A question as to the *serayet* lands.

Thirdly.—A question as to 49 beegahs of *serayet* lands.

Fourthly.—As regards the produce and the value of those lands.

Fifthly.—As to the area of the *bhowlie lands.*—

And *lastly.*—As to the assessment with regard to saltpetre.

With reference to the principle of calculation to be adopted in this case, the appellant contends that the Full Bench Ruling, IX Weekly Reporter, page 445, ought to be our guide.

It has been in many cases held that the decision cited does not cover all descriptions of claims to mesne profits, and we think the most general rule is to be found in IX Weekly Reporter, page 478, a judgment which was delivered subsequently to the Full Bench decision, and concurred in by Mr. Justice Hobhouse who was one of the Judges who sat on the Full Bench.

We would state that rule in these terms, that the loss of the party wrongfully kept out of possession must generally be measured, by the actual profits arising from the usufruct of the land during that time, on an occupation of the same character as that of the party wrongfully kept out of possession, at the date of his ouster, or of the last legal occupant whom the plaintiff claims to succeed to, if the plaintiff himself never entered into possession.

Thus, if the lands had been held by tenants, the judgment-debtor would be answerable for the rents which he realized from them; if the last rightful occupant had held the lands, as is found in the present case, with regard to a great portion of them, in his possession and cultivated them himself, the debtor is answerable to the decree-holder for the profits which he, the decree-holder, might have made out of those lands by continuing to hold them in the same way.

We find from the judgment of the Court below that the lands in the possession of the judgment-debtor were somewhat in excess of 500 beegahs, and the Ameen, after taking the evidence of the tenants in the neighbourhood, and after having measured the *serayet* lands, as pointed out by the decree-holder, and after having heard the objections that were made by the judgment-debtor, has assessed these lands at an average which gives the sum of eight thousand rupees and odd. In coming to this conclusion, the Ameen has deducted one-half as the expenses of cultivation to which he thinks the debtor in possession would be entitled.

But the lower Court in disposing of this case considers that by so doing the Ameen has made no difference between these lands held by the judgment-debtor and *bhowlie* lands which are held by tenants. And the Subordinate Judge has, therefore, held that the debtor is liable to pay the whole amount minus the expenses of cultivation. He has accordingly allowed a deduction of 2 rupees a beegah as the expenses of cultivation, and has given a decree upon this head for 14,841 rupees. On this point we concur with the Subordinate Judge.

In appeal before us an objection was raised with regard to the quantity of the *serayet* lands. But on a reference to the petition of appeal, it appears that no objection was taken to the area as found by the Ameen; but only an objection was taken with regard to 49 beegahs of the *serayet* lands, and therefore the Court confined the arguments of the pleader for the appellant to those 49 beegahs which were mentioned in the petition of appeal, and we think no sufficient grounds have been made out for interfering with the judgment of the Court below in respect of those 49 beegahs.

It is true that a *jummabundee* of 1270 was filed by the decree-holder in this case, and that *jummabundee* shows that these lands were held by some of the decree-holders and others as tenants during that year 1270. But the mesne profits which are claimed are for 1274 and 1275; so that the state of things that was in 1270 did not necessarily exist in 1274 and 1275 : while the evidence taken by the Ameen clearly shows that these lands were held by the debtor as part of his *serayet* lands.

With regard to the produce and value of these lands, and indeed of all the lands concerned in this case, we have to remark that it was the duty of the judgment-debtor to produce his accounts and to prove what were the real assets of the property. He has not produced any reliable accounts whatever; and though it is remarked that the evidence of some of the witnesses who have been twice examined by the Ameen, and who in their second examination added something to what they stated in the first instance, yet the exaggeration of these men will not in any way invalidate the full investigation made by the Ameen who appears to have examined one or two hundred ryots, who prove what the average produce of the lands was in the years for which mesne profits have been decreed. According to their statements, the Ameen has assessed the lands, and nothing has now been shown us why we should not accept their evidence.

Then with regard to the *bhowlie* lands, the area has been found by the Ameen, and there is no contradictory evidence to show that it is wrong. The objection consists rather of a general assertion than any thing else. The Ameen has not come to the conclusion from guess. He has examined the ryots, and it is from their examination that he has found what the area is and what the produce of those lands is worth.

The last point that we have to consider is the amount of mesne profits as regards the saltpetre. With regard to the order which has been made by the lower Court on this point, we think that the original decree itself does not warrant any amount of mesne profits being given on this head. The decree merely sets forth that a saltpetre godown in Mouzah Nauora, with 700 maunds of clarified saltpetre, or its value, which is 2,450 rupees, should be given to the decree-holder, and though it provides that mesne profits of different mouzahs, of which possession has been given, should be given to the decree-holders; it does not, as we read the decree, declare that they shall have mesne profits with regard to the saltpetre manufacture. We, therefore, strike out this item from the order of the lower Court. After deducting this amount, we affirm the order of the lower Court and dismiss this appeal with costs, fifty rupees being allowed for pleaders' fees.

The 29th January 1872.

Present :

The Hon'ble H. V. Bayley and W. Markby,
Judges

Right to Pottah—Occupant Ryots in Assam.

Case No. 1158 of 1871.

Special Appeal from a decision passed by the Deputy Commissioner of Kamroop, dated the 20th June 1871, reversing a decision of the Sudder Moonsiff of that district, dated the 30th November 1870.

Mora Rabha (Plaintiff) *Appellant,*

versus

Dhew Rabha and another (Defendants) *Respondents.*

Baboo Obhoy Churn Bose for Appellant.

Baboo Grish Chunder Ghose for Respondents.

An occupant ryot in Assam does not forfeit his right to a *pottah* from Government by not applying for it so soon as another who was not in possession of the land.

Markby, J.—The question, to be decided in this suit is whether or no the plaintiff is entitled to a pottah of certain land from Government. It is proved to the satisfaction of both the Courts below that plaintiff's father was in possession of the land up to the year 1275 and that plaintiff has been in possession since. The first Court found that from the *dag chitta* and copy of the Mouzahdar's report as to the disputed land, it was evident that the measurement of the land was first made in plaintiff's name, but subsequently confusion was made by the officer preparing those papers and a *pottah* was given in the defendant's name.

The lower Appellate Court found that the son "succeeded the father in *de facto* possession and thereon ought to have applied "either for transfer of the *pottah* or for a "fresh *pottah* in his own name; he neglected "both these obviously necessary steps, and "allowed the land to be measured by an "Ameen on behalf of Government from "whom he received a *hath chitta* for which "no one but the Ameen himself was responsible, and eventually the occupant found "that the *pottah* for the land had been made "out in another man's name." There is no substantial difference in the facts as found by the two Courts, but the first Court gave the plaintiff a decree for all he asked, whereas the second Court says that he ought to have a decree declaring his possession only, and that he could not have any *pottah* from Government who had a right to dispose of the land to any one they pleased, but must content himself with the position he has as under-tenant to the Government *pottahdar*. This seems to me to be in direct contravention of the 2nd Rule of Section 19 of the Assam Rules for settlement in page 85 of the Gazette of the year 1868 which provides that "settlement for all lands which are "found occupied shall be made directly by "the settlement officers with the occupant "ryots." It seems to me that the present plaintiff comes within the class of persons there described as occupant ryots who have a right under those rules to claim settlement from Government. It has been contended that he does not, because he forfeited that right by his own conduct, but there is nothing in the finding of either of the Courts to justify such a contention. The first Court seems to attribute the granting of the *pottah* to the defendant to some confusion on the part of the officer who prepared the papers. The second Court only says that the plaintiff was not diligent in applying for the *pottah*. It seems to me that the mere fact, that the plaintiff did not apply for the *pottah* so soon as he might have done, cannot constitute such want of diligence on his part as would make him liable to forfeit his rights. If it were shown that he had knowledge or any notice to the effect that the land would be settled with other parties if he did not appear, the case would be wholly different; but, as I understand it, the proceeding between the defendant and the Government took place without any knowledge on his part or without any notice to him as to what was being done. I think, therefore, that the judgment of the lower Appellate Court must be reversed, and a decree given to the plaintiff declaring that he was in possession, and thus entitled to the settlement of the *jote* held by his father.

Bayley, J.—I quite concur. I would observe that it frequently happens in settlements that on the first measurement, after proper and general notice had been given in the Mehal to parties concerned to come forward, they are prevented from appearing by illness, accidental absence, and other causes. In that case, the Revenue officer, if he is satisfied that there was sufficient cause for non-appearance at the proper time, alters the *jumabundee* papers and *ryotwaree* lists. If he is not satisfied, he refuses to do so, but that refusal cannot prejudice the right of the party to establish his title by proceedings in the Civil Courts.

Under the circumstances, we think each party should bear his own costs in all Courts.

The 18th January 1872.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Share of Decree—Mortgage—Sale—Execution—Satisfaction.

Application for review of Judgment passed by the Hon'ble Justices E. Jackson and Onoocool Chunder Mookerjee, on the 4th July 1871, *in Miscellaneous Appeal Motion No.* 1517 *of* 1871.

Kristo Doss Koondoo, Decree-holder (Appellant) *Petitioner*,

versus

Mr. C. J. Wilkinson, Receiver of the Estate of Pran Kristo Biswas, deceased, judgment-debtor (Respondent) *Opposite Party.*

Mr. J. W. B. Money and *Baboo Aukhil Chunder Sein* for Petitioner.

No one for Opposite Party.

A share of a decree was mortgaged by the decree-holder's vendee who sold his rights and interests to petitioner, who now seeks to execute the decree as against the judgment-debtor with reference to that share. The judgment-debtor having paid in the money by order of the Court, and the mortgagee having entered up satisfaction of this decree against the judgment-debtor,—HELD that there was an end to that decree as against any persons liable under it for the mortgagee's share.

Jackson, J.—IF I was in any way satisfied that there was any error in our decision, I should have no hesitation whatever in admitting this application, but I am satisfied that the orders which we passed upon this case were correct. I shall not now go into all the particulars of the case, as it is admitted that the judgment-debtor might have discharged himself by paying the mortgage; and as the record shows that the mortgagee wrote up satisfaction of this decree against the judgment-debtor, that fact alone seems to me to put an end to the execution proceedings against the judgment-debtor as regards the money which was due for the mortgagee's share. I do not think it is incumbent upon the judgment-debtor in this case to show that, when that satisfaction was entered up, he paid up all the money which was due for that particular share. It is quite possible that satisfaction had been obtained by the mortgagee in some other way besides the payment of money; but under any circumstances the mortgagee having the power to execute this decree, and having entered satisfaction, there is an end to that decree as against any person liable under it for the mortgagee's share, and under these circumstances I think we were quite right in not allowing these execution proceedings to go any further. As regards the mortgagor's case, there is nothing to show on what terms the mortgagor and mortgagee stand to each other, and the mortgagee is no party to these proceedings in any way. It is very possible that there may be some good foundation for another suit between the parties, but as regards the execution proceedings they cannot be allowed to go on. The application is rejected.

Kemp, J.—I also think that this application must be rejected. It appears that Chunder Monee got a decree in 1887. She sold a 5 annas 6 gundahs 2 cowries 2 krants share of this decree to one Gunga, who, out of this 5 annas 6 gundahs 2 cowries 2 krants, or one-third share, sold a 2 annas 10 gundahs share to Gooroo Churn, and mortgaged a 1 anna 16 gundahs 2 cowries 2 krants share to the same party. There is no dispute as to the execution proceeding with reference to the 2 annas 10 gundahs share. The dispute is with reference to the share which was mortgaged to Gooroo Churn. Mr. Money's client has purchased Gunga's rights and interests, and he now seeks to execute the decree as against the judgment-debtor with reference to the share of 1 anna 16 gundahs 2 cowries 2 krants mortgaged to Gooroo Churn. The first Court held that, although Gooroo Churn had no right to recover *qua* this 1 anna 16 gundahs 2 cowries 2 krants share, yet as the judgment-debtor had paid by order of the Court, he could not be held liable to pay that sum over again. The first Court also held that, although it was very probable that there was collusion between Gooroo Churn and the judgment-debtor, and such presumption appears to be corroborated by the fact that a large sum was remitted by Gooroo Churn, and that the transaction took place in the Twenty-four Pergunnahs, where the decree had been sent for execution by a certificate under the provisions of Section 285 of Act VIII of 1859; still as the money had been paid in by the judgment-debtor by order of the Court, it would not be equitable to make the judgment-debtor pay twice over. This view was adopted by the Judge on appeal, and I think that the applicant should now proceed by way of a separate suit against Gooroo Churn.

The decisions of the lower Courts appear to me to be correct, and I concur in rejecting this application.

The 20th January 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Staying Execution of Decree—Appeal—Delay.

In the matter of
S. J. Leslie, *Petitioner*,

versus

The Land Mortgage Bank of India, *Opposite Party*.

Mr. R. T. Allan for Petitioner.

Mr. G. C. Paul for Opposite Party.

The Court declined to stay the execution of a decree (1) because the applicant had not shown, as he was bound to show, something beyond the mere fact of an appeal having been preferred against it, and (2) because there seemed to have been great delay on his part.

Couch, C.J.—In this case there appears to be no cause shown for staying the execution of the decree except the fact that the applicant has preferred an appeal to this Court, which appeal is upon the question whether there was jurisdiction in the Court which passed the decree. It is by no means clear to our mind that the appeal is at all likely to be successful upon that ground; but, however that may be, we think the applicant was bound to show something beyond the mere fact of an appeal having been made in order to obtain from the Court an order staying the execution of the decree. On that ground, therefore, it would seem that the application ought to be refused.

Also there seems to have been great delay on the part of the applicant. The order refusing to set aside the judgment was made on the 12th of October, and two months were given for the money to be paid in order to prevent the sale of the property. Now it is true that this Court was closed at that time, but the appeal might have been preferred and an application made to the Court to stay the sale as soon as the Court opened. Instead of that, an application of a different nature appears to have been made, no appeal being preferred, and on the 18th of December the order was made by Mr. Justice Glover and Mr. Justice Mitter. Why, when that order was made, the appeal was not at once preferred and an application made to the Court to stay the execution of the decree, it is difficult to see. The applicant waits until the 9th of January, within three or four days of the expiration of the three months, before he does anything, and then he does not immediately after filing his appeal apply to the Court, but waits until within three days of the day fixed for the sale. There seems to have been great delay there, such delay as disentitles the party to any consideration from the Court.

Again, it is to be observed that, although the decree is a decree for money and the property is to be sold in execution of that decree, the Land Mortgage Bank would have had a right to have the property under the mortgage, and it is not quite the case of a party seizing property in execution of a mere money decree.

We think that in the present case no sufficient reason is shown for our staying the execution of this decree. If the defendant suffers by the sale taking place on Monday, and the property is sold under unfavorable circumstances, he has only himself to blame for it. He had opportunities of preventing it if he was so minded, but he did not choose to do so.

The application is refused with costs.

The 23rd January 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Special Appeal—Findings of Fact—Evidence (of Weavers and Cultivators)—Possession—Dispossession—Act XIV of 1859 *s.* 15*—Onus Probandi.*

Case No. 1041 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Sylhet, dated the 15*th May* 1871, *reversing a decision of the Moonsiff of Russoolgunge, dated the* 31*st January* 1871.

Juggurnath Deb (one of the Defendants) *Appellants,*

versus

Mahomed Mokeem (Plaintiff) *Respondent.*

Baboo Rajendro Nath Bose for Appellant.

Baboo Bhowanee Churn Dutt for Respondent.

A finding of fact by a Lower Appellate Court may be disturbed in special appeal, if, as in this case, the reasonings and the views upon which that finding is based are erroneous in law.

It is an error in law to reject the evidence of weavers simply because they are weavers by caste, or to accept the evidence of witnesses who are cultivators because they are cultivators.

The defendant having had an award under Section 15 Act XIV of 1859, the plaintiff's allegation of possession and dispossession by the defendant required him specifically to prove those facts before the defendant could be called upon to prove his case.

Bayley, J.—We think the judgment of the Lower Appellate Court in this case cannot be sustained, and that the case must be remanded to be tried *de novo* by the Judge.

The plaintiff sued for possession of certain lands on the allegation that he was in possession, and was dispossessed by the defendants on the 12th Assar 1276.

The defendant's allegation was that he held an award under Section 15 Act XIV of 1859 in his favour, that he purchased the land from Abed, Kadir, and Sadir who obtained it from one Nasseer. This Nasseer was in the written statement of the defendant alleged to be the plaintiff's brother, and this was not denied by the plaintiff.

The defendant also stated that Nasseer made the sale of some other lands to him and one Gopal Kishen, and that subsequently he (defendant) purchased the share of Gopal Kishen.

The first Court dismissed the plaintiff's case, finding on the several issues of fact that the plaintiff failed to produce any documentary evidence showing that the land in suit was his property, and also on the ground that the evidence of the plaintiff's witnesses was not trustworthy. The first Court further goes on to state that the *kobala* of the 12th Magh 1258, and the *kubooleut* of Chyet 1259 produced by the defendant, and the evidence of the defendant's witnesses, established the allegations of the defendant.

The Lower Appellate Court has reversed the judgment of the first Court on various grounds, many of which form the subject of this special appeal.

Unfortunately, it is necessary in this case to go at some length into the judgment of the Lower Appellate Court in order to point out where there has been a defect of investigation in the case which has affected the decision on the merits, although we must say there has been to some extent a finding of fact by the Lower Appellate Court that the plaintiff had possession and was dispossessed. Here then we would remark that it is not sufficient and has never been held sufficient to say that the Lower Appellate Court has come to a finding of fact which cannot be disturbed in special appeal, if, as in this case, the reasonings and the views upon which that finding is based are erroneous in law. The Subordinate Judge commences:—"The "Moonsiff cannot distinguish between those "who are respectable and trustworthy wit- "nesses, and who are not. One can easily "make out on reference to record those who "have spoken the truth, and those who have "not, but the Moonsiff without attending to "that point, has indiscriminately disbelieved "those who are trustworthy and relied upon "those who are not." This is a remark which at any time it would be dangerous in an Appellate Court to make. It would require much care and much experience to justify such an assertion, even if the assertion be correct. The Subordinate Judge then disbelieves the evidence of the witnesses to the *kobala* produced by the defendant simply because they are low illiterate people, Joogees and Jollas by caste, and believes the witnesses for the plaintiff who it would appear are most of them cultivators. Now, although it would be quite open to the Lower Appellate Court to reject the evidence of the defendant's witnesses, it would be an error in law to reject their evidence simply because they are weavers by caste. In like manner, it would be an error on the other side in the Lower Appellate Court to accept as a rule, the testimony of witnesses who are cultivators from the very circumstance that they are cultivators. The Subordinate Judge goes on—"The Moonsiff records that it has been "proved before him by the evidence of wit- "nesses that Nasseer made the sale to Abed "and others who again sold it to Juggurnath "Nazeer, but the defendant Juggurnath Na- "zeer has not produced any kobalah of sale "by Nasseer and not a single witness of the "defendant has said that Nasseer made the "sale to Abed and others. It was not, there- "fore, proper for the Moonsiff to record such "false statement in his judgment." Here it would appear that the Subordinate Judge is wrong in his own statement, for what the Moonsiff speaks of there is not with reference to the lands in dispute, but with reference to *other lands altogether*. We only hope that the Subordinate Judge in calling this a *false* statement made by the Moonsiff (which word in the original is stated to be মিথ্যা) did not use it in any offensive sense, but simply as a statement which he considered incorrect. The Subordinate Judge then states that the vendors Abed, Kadir, and Sadir are strangers and parties without any title, which, however, does not appear to be the case. The Subordinate Judge, therefore, has also made a mistake in this part of his judgment.

The Subordinate Judge then finds that the defendant's witness Shahebdee, who called himself a subscribing witness to the *kobala* was not the identical person who witnessed the *kobala*, but a different man of the same name brought forward by the defendant to give false evidence, and this, the Subordinate Judge says, "is disclosed from looking at their residences." Now, if we look to the date of the *kobala* which is some 19 or 20 years old, possibly this change of residence may easily be accounted for, but the witness was not allowed the slightest opportunity to explain this which the Subordinate Judge has considered quite sufficient to falsify the evidence and has brought forth the most unnecessary and indiscreet and incorrect remark from him that "the Moonsiff has not been able to detect such a gross thing as this." The *pottah* or rather the *kubooleut* relied upon by the respondent showed the land to be the joint property of Nasseer and the plaintiff. This fact, however, seems to have been lost sight of by the Lower Appellate Court, and it was one of the most material points which were necessary to be investigated in order to test the plaintiff's alleged exclusive title to the property.

We also think that the remark of the Subordinate Judge that no documentary evidence whatever can be brought forward by one who holds land in *neej-jote* is incorrect, and that his remark "I cannot persuade myself to believe that the Moonsiff himself holds any document as to his possession of his own *khamar* land" is quite uncalled-for and unjudicial.

In the face, therefore, of these several defects in the judgment of the Lower Appellate Court, a statement in general words that the evidence satisfactorily establishes the possession of the plaintiff, and his ouster by the defendant in 1276 is hardly a ground to bar our interference in special appeal.

It has been pressed on us that the *onus* of proof has been wrongly thrown on the defendant. We think this contention correct. The defendant had an award under Section 15 in his favor, and the plaintiff's allegation of possession and dispossession by the defendant required him most specifically to prove those facts before the defendant could be called to prove his case.

It is with extreme regret that we have to express our very great dissatisfaction with the tone and spirit of the whole judgment of the Subordinate Judge in this case towards the Subordinate Moonsiff.

We reverse the judgment of the Lower Appellate Court and remand the case to the Judge of the district to try the case *de novo*. The costs will follow the result.

The 26th January 1872.

Present:

The Hon'ble A. G. Macpherson, *Judge.*

Review—Time for Application.

Application for review of judgment passed by the Hon'ble Justices W. S. Seton-Karr and A. G. Macpherson, on the 11*th May* 1866 *in Regular Appeals Nos.* 65 *and* 78 *of* 1866.

Bolakee Lall, Plaintiff (Respondent) *Petitioner,*

versus

Monjee Lall and others, Defendants (Appellants) *Opposite Party.*

Messrs. R. E Twidale and *C. Gregory* for Petitioner.

No one for Opposite Party.

A decision of the Privy Council in 1871 as to a question of fact in another suit, or the pendency of the appeal in the High Court, is no cause (under Section 379 Act VIII of 1859) for not having preferred an application for review of a judgment passed in May 1866, within ninety days from the date of the decree.

Macpherson, J.—THIS application is refused.

By Section 377 of the Code of Civil Procedure, an application for a review of judgment must be made "within ninety days "from the date of the decree, unless the party "preferring the same shall be able to show "just and reasonable cause," for not having preferred the application within the limited period.

The judgment which the Court is now asked to review was given in May 1866. A review is asked for on account of a decision of the Privy Council as to a question of fact in another suit, which decision was passed in July 1871. It may be that, if the present application were in time, the decision of the Privy Council might be deemed good and sufficient reason (within the meaning of Section 376) for granting a review. But it is clear that the decision of the Privy Council in 1871, or the pendency of the appeal in the High Court, is and can be no possible cause for not having preferred the application for review within the limited period. (See XIII Weekly Reporter, 120, and the Decision of the Full Bench, IX Weekly Reporter, 181).

The 29th January 1872.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Resumed Khas Mehals—Accretions—Regulation XI. 1825—Rights of Government.

Case No. 1157 of 1871.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 16*th June* 1871, *reversing a decision of the Subordinate Judge of Pubna, dated the* 22*nd April* 1870.

The Collector of Pubna, on the part of Government (Defendant) *Appellant,*

versus

Ranee Surno Moyee (Plaintiff) *Respondent.*

Baboo Unnoda Pershad Banerjee for Appellant.

Baboos Motee Lall Mookerjee and *Bhugobutty Churn Ghose* for Respondent.

The Government, when it holds a resumed mehal on its rent-roll as its *khas* property, holds it as, and with all the rights and liabilities of, a private zemindar, and is therefore entitled, under Regulation XI of 1825, to claim accretions to the *khas* estate.

Bayley, J.—Two distinct objections have been taken in this special appeal; one affecting the *uslee* lands of Kooshtea, part of the admitted zemindaree of the plaintiff, Ranee Surno Moyee, and the other with reference to that accreted portion which the plaintiff claims as part of the parent estate, and the defendant claims as attaching to Chur Jynepore.

In regard to the *uslee* lands, the grounds taken in special appeal are that the Lower Appellate Court has erred in law in holding that the question of title can be affected by the fact of possession having been found in the plaintiff's favor prior to 1275, and that the Lower Appellate Court was wrong in ordering a local investigation in this case.

With reference to the *first* of these objections, I have only to observe that the Lower Appellate Court finds, as a fact upon the evidence of both sides, that the plaintiff's long possession of the *uslee* lands as part of her zemindaree, Kooshtea, has been established by the evidence of witnesses, and that the defendant's claim thereto has not been made out. This, therefore, is a finding of fact upon evidence which we cannot disturb in special appeal.

With reference to the *second* point, it is only necessary to remark that no objection was taken either to the first Ameen's or the second Ameen's deputation. It further appears to me that the instructions to the second Ameen went to provide for a full investigation into the matter in dispute, to compare the plaintiff's chittahs with the land, and with reference to the survey map, on which alone the first Court decided the case.

With regard to the *second* portion of the case, *viz.*, the accreted lands, I think the judgment of the Lower Appellate Court cannot stand. It is urged by the pleader for the respondent that the Lower Appellate Court has found as a fact that the land accreted to the plaintiff's settled estate, Kooshtea, and that she has established her title to that land, a finding with which, it is contended, we cannot interfere in special appeal, but I think that the view in which the Lower Appellate Court has come to this finding is erroneous in law. The Judge says :—"The law for disposal of "accreted lands is Regulation XI of 1825, "but in no Section of that law can I find "that Government is entitled to claim accretions to a *khas* estate. They must be "made over to the person to whose land or "estate it has become annexed, and Government have the power to assess the public "revenue thereon. Government is not a "person, and I fail to see that Government "can claim accretions, except in case of accretions to an island, of which it is sole "possessor, and to which no person can establish any claim." Now the Government, when it holds a resumed mehal on its rent-roll as its *khas* property, holds it as a private zemindar, and has similar rights and liabilities. The pleadings of the parties in regard to "*Kanoon Doyum*," Kooshtea, and the facts found in relation to it, must be considered in coming to a determination on the relative rights of the parties in regard to the lands claimed as accretion. The case will, therefore, be remanded to the Lower Appellate Court to try, with reference to the above remarks, the issue as to whether the land in dispute other than the *uslee* land accreted to the estate of the plaintiff.

Markby, J.—I concur.

The 29th January 1872.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Suit for Separate Possession—Decree for Joint Possession — Procedure — Fresh Suit — Act VIII of 1859 s. 97.

Case No. 1155 of 1871.

Special Appeal from a decision passed by the Judge of Sylhet, dated the 18th July 1871, affirming a decision of the Moonsiff of Sonamgunge, dated the 23rd March 1871.

Juggunnath Deb Nazir (Defendant) *Appellant,*

versus

Moheboollah (Plaintiff) *Respondent.*

Baboo Rajendro Nath Bose for Appellant.

No one for Respondent.

The plaintiff having sued, and the issues having been laid down, as though the suit was for separate possession, the decree of the lower Courts for joint possession was set aside, with leave to plaintiff, under Act VIII of 1859 Section 97, to bring a fresh suit for joint possession.

Markby, J.—We do not think it necessary in this case to go into the other objections, because it appears to us that there has been a miscarriage which is fatal to the decree made by the lower Courts.

The plaint does not appear to be very distinct, but it is quite clear in what sense the first Court understood it from the abridgment which the Moonsiff has given in his judgment. He understood this as a suit asking for distinct and separate possession of a specific portion of land, not for *ijmalee* or joint possession, and the issues are framed without indicating any change in the frame of the suit.

The Moonsiff then goes into the plaintiff's title, and gives him a decree not for what he asked, — *viz.* distinct and separate possession,—but in so many words for *ijmalee or joint* possession of a 7-anna share.

The defendant distinctly objected in the Lower Appellate Court that this could not be done, which objection is not further noticed by the District Judge than by saying that he sees no reason why it should not be done.

Now I may say, for both of us, that we are most anxious not to throw any impediment whatever in the way of any Court ascertaining by examination of pleaders or parties and raising in the shape of issues the real question which has to be tried, and that we are in no way whatever desirous of fettering Courts of Justice by any technical rule. But, as far as we are able to discover in this case, after the nature of the suit had been ascertained by the Court, and after the issues had been laid down on the supposition that the suit was for distinct possession, a decree was given for joint possession without any change whatever being anywhere recorded or in any way made in the issues. Nor, supposing that the Lower Appellate Court could have done so, was any change made there either. It seems to us that that leaves this suit in a condition in which the decree cannot be supported. If Courts are desirous of giving a decree different from what is asked for in the plaint, or to try any question not raised in the issues, undoubtedly some record or other of the change must be made in order that the parties may bring their evidence and shape their contentions accordingly. If not, it is obvious that parties coming into Court on one question and bringing evidence upon and arguing that question may find themselves defeated upon a matter which they never expected to have tried by the Court. We think, therefore, that the decisions of the lower Courts should be set aside; but as this objection is one which goes only to the form of the suit and does not ultimately settle the real question between the parties, this decision will be no bar to a suit properly framed for the purpose of ascertaining whether or not the plaintiff is entitled to joint possession of any portion of this property, to bring which suit we grant permission under Section 97 of the Code of Civil Procedure.

The judgments of the lower Courts are set aside, and the plaintiff's suit, as brought, dismissed with costs.

We think the appellant is also entitled to his costs of the Courts below, because the fault was of the plaintiff who might, without difficulty, have clearly stated the question which he wished to have tried by the Court.

The 29th January 1872.

Present :

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble A. G. Macpherson, *Judge.*

Execution of Decree — Infructuous Execution against Property—Execution against Person—Onus Probandi.

Appeal from a decision of the Hon'ble J. B. Phear, exercising the Ordinary Civil Jurisdiction of the High Court.

C. Seton and another (Judgment-creditors) Petitioners, *Appellants,*

versus

A. S. Bijohn (Judgment-debtor) Opposite Party, *Respondent.*

Mr. Phillips for the Appellants.

No one for the Respondent.

HELD that the Lower Court was bound upon, the application of the judgment-creditor, to issue execution against the person of the judgment-debtor after an infructuous execution against the property of the latter; and that instead of throwing upon the creditor, when applying for execution, the burden of proving to the satisfaction of the Court that by sending the debtor to prison some satisfaction of the debt would be obtained, the burden of proof should be put on the debtor when arrested to show that he has no means of satisfying the debt and that he has not been guilty of any misconduct and ought not to be sent to prison.

THE petitioners alleged that, on the 2nd June 1871, they obtained a decree against the defendant, whereby the defendant was ordered to pay them the sum of Rs. 2,227-15-6, with interest at 6 per cent. and costs; that, on the 4th July 1871, the petitioners' costs were taxed by the Taxing Officer, who allowed the sum of Rs. 481-6; that, on or about the 19th May 1871, the Sheriff of Calcutta had attached five casks of linseed oil, the property of the defendant, under a writ of attachment; and, on the 30th May 1871, a claim to the said property was preferred by one Sapoorjee Byramjee, who alleged that he was the owner thereof, and prayed that the said attachment might be removed; that, on the 27th June 1871, the application of the said claimant was refused with costs, the amount whereof had since been paid to the petitioners; that, on the 6th July 1871, the petitioners obtained a writ of attachment under their decree against the said five casks of linseed oil; and, on the 13th of the same month, obtained an order of the Court directing that the Sheriff should sell the said oil by public auction, and that the petitioners should be at liberty to bid for and purchase the same; and in the event of their becoming the purchasers thereof, that they should be at liberty to set off *pro tanto* the purchase money against the amount of principal, interest, and costs, payable under the decree; that, on the 3rd August 1871, the property attached was sold by the Sheriff and realized the sum of Rs. 367-7-8, after deduction of poundage and charges; that the balance due to the petitioners under the decree still remained due and unsatisfied; that the defendant was then a prisoner for debt in the Presidency Jail; that the petitioners had been unable to discover any other property of the defendant which could be attached in execution of the said decree, and they, therefore, prayed for a writ of attachment against the person of the defendant in execution of the said decree.

The judgment of the Lower Court, from which the appeal was preferred, was as follows:—

Phear, J.—It appears to me, Mr. Phillips, that on the facts which you disclose in your affidavit I ought not to issue execution against the person of the defendant. In the case of a first application for execution, all things being regular, the Court is obliged, under our Civil Procedure Code, to issue execution in whichever form the judgment-creditor asks it; but when the writ of the Court's process is invoked a second time, the matter is, I think, different. In my opinion, the Court has then a discretion to enquire what has been done with the first process, why it has not proved fully fructuous, and whether there is any reason for anticipating any beneficial result to the creditor as the effect of issuing another process. The Court is of course bound to do all in its power to compel obedience to the order which itself has passed, but in execution proceedings, its action should be limited to this end—it should not allow its process to be used for any bye purpose; it is bound to take care that the judgment-debtor, however worthless a man he may be, is not uselessly harassed by process which cannot lead to satisfaction of the decree. The Court ought not to arrest a judgment-debtor merely to punish him. I have always held in this Court that after process of execution has been once granted to a judgment-creditor, in accordance with his request, it becomes matter of judicial discretion with the Court to decide whether or not a second application for execution should be granted, a discretion to be exercised in view of all the facts of the case. And I have reason to know that the Judges of both the Bombay and the North-West High Courts have followed a like practice. Now, the affidavit on which you move shows that the judgment-debtor has no property, so far as the plaintiff knows. The judgment-debtor is also already in prison at the suit of another creditor, from which fact I infer that other persons are equally unable with the present applicant to find any property of his. Your client does not venture to say that he has reason to think the judgment-debtor has means of satisfying the decree, which he, the creditor, is unable specifically to ascertain or to get at; and this omission is the more important, because, when you first made the present application two days ago, I said I would grant it, provided something of this kind were made out to me. It is, therefore, I think, clear by your own showing that, if I issued the execution which you ask, it could only end in the debtor being brought before me and discharged. And I do not think I ought to cause the man to be arrested merely by way of punishing him for his conduct in incurring the debt, however gross that may have been. The Criminal Tribunals should be resorted to, if such a purpose as this actuates the creditor. I refuse the application.

The petitioners appealed from this order on the following grounds:—

First.—That the Judge erroneously ruled that he was entitled, in the exercise of his discretion, to refuse the application, whereas he was bound to issue execution according to the nature of the application.

Second.—That the Judge was in error in refusing the application, and that the same should have been granted.

The judgment of the Appellate Bench was delivered as follows by—

Couch, C.J.—This was an appeal from a decision of Mr. Justice Phear, refusing to grant an application which was made by the appellants for execution of the decree obtained by them, on the 2nd of June 1871, by attachment of the defendant's person.

The learned Judge in his judgment thus stated the ground on which he proceeded when he refused to grant the application. "The affidavit, on which the application was "made, shows that the judgment-debtor has no "property so far as the plaintiff knows. The "judgment-debtor is also already in prison "at the suit of another creditor, from which "fact I infer that other persons are equally "unable with the present applicant to find "any property of his. Your client (addressing "Mr. Phillips and meaning the appellant) "does not venture to say that he has reason "to think the judgment-debtor has means of "satisfying the decree, which the creditor is "unable specifically to ascertain or to get at, "and this omission is the more important because when you first made the present application two days ago, I said I would grant it "provided some thing of this kind were "made out to me. It is therefore I think "clear by your own showing that if I issued the execution which you ask, it could only end in the debtor being brought before me and discharged. And I do not think I ought to cause the man to be arrested merely by way of punishing him for his conduct in incurring the debt, however gross that may have been."

There have been several decisions of this Court upon the question of the Court granting execution of its decrees, to which it is desirable that we should refer. The earliest case which I am aware of is Davis *vs* Middleton, reported in the 8th Volume of the Weekly Reporter, page 282. The learned Judges in that case were the late Chief Justice Sir Barnes Peacock and Mr. Justice Markby. The Chief Justice said "It appears to us that, upon these Sections, the judgment-creditor has an uncontrolled option whether he will proceed, in the first instance, against the person or the property of the judgment-debtor. That option is clearly given by Section 201; and by Section 15 Act XXIII of 1861, it appears that the Court is bound, if the application be in due form, to admit it, and, when it is admitted, to order execution 'according to the nature of the application.' The only words which can give any apparent discretion to the Court are in Section 221 of Act VIII of 1859 which relate to the issue of 'the warrant which the Court is to issue 'unless it see cause to the contrary.' Looking to the previous Sections, we do not think it was the intention of the Legislature to control by those words the option of the judgment-creditor. It would be very inconsistent if the Court, under Section 15 Act XXIII of 1861, were bound to order the execution, and were not bound under Section 221 Act VIII of 1859 to issue the warrant." In a subsequent paragraph the learned Chief Justice says;—"We are of opinion that the Court may in its discretion refuse execution against the person and property at the same time, and it may also refuse execution against the person when, under Section 13 Act XXIII of 1861 or under Section 19 Act XI of 1865, application for immediate execution is made verbally at the time of passing the decree; but that when application is made after the passing of the decree by written application under Section 207 Act VIII of 1859, the Court is bound to issue execution according to the nature of the application."

That judgment does not apply to the question whether the Court is bound to issue execution according to the nature of the application when execution has been already issued either against the person or property of the judgment-debtor.

The next case is reported in the 9th Volume of the Weekly Reporter, 527, and is a decision of Mr. Justice Phear, and there the learned Judge said. "It seems to me that under the Procedure Act (Act VIII of 1859) although the Court is bound to issue process of execution of one sort or the other when first the execution-creditor makes application in due form for execution, and shows that every thing has occurred to entitle him to it in the mode prescribed by the Act, still I do not think that, when the Court has once granted an application of this kind, it is bound upon the second application of the same judgment-creditor, to grant the second application as a matter of course. I think that it is specially incumbent upon all Courts charged with the execution of decrees to take care that their proceedings and processes are not abused, and that there is probably no process or proceeding of Court in regard to which it is necessary to be more attentive in order to prevent abuse than the process of execution. I think that except in the first instance, when no doubt the Court is obliged to grant the application of the judgment-creditor, in other cases it ought always to require of him to show why the steps previously taken by him in execution had not led to a full discharge of the debt; and unless the judgment-creditor should satisfy the Court that the failure of these proceedings to bring about execution of the decree was not attributable to his own fault, the Court ought not, I think, to grant its process a second time." Sir Charles Hobhouse who sat with him does not appear to have concurred in that view, and says, in the short judgment which he gave, "I am not prepared to give any opinion upon the subject discussed in the second part of my brother Phear's judgment. I do not think that that subject necessarily arises in this particular case."

This subject again came before Sir Barnes Peacock and my brother Macpherson in the case reported in the 12th Volume of the Weekly Reporter, Original Jurisdiction, page 7. There the question was whether the decree-holder, who had obtained two successive writs for execution, both of which had been returned unexecuted by the Sheriff, was entitled to a writ of attachment returnable at the end of a year. Sir Barnes Peacock said, after mentioning the circumstances of the case :—"Under these circumstances, I am "of opinion that, although the Judge has a "discretion, yet the fact that the plaintiff "has not used the utmost possible diligence, "is not a sufficient ground upon which a "fresh writ for one year should be refused. "At any rate, in this particular case in which "each of the two writs issued was returnable in one month, a longer period ought "to be allowed, and a fresh writ issued "against all the defendants returnable in "twelve calendar months." Mr. Justice Macpherson said :—"While I incline to agree in "thinking that in this particular case a warrant to attach the persons of the defendants "should issue, I desire to add that in my "opinion the learned Judge was right in the "principle on which he considered himself "to be acting when he refused to order that "a warrant should issue, I think that the "Court clearly had a discretion in the matter, such discretion being expressly given "by Section 221 of Act VIII of 1859. In "the exercise of the discretion given by "that Section, if the Court is not satisfied "that the judgment-creditor has been using "his best endeavours to execute the former "warrant, a fresh writ ought not to be "granted."

Now the judgment of the learned Judge, which is appealed against, goes beyond either of the decisions to which Sir Barnes Peacock was a party. It appears to me also to go beyond the opinion which Mr. Justice Phear had himself expressed, although I can see the view which he has expressed in this case, was foreshadowed in his judgment in the former. I think, when we look at the provisions of Act VIII of 1859, that the principle upon which this refusal proceeded cannot be supported, and that the order of the learned Judge must be reversed, and an order made that the attachment applied for shall issue.

Section 8 Act XXIII of 1861 provides that, "when a person arrested under a warrant in execution of a decree for money shall, on being brought before the Court, apply for his discharge on either of the grounds mentioned in Section 273 of Act VIII of 1859, the Court shall examine the applicant in the presence of the plaintiff or his pleader, as to his then circumstances, and as to his future means of payment, and shall call upon the plaintiff to show cause why he does not proceed against any property of which the defendant is possessed, and why the defendant should not be discharged."

This is not a mere formal proceeding ; and that it is one which the plaintiff is entitled to have adopted, appears to me to be shown by two decisions of Mr. Justice Phear himself. They are both quoted in Mr. Broughton's Edition of the Code of Civil Procedure, under the repealed Section 274 of Act VIII of 1859. One of them is the case in 1 Bourke's Reports, page 101, where Mr. Justice Phear is reported to have said :—"The Legislature "intended that, if the prisoner was brought "up on arrest at the instance of an execution-"creditor, he should be committed to prison. "If, however, he should be proved to have "been perfectly honest, to have no present "means of payment, and to have put no obstacle in the way of his creditors taking "possession of his property, but, on the contrary, to be willing to give every facility "for getting it, and that it should be apparent that his being kept in prison would be "mere useless oppression, and could lead to "no good result, the Legislature intended "that he should be discharged." In the other case, the learned Judge held that, "where the defendant had endeavored to "retain possession of land, and set up an unwarrantable defence founded on the alleged "unchastity of a widow under whom the "plaintiff claimed, a defence utterly groundless, that was an act of bad faith sufficient "to warrant his re-committal under Section "275." So that, according to these opinions, the plaintiff has a right to have an enquiry made when the defendant is brought up as to various matters which are most material to be considered upon the question whether the defendant should be committed to prison and detained in execution of the decree. The learned Judge in the view he takes excludes the plaintiff from having any such enquiry, and takes upon himself to determine, as it appears to me, that, without any examination of the defendant, he can come to the conclusion that the plaintiff has no right to take him in execution. It seems to me that, instead of putting the burden of proof on the person who has been arrested to show that he has no means of satisfying the debt, and that he has not been guilty of any misconduct, and ought not to be sent to prison, he has thrown upon the plaintiff the burden of proving to the satisfaction of the Court when applying for execution that, by sending the debtor to prison, some satisfaction of the debt would be obtained. I think that this is a wrong principle, and is not justified by previous decisions of the Court ; and although there might not possibly be an appeal from the exercise of the learned Judge's discretion in any particular case, I think when we find that he has proceeded on an erroneous principle, an appeal under Clause 15 of the Letters Patent clearly lies. I am of opinion that his decision should be set aside, and an order made for the attachment of the person of the debtor.

As the debtor has not appeared, we cannot make any order as to costs. The appellant will bear his own costs of this appeal.

Macpherson, J.—I am of the same opinion.

The 30th January 1872.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Registration—Suit to compel—Splitting up Tenure—Act X of 1859 *s.* 27.

Case No. 181 of 1871.

Special Appeal from a decision passed by the Second Subordinate Judge of Hooghly, dated the 8th *December* 1870, *affirming a decision of the Moonsiff of Ghattal, dated the 5th September* 1870.

Bhooputee Roy (Plaintiff) *Appellant,*

versus

Umbica Churn Banerjee and others (Defendants) *Respondents.*

Baboos Ashootosh Dhur and *Taruck Nath Sein* for Appellant.

Baboos Bhyrub Chunder Banerjee and *Mohendro Lall Mitter* for Respondents.

A *putneedar* is not bound to split up a tenure and to record separately the *jumma* payable by the holder of a share. Instead also of the latter bringing a suit in the first instance to compel the *putneedar* to register his share, he should have made an application for registration to the *putneedar* under Section 27 Act X of 1859.

Kemp, J.—THE plaintiff in this case, the special appellant before us, sued alleging that the Rajah of Burdwan granted an *Ayma*, consisting of 2000 beegahs, to one Gokool Nath Mitter; that the plaintiff's ancestor has by purchase become the owner of 200 beegahs of this *Ayma* in Mouzah Kabeelpore, and that the defendant *putneedar*, Umbica Churn Banerjee, had falsely and fraudulently and in collusion with the plaintiff's brother brought a suit for arrears of rent against the recorded *Aymadar* and recovered rent; that the plaintiff's title is jeopardised by that decree, and he therefore sues to compel the *putneedar* to register the 200 beegahs alleged to have been purchased by the plaintiff's ancestor so far back as in 1859, or rather the plaintiff's share of these 200 beegahs, namely 100 beegahs, and not only to register these 100 beegahs separately but to apportion the *jumma* payable upon them at the rate of 8 annas 7 gundahs per beegah or on the 100 beegahs a *jumma* of 88 rupees 7 annas for which the plaintiff says he is liable to the *putneedar*.

Both Courts have found that this suit cannot be maintained. There can be no doubt that the *putneedar* is right in law in bringing the suit for arrears against the recorded proprietor of the tenure. There has been no application to the *putneedar* under Section 27 for registration, and the averment that there has been such application is distinctly denied by the *putneedar*. It is clear that the plaintiff has not attorned to the *putneedar* and has never paid a pice of rent to him since 1859. It is admitted by the pleader for the plaintiff, appellant, that his client has asked too much in his plaint, and that the *putneedar* is not bound to split up the tenure and to record separately the *jumma* payable by the plaintiff; but he asks the Court to do for him what he should have done for himself in the first instance, namely, to make an application for registration to the *putneedar* under Section 27.

We think that the lower Appellate Court's order dismissing the plaintiff's suit was quite right, and we dismiss this appeal with costs.

The 30th January 1872.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Act VIII of 1859 *s.* 15—*Declaratory Suit—Vesting of Shares of deceased Person.*

Case No. 988 of 1871.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 3rd *June* 1871, *reversing a decision of the Moonsiff of Arrah, dated the 24th February* 1871.

Baboo Bhugwan Singh and others (Plaintiffs) *Appellants,*

versus

Mitturjeet Singh and others (Defendants) *Respondents.*

Baboo Kalee Kishen Sein for Appellants.

Baboos Sreenath Doss and *Chunder Madhub Ghose* for Respondents.

There is nothing in Section 15 Act VIII of 1859 to prevent the entertainment of a suit to ascertain how the shares of a deceased person are vested, notwithstanding that no overt act has occurred to give rise to relief in the shape of damages or a decree for possession.

Markby, J.—It seems to me that the real issue raised between the parties in this case was a general one, *viz.*, in whom was the share of Chatro, one of the four sons of Roop Singh, vested.

The plaintiff represents two of the sons who alleged that the share vested in them to the exclusion of the defendants who claimed as representatives of Seeta, the other son, because Seeta was separated from the rest of the family. That was the mode in which they arrived at the result which they desired to obtain, but the general issue raised was as to the person in whom vested the share of Chatro.

The first Court found that the contention of the plaintiff was right, that Seeta was separated from the rest of the family, and that the defendants were excluded; and according to that view gave a decree in the plaintiff's favor.

The Appellate Court, however, did not concur in this view. The Judge came to the conclusion that all four brothers were joint, and having come to that conclusion he dismissed the whole suit. It was only when the Judge arrived at the conclusion that Seeta was living joint with the rest of the brothers, that it became necessary to enter upon an enquiry into the state of the family to ascertain what the result of that would be upon Chatro's share. It was then only that the Court ought to have entered into such an enquiry. Now the vesting of the share of Chatro, even supposing (as is now finally found) all the brothers to have been joint, will depend upon the dates of the death of the several brothers and upon other circumstances all which must be enquired into before that question can be decided. Taking the case, therefore, in that point of view, I think there must be a remand for the purpose of enquiry on that point.

A cross-objection has, however, been taken by the respondent that the suit cannot be maintained because the plaint discloses no cause of action. No doubt, this objection was taken in the first Court, and in all probability it was only not taken in the second Court, because there the suit was dismissed on another ground. But as the suit seems to have been wrongly dismissed, it now becomes necessary to consider this point.

Now, though the plaint in this case is not drawn with anything like technical accuracy, there really was a contest in this family as to the share of Chatro which contest has been sought to be made the subject of a suit and of decision in a Court of law. There was a contention on one side that the share wholly vested in the plaintiff, and a contention on the other that a moiety thereof vested in the defendants. It does not appear to me that there is anything in Section 15 Act VIII of 1859, which prevents the Court entertaining a suit to ascertain how the shares of a deceased person are vested, notwithstanding that no overt act which could give rise to relief in the shape of damages or a decree for possession has occurred. It must be remembered that the words of Section 15 are not, as the expression is, "*disabling*," but "enabling." They do not say that no suit shall lie in which a merely declaratory order or decree is sought, but that no suit shall be open to objection on the ground that a merely declaratory order or decree is sought thereby; and I do not think it was the intention of the Legislature to exclude any suits which by the practice of the Courts at the time this Act was drawn had been usually entertained. And as far as I can see, suits such as I consider the present in substance to be, *viz.*, a suit to ascertain the shares of the several members of a family in a family property, where there is a dispute between them as to their respective rights, have been frequently entertained by this Court. Upon this ground, therefore, that there was a real dispute between the parties as to their right to Chatro's share, which dispute the parties were desirous of having settled; and that though no one had yet been disturbed in his possession, the defendants were asserting and acting upon their rights, I think this suit can be maintained.

It may be added that, as to the share of Jhotaca, it is admitted on all hands that she is in possession of 2½ dams in lieu of maintenance, and she claims no more. No further enquiry, therefore, so far as her claim is concerned, is necessary, no question having been raised on that point.

The case will be remanded accordingly. The costs will follow the result.

Bayley, J.—I concur.

The 30th January 1872.

Present :

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Minors—Sale by Manager—Jurisdiction—Summary Department—Demolition of House—Title.

Case No. 821 of 1871.

Miscellaneous Appeal from an order passed by the Officiating Judge of Rungpore, dated the 22nd July 1871.

Mukrumunnissa and another (Second Party) *Appellants,*

versus

Abdool Jubbar (First Party) *Respondent.*

Moulvie Syud Murhumut Hossein and *Baboo Bykunt Nath Paul* for Appellants.

No one for Respondent.

HELD that the lower Court could not, in the Summary Department, pass an order declaring invalid a sale of a house made by a manager as being beyond the scope of Section 18 Act XL of 1858, and granting an injunction to prevent the demolition of such house, but should have left the title of the parties to be established in a regular suit.

Bayley, J.—THE respondent in this case does not appear.

After reading the judgment of the Judge below, we think that his order must be set aside.

A petition was made in the Court below by the respondent, Abdool Jubbar, for the Court to declare as invalid certain sale of a house made by a manager as not being in conformity with but beyond the scope of the provisions of Section 18 Act XL of 1858, and for an injunction to prevent the demolition of such house, and the lower Court has granted both the prayers.

The petitioner represented himself to be one of the heirs of the deceased, and in that capacity objected to the proceedings of the manager who was appointed under the provisions of the Act referred to above.

The appellant before us takes objection to the order of the lower Court, *firstly,* on the ground that there is no evidence to support the allegation of the respondent, and *secondly,* that no such order can be passed in the Summary Department, but that the *title* of the parties must be established in a regular suit.

We think it sufficient to say that the second objection is good, and we therefore set aside the order of the lower Court with all costs.

Markby, J.—I concur.

The 30th January 1872.

Present :

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Admission—Non-traverse of Particular Allegation—General Denial.

Case No. 965 of 1871.

Special Appeal from a decision passed by the Officiating Judge of Purneah, dated the 4th April 1871, *reversing a decision of the Moonsiff of Kishengunge, dated the 31st December* 1870.

Shaikh Hameedoollah (one of the Defendants) *Appellant,*

versus

Genda Lall (Plaintiff) *Respondent.*

Baboo Rajendro Nath Bose for Appellant.

Mr. C. Gregory for Respondent.

The mere fact of non-traverse of the plaintiff's allegation of heirship was held not to amount to an admission of title, especially (as in this case) where there was a general denial of the plaintiff's allegations including that of plaintiff's title, and where the real question at issue was as to the share to which plaintiff was entitled.

Bayley, J.—THE plaintiff in this case sued for a declaration of his right to an estate sold as the property of one Nowrungee Lall.

The plaintiff alleged that the property in suit was a resumed mehal acquired by his father Topha Lall, his uncles Dhurm Lall and Koonj Lall, and his cousin Koron Lall, excluding the four other brothers of his father; and that, in addition to the share of his father, he was entitled to succeed to his uncles who died childless.

The first Court found that the property in dispute was not solely acquired by Topha Lall, Dhurm Lall, Koonj Lall, and Koron Lall, as the plaintiff alleged, but that, besides these persons, there were four other brothers of the plaintiff's father who had a joint interest in the property, and that, therefore, the plaintiff as heir to his father was only entitled to a one-eighth or two annas share in the property in suit.

The Lower Appellate Court has reversed this decision. It says that the issues framed by the Moonsiff, although they were accepted by the parties, were unnecessarily complicated. It then lays down that the only issue to be decided in the case was, whether the "beneficiary" interest in the estate, prior to the sale, was vested in the plaintiff or not. On this point, the Lower Appellate Court says that "the plaintiff has fully succeeded "in establishing his *right* by the settlement "of the Collector in 1845, by a series of "challans subsequent to that date, by some "pottahs, and by the evidence of some "witnesses, whom the Moonsiff has called "incompetent and incredible without giving "any reason for thinking them so. It has "been most satisfactorily proved that every-"thing connected with this estate has been "carried on by Topha Lall, Dhurm Lall, "Koonj Lall, and one Raj Coomar, who is "father of, and who was succeeded by, Koron "Lall." The Lower Appellate Court then proceeds:—"The first four of these were brothers, and the *plaintiff's allegation that he is their heir is nowhere traversed.*"

We think the judgment of the Lower Appellate Court cannot be maintained. The mere fact of non-traverse of the plaintiff's allegation does not amount to an admission of his title, especially in this case, where there was a general denial of the plaintiff's allegations which included that of plaintiff's title. Independent of this, the issues framed in the first Court, which issues were accepted by the parties, show that the real question in dispute was as to the share to which the plaintiff was entitled. Under these circumstances, to decide against the defendant by accepting the plaintiff's allegations, on the ground that they were not traversed by the defendant is, we think, a defect in the investigation which affects the decision on the merits of the case. The result of the Lower Appellate Court's views would be to preclude any proper determination of the question of title between the parties. Besides, the passage quoted from the Judge's decision does not cover the actual point to be decided, *viz.*, *the* share to which the plaintiff was entitled, and to do that it was necessary to make a thorough enquiry into the rights of the parties from whom the plaintiff claims to inherit.

The case is, therefore, remanded to the Lower Appellate Court, with reference to the above remarks.

We think, under the circumstances, the special appellant is entitled to his costs of this appeal. The other costs in the suit will abide the ultimate result.

The 30th January 1872.

Present:

The Hon'ble H. V. Bayley and W. Markby,
Judges.

Witnesses (Examination of)—Duty of Court.
Case No. 961 of 1871.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 12th July 1871, *affirming a decision of the Moonsiff of Buxar, dated the 4th April* 1871.

Chowdhry Khoorgo Roy (Plaintiff) *Appellant,*

versus

Shib Tohul Roy (Defendant) *Respondent.*

Baboo Romesh Chunder Mitter for Appellant.

Baboos Kalee Mohun Doss and *Chunder Madhub Ghose* for Respondent.

It is the bounden duty of a Court, unless where it sees that there is a clear intention to delay or obstruct justice, to examine all witnesses whom the parties wish to be examined.

Bayley, J.—We think the judgment of the Lower Appellate Court in this case must be reversed.

The ground taken in special appeal is that, out of six witnesses adduced by the plaintiff, the first Court examined only two, and further that although objection was taken to this proceeding, the Lower Appellate Court overruled the objection without due consideration.

On the other side, it is contended that no remonstrance was made when the first Court refused to examine the remaining four witnesses, and no prayer was made to the effect that they were material witnesses and should be examined.

Now it is certainly the duty of the parties to ask that their witnesses, when present, should be examined if they wish them to be examined; and the reason is obvious, because it is in their discretion to offer some witnesses for examination and withhold others as they know best the strength and weakness of their case. It is consequently not for the Court to interfere with that discretion. But when the Court, against the wishes of the parties and without sufficient reason, does refuse witnesses whom the parties wish to have examined, that we think would constitute a defect in the investigation such as would affect the decision on the merits of the case, and unless the Court can see that there is a clear intention to delay or obstruct justice, we think it is its bounden duty to examine all those witnesses whom the parties wish to have examined.

In this view we reverse the judgment of the Lower Appellate Court, and remand the case to that Court in order to be remitted to the first Court with directions that the evidence of all the witnesses tendered by the plaintiff whom he asks to have examined may be taken, and a decision come to accordingly.

The costs will follow the result.

The 30th January 1872.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Construction of Pottah—Payment of Rent in equal monthly Kists—Interest.

Case No. 559 of 1871 under Act X of 1859.

Special Appeal from a decision passed by the Officiating Judge of East Burdwan, dated the 10th December 1870, modifying a decision of the Deputy Collector of Culnah, dated the 9th September 1870.

Bhyrub Chunder Banerjee (Plaintiff) *Appellant,*

versus

Meer Ameeroolldeen (Defendant) *Respondent.*

Mr. J. S. Rochfort and *Baboo Umbika Churn Banerjee* for Appellant.

Baboo Sham Lall Mitter for Respondent.

Where a pottah, after providing for payment of rent by the *durputneedar* "year by year, month by month, and *kist* by *kist*," contained a distinct declaration that if the *durputneedar* did not, at the end of each month, pay up the amount due for that month, he should from the first day of the succeeding month pay interest upon the amount in arrear, THE COURT held that the Judge below was not correct in his construction of the pottah that the *durputneedar* was not bound to pay rent in equal monthly *kists* nor liable to interest if he did not so pay it.

Jackson, J.—THIS was a suit to recover certain arrears of rent with interest which the plaintiff alleged to be due on the defendant's *durputnee* tenure. The plaintiff's allegation is that the defendant is bound under the terms of the *putnee* pottah to pay his *putnee* rent in twelve equal shares or *kists,* month by month, and the defendant having defaulted as regards certain portions of the monthly payments, this is a suit not only for arrears, but also for interest upon these arrears in default of these monthly *kists.*

The defendant has contended that he is not bound to pay month by month, that he is to pay a rent of Rs. 1,560, and that out of this, all except Rs. 60 is to be paid to the Collectorate on the part of the *putneedar,* and that there is nothing within the terms of this *kubooleut* which requires him to pay the rent in month by month.

The first Court, looking partly to a copy of the *pottah* produced by the plaintiff and partly also to the conduct of the defendant in former years and in a former suit for arrears of rent, was of opinion that the defendant was bound to pay the rent in equal *kists* of 180 rupees per month, and that if he did not pay it, he was bound to pay interest. The first Court, accordingly, decreed the suit. The Judge has set aside this judgment, and has dismissed the plaintiff's suit. He quotes to a certain extent the words of the *pottah* put in by the plaintiff, and he thinks that that clause which states that the defendant is to pay year by year, month by month, and *kist* by *kist* is a usual clause in such deeds, and that it does not mean to establish that monthly *kists* shall be paid by the under-tenant. Perhaps the Judge might have been right if there were no further terms in the *pottah;* but very shortly after the words alluded to by the Judge, there is also a distinct declaration in the *pottah* that if the *durputnee* does not at the end of each month pay up the amount due for that month, he shall from the first day of the succeeding month pay interest upon the amount in arrear. These words, taken in connection with the former words, certainly lead to the impression that the *durputneedar* was bound to pay the rent month by month. It might have been a question in the absence of the *Kistbundee* whether the monthly instalments or *kists* should have been equal for each of the twelve months; but that point is pretty well cleared up by the fact that there have been several suits against the defendant for these special instalments; in each case treating the instalments as due at the end of the month in equal shares. Looking to this fact and looking also to the words of the agreement, we think that the Judge is not correct in the construction which he has placed upon the *pottah.* We must, therefore, reverse his decision, and restore that of the first Court with costs.

The 30th January 1872.

Present :

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Act XXVII of 1860 *(object of)—Recall of Certificate.*

Case No. 354 of 1871.

Miscellaneous appeal from an order passed by the Officiating Judge of Mymensingh, dated the 14*th September* 1871, *reversing an order of the Additional Subordinate Judge of that district, dated the* 30*th June* 1871.

Kubeer Chunder Bundo (Petitioner) *Appellant,*

versus

Ramkanye Doss Biswas and another (Objectors) *Respondents.*

Baboo Kalee Kishen Sein for Appellant.

Baboo Kalee Prosunno Dutt for Respondents.

HELD that the lower Appellate Court properly exercised its discretion in refusing to re-call a certificate under Act XXVII of 1860, because there was an heir in a nearer degree to the deceased than the person to whom the certificate was granted ; the object of that Act being to give facilities to debtors and not to assist parties in establishing a disputed right or title.

Bayley, J.—We think this appeal must be dismissed with costs.

It is an appeal against the order of the Judge of Mymensingh, passed in a certificate case under Act XXVII of 1860, refusing to recall a certificate granted to the respondent. Section 6 of the Act leaves it entirely to the discretion of the Judge to recall a certificate. We are pressed with the argument that, with reference to the decisions of this Court, to be found at page 394, Volume IX, Weekly Reporter, and page 158, Volume XI, Weekly Reporter, the discretion of the Judge has not been properly and judicially exercised, but we think that neither of the cases applies. The first case was one in which a woman fraudulently obtained a certificate, representing herself to be the widow and heir of the deceased, whereas in fact she was neither the widow nor the heir. The next was a case of *extension* of certificate, and not as the present is, of a recall of certificate. The question we have to decide is, whether the lower Appellate Court has erred in law in refusing to recall the certificate. At the time that the certificate was first granted there was no objection taken, but subsequently the present applicant came in and urged that he had an heir in a nearer degree to the deceased than the respondent. The lower Appellate Court observes that Act XXVII of 1860 was intended simply to give security to debtors, who, by making payments to such persons as may be appointed by the Court may thereby have full legal acquittance from their respective debts. We also think that this was really the object of Act XXVII. Unfortunately, however, there is a too widely spread mistaken notion in the Mofussil, that an order for a certificate to collect debts, *i. e.* under Act. XXVII of 1860, secures some likelihood of success in establishing a disputed right or title, and the sooner such notions can be got rid of the better. The Judge in this case says, that he does not think it at all necessary to cancel the former certificate, and the only point taken is, whether the appellant and the respondent are nearest heirs to the deceased.

I am of opinion that, under all the facts of the case, the lower Appellate Court has properly exercised its discretion in this case, and that no such error in law has been made out as would warrant us in interfering in this Miscellaneous Special Appeal.

I would, therefore, dismiss this appeal with costs.

I pass no opinion on the points raised by the pleader for the respondent that the Judge had no jurisdiction in this case, and that no special appeal lay to this Court.

Markby, J.—I am of the same opinion. I entirely agree in the assent which Mr. Justice Bayley has given to the view of law taken by the Judge below. I think the District Judge is quite right when he says that the real object of the Act is to give facilities to debtors. I also fully agree in what Mr. Justice Bayley has said as to the misapprehension which is common as to the purposes of this Act, and I think that, if all the Judges would adhere as strictly as the District Judge has done in this case to the true object of the Act, which is clearly enough stated in the Preamble, an enormous amount of useless litigation and a great waste of money and time both public and private might be saved. I think the Judge was quite right in refusing to withdraw the certificate.

I think it as well to note that a cross objection has been taken that the Court below had no jurisdiction, but on that point it has not become necessary to express any opinion.

The 31st January 1872.

Present :

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Construction—Decree—Interest.

Case No. 267 of 1871.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Dacca, dated the 31st May 1871.

Kalee Nath Paul (Decree-holder) *Appellant,*

versus

Nuboddeep Chunder Sircar (Judgment-debtor) *Respondent.*

Baboos Kalee Mohun Doss and *Boykunt Nath Doss* for Appellant.

Baboo Nullit Chunder Sein for Respondent.

Where a decree of the High Court found a certain sum due on account of a loan transaction, and went on to direct payment of costs and interest thereon, the lower Court was held to be right in its view that the decree of the High Court made no provision for interest on the sum decreed on account of the loan transaction.

Kemp, J.—We think that the Subordinate Judge has taken a right view of this case. It appears to us, on reading the decree of the High Court dated the 30th June 1869, that this Court found that Rs. 1,578 on account of the loan transaction were due, and that amount was decreed; the first Court not having decreed any specific sum on account of the loan transaction. The decree of the High Court then goes on to say, that the defendants, appellants, do pay to the plaintiff, respondent, the sum of Rs. 98, as noted in the margin, being the amount of costs incurred by the said plaintiff, respondent, in this Court, with interest thereon, at the rate of 12 per cent. from the date of the decree, that is to say, interest on the costs. The decree of the High Court makes no provision for interest on the sum decreed on account of the loan transaction, and the order passed by the lower Court is a correct one. The appeal is dismissed with costs.

The 31st January 1872.

Present :

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Limitation—Survey Proceedings—Possession—Fraud.

Case No. 723 of 1871.

Special Appeal from a decision passed by the Officiating Judge of Jessore, dated the 25th March 1871, *affirming a decision of the Subordinate Judge of that district, dated the* 10*th January* 1870.

Gopal Kishen Sircar and others (Defendants) *Appellants,*

versus

Ram Narain Koondoo and others (Plaintiffs) *Respondents.*

Baboo Sreenath Doss for Appellants.

Baboo Chunder Madhub Ghose for Respondents.

The Lower Appellate Court was of opinion that, as plaintiffs alleged that the disputed lands were fraudulently caused to be demarcated with defendants' zemindaree at the time of the survey, and as plaintiffs were not parties to the survey proceedings, the present suit was barred by limitation under the decision in 10 W. R., 15. HELD that, in order to bring a suit within the purview of that decision, it was not enough for plaintiffs to say that this fraud was committed against them by the *saheb* defendants, and that those defendants were still in possession of the lands as belonging to them and other neighbouring proprietors; but that it was necessary for them to show that they themselves were in possession of the disputed lands at the time when they granted the putnee to the *saheb* defendants, and that they made over that possession to those defendants at that time.

Mitter, J.—In this case it appears to us clear that the judgment of the Lower Appellate Court, as it stands, cannot be supported. Before the plaintiffs can bring their suit within the purview of the decision reported in X Weekly Reporter, page 15, it is absolutely necessary for them to show that they themselves were in possession of the disputed lands at the time when they granted the putnee to the *saheb* defendants, and that they made over that possession to those defendants at that time. The learned Judge in the Court below says that, as the plaintiffs allege that the lands in question were fraudulently caused to be demarcated with the zemindaree of the defendants at the time of the survey, and as the plaintiffs were not parties to the survey proceedings, though they might have been aware of them, it would follow that the present suit is not barred by limitation under the decision of this Court which has been already referred to. But it is not enough for the plaintiffs merely to say that this fraud was committed against them by the *saheb* defendants, and that those defendants are still in possession of the lands under the allegation that they belong to the estates of the special appellants and of other neighbouring proprietors.

Upon the merits also we find the Judge's decision to be not very satisfactory. The Judge says that, after a comparison of the boundaries as given in the *roidad* of Ram Huree Ameen, there can be no doubt whatever that the map prepared by the Ameen who was deputed to hold a local investigation in this case is correct. But nobody ever disputed the correctness of that map so far as the delineation of the lands in question is concerned. Each party, however, started with different boundary marks, and the real dispute which the Judge had to determine in this case was, which of the parties was right in his allegations with reference to those boundary marks.

The Judge further says that, after comparing the measurement made by the present Ameen with the measurement given in Ram Huree's *roidad*, the lands appear to be in a particular direction with reference to some other lands. The measurements given in the *roidad* of Ram Huree Ameen are so vaguely stated that, in the absence of a map corresponding with that *roidad*, it is impossible to say merely from measurement, that the lands in dispute belong to the plaintiff's estate, and not to that of the defendants.

Again, the Judge is wrong in holding that the defendants, special appellants, are bound by the proceedings in the case of the year 1822. It is admitted on both sides that neither the special appellants nor the parties through whom they claim were parties to those proceedings, and it therefore follows that those proceedings cannot be treated as evidence against them, much less as conclusive evidence. The *roidad* of Ram Huree, however, may be admitted as evidence merely for the purpose of showing what were the lands that were leased in putnee by the plaintiffs to the *saheb* defendants, but no further.

Upon the whole, then, it appearing to us that the Judge has committed several errors in law in the investigation of this case, and that those errors are likely to have caused an error in the decision of the case upon the merits, we reverse the decision of the Judge, and after formally remanding the case to him, transfer it to our own file, in order that it may be tried by us as a Regular Appeal. The costs of this appeal and of the Lower Courts will abide the ultimate result.

The other appeals will stand over until the decision of this case.

The 1st February 1872.

Present:

The Hon'ble Louis S. Jackson and F. A. Glover, *Judges.*

Parties—Suit for Rent—Intervenor—Act VIII of 1859 *s.* 73.

Case No. 1056 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Tipperah, dated the 26th June 1871, *reversing a decision of the Sudder Moonsiff of that district, dated the* 18*th December* 1870.

Chunder Kalee Ghose (Intervenor) *Appellant,*

versus

Shibnath Bhuttacharjee and others (Plaintiffs) and others (Defendants) *Respondents.*

Baboo Obhoy Churn Bose for Appellant.

Baboo Huree Mohun Chuckerbutty for Respondents.

In a suit for rent before the Moonsiff, special appellant petitioned and was irregularly admitted into the suit as intervenor as if the suit were being tried under Act X of 1859 in a Revenue Court. Defendants having admitted their liability to plaintiffs under a *kubooleut* set up by the latter, the suit was decreed in the Lower Appellate Court, and intervenor now appeals specially claiming to be treated as if he had petitioned and was made a party to the suit under Section 78 Act VIII of 1859. HELD that, as he made no such application, he was not entitled to be so treated, and that his interests were not likely to be affected by the decree if he had abstained from intervention.

Jackson, J.—THIS was a suit brought by the Bhuttacharjees against Nazir Mahomed and others, for rent of land which the plaintiffs alleged to be held under them, being part of their lakheraj land, this suit being instituted in the Moonsiff's Court at Comillah.

The present special appellant, Chunder Kalee Ghose, who, it seems, is the ijaradar of the estate in which these lands are situated, presented a petition as intervenor, as if the suit were being tried under Act X of 1859 in a Revenue Court. This petition of his was placed upon the file, and he appears to have been allowed to give some evidence to show that he had been in the previous receipt and enjoyment of the rent.

The Moonsiff having gone into the question and finding a *kubooleut* set up by the plaintiffs to be unproved, ordered the plaintiff's suit to be dismissed, and ordered that the costs of the intervenor be paid by the plaintiffs.

Against this decree, the plaintiffs appealed against the original defendants and also against the so-called intervenor. The Subordinate Judge, finding that the defendants had admitted their liability under the *kubooleut*, and that the intervenor had been irregularly admitted into the suit, decided that the Moonsiff was wrong in dismissing the plaintiff's suit, and accordingly reversed his judgment, and decreed the appeal with costs.

The intervenor now appeals specially. He claims to be treated as if he had petitioned and been made a party to the suit under Section 73 of the Code of Civil Procedure. It appears to us that he made no such application and is not entitled to be so treated, that his interests were not likely to be affected by the decree if he had abstained from intervention, and that the defendants having admitted that they held the lands under the plaintiffs, would properly be declared liable to pay them rent. The intervenor, special appellant, might have very well established his own rights, if he thought fit, if any rents due to him were withheld, in the same manner as if the tenants had defaulted in the payment of rent to him.

We understand that the effect of the Subordinate Judge's order is to reverse the decision of the Moonsiff and to give the plaintiffs a decree against the original defendants, and we find that they have been ordered to receive their costs from those defendants and from no one else. Consequently, the present special appellant has no grievance whatever. He has no *locus standi* in special appeal, and his special appeal ought therefore to be dismissed with costs, he being left to follow any remedies that he may have against either the plaintiffs or the defendants in this suit.

The 1st February 1872.

Present:

The Hon'ble Louis S. Jackson and F. A. Glover, *Judges.*

Set-off—Different Claims—Account stated—Procedure.

Case No. 1015 of 1871.

Special Appeal from a decision passed by the Judge of Backergunge, dated the 26th May 1871, *modifying a decision of the Subordinate Judge of that district, dated the 4th May* 1870.

Kalee Koomar Chuckerbutty and another (Defendants) *Appellants,*

versus

Huro Chunder Chuckerbutty (Plaintiff) *Respondent.*

Baboo Bhowanee Churn Dutt for Appellants.

Baboo Kalee Mohun Doss for Respondent.

It is not equitable to allow a set-off, against a claim relating to a particular account, of a matter of another nature altogether.

In a suit for money due upon an account stated, the Judge ought not to go into the question of set-off, but should confine himself to giving plaintiff a decree for the amount which may be found to be due upon the account stated.

Jackson, J.—In this case the plaintiff sued the defendants for a sum of money alleged to be due upon an account stated. The defendants began by denying that they had ever signed or agreed to the account, or that anything was due by them to the plaintiff, and they also alleged that certain amounts were due from the plaintiff to them.

The Subordinate Judge, who first tried the suit, refused to allow the defendants to go into the question of set-off, but found for the plaintiff upon the document relied upon by him, and gave judgment accordingly.

On appeal, the District Court remanded the case with directions that the claim of set-off should be gone into.

Thereupon, an Ameen was appointed, and, upon not a complete, but a partial investigation of accounts between these parties, he found that one sum was certainly due by the plaintiff, and that another sum was doubtfully due, and he made a report accordingly.

The Subordinate Judge then made a deduction according to the Ameen's report. The case went again on appeal to the Zillah Judge, and he modified the judgment of the Subordinate Judge, and gave the defendants credit only for the one sum which the Ameen reported to be clearly due.

Now the defendants have come up here in special appeal against the judgment of the Court below, and contend that they were entitled to a credit for the further sum which the Judge has disallowed. But it seems to me that, upon this part of the case, the Judge's decision is unimpeachable. He has found, as a matter of fact, that the parties entered into the account stated, and, for reasons which I will state presently, I do not think that any other matter should have been gone into.

The plaintiff has also objected to the decision of the Court below, on the ground that, in the circumstances of the case, no question of set-off should have been gone into.

It appears to me that, in the circumstances of this case, the plaintiff's contention is correct. The matter to which the plaintiff's claim related was one relating to a particular account in respect of moneys advanced by the plaintiff to the defendants, and, in connection with that particular transaction, there was an account stated between the parties; they agreed to that and reduced it to writing. As to the set-off claimed by the defendants, it is a matter of another nature altogether. It refers to various claims and liabilities, and, upon being advanced by them, it is immediately answered by the plaintiff who makes other claims. Under these circumstances, it appears to me, on the authority of the ruling to be found in II Madras High Court Reports, page 296, that it is not equitable to allow a set-off on the part of the defendants, but that they should be referred for adjustment of those accounts to a separate suit for an account, and that the Judge was wrong in going into the question of set-off: he ought to have confined himself to giving the plaintiff a decree for the amount which may have been found to be due upon the account stated. To this extent, I think the Judge's decision should be modified. The plaintiff is entitled to his costs.

Glover, J.—I concur.

The 1st February 1872.

Present:

The Hon'ble Louis S. Jackson and F. A. Glover, *Judges.*

Jurisdiction—Suit to assess higher Rent—Building on Land—Small Cause Courts.

Case No. 1053 of 1871.

Special Appeal from a decision passed by the Officiating Judge of Backergunge, dated the 22nd May 1871, *affirming a decision of the Moonsiff of that district, dated the* 10*th March* 1871.

Joy Kishore Chowdhrain and others (Plaintiffs) *Appellants,*

versus

Nubee Buksh (Defendant) *Respondent.*

Baboo Kally Mohun Doss for Appellants.

Baboo Issur Chunder Doss for Respondent.

A suit to assess rent at an increased rate upon the defendants and for a decree for rent at such rate in respect of land situated in a town and upon which either a house or shop stands, is not a suit for rent within the meaning of Section 6 Act XI of 1865, and is maintainable in the ordinary Civil Courts, and not in the Small Cause Courts.

Jackson, J.—The plaintiff in this case brought a suit against the defendants in which he asked the Court to assess rent at an increased rate upon the defendants, and to give him a decree for rent at such rates, the land which the defendants had in their occupancy being land situated in the town of Burrisaul, and upon which either a house or a shop was situated.

The Moonsiff took cognizance of the suit, but finding that notice of enhancement had not been served on the defendants, dismissed the suit.

The case coming on the appeal of the plaintiff before the Zillah Judge, he came to the conclusion that the suit was not within the cognizance of the Moonsiff's Court, being one not affected by the provisions of Act X of 1859, or Act VIII of 1869, and on that ground apparently he dismissed the appeal of the plaintiff and decreed a cross-appeal of the defendants.

The plaintiff appeals specially and contends that the special jurisdiction of the Revenue Courts having been abolished by Act VIII of 1869, the Moonsiff had jurisdiction over this suit, and that consequently the decision of the Judge on that point was erroneous.

On calling upon the respondent to support the decision of the Judge, he contends that the decision is right upon the ground, apparently not taken by the Judge, that the suit was really cognizable only by the Court of Small Causes. He contends that the suit is one coming within the description in Section 6 Act XI of 1865, being a claim for rent, and that, as the land to which the suit related was not land occupied for agricultural purposes, under the various rulings of the Court, the suit could not have been cognizable before a Revenue officer, and therefore the cognizance was not barred by the 4th class of exceptions to Section 6.

The only question to be considered in this matter, really, is whether or not the suit was one cognizable by the Court of Small Causes; for, if so, the Moonsiff would not have jurisdiction to try it. It seems to us that the suit before us is not one which can be characterized as a claim for rent, that is, a claim for rent within the meaning of Section 6 Act XI of 1865. We think the claim mentioned in that Section must mean a claim for rent due under a contract between the parties, or a claim arising out of the occupancy of the land by the defendant, so that, ordinarily, the plaintiff would be entitled to recover rent from him. But this is a suit of a different description. The defendant seems to have been occupying, or his ancestors seem to have been occupying, the land under the plaintiff, and what the plaintiff seeks in the present suit is to obtain a declaration from the Court that the defendants are liable to pay a larger amount of rent, and to compel them to enter into a contract for the payment of that larger amount of rent. It may be that the suit is one which the plaintiff could not maintain; but if maintainable, it is maintainable, we think, in the Ordinary Civil Courts, and not in the Courts of Small Causes.

We think, therefore, that the decision of the Judge should be set aside, and the case should go back to the Lower Appellate Court in order that the remaining questions arising between the parties may be enquired into.

Costs will abide the event.

The 1st February 1872.

Present:

The Hon'ble Louis S. Jackson and F. A. Glover, *Judges.*

Interest—Contribution.

Case No. 1057 of 1871.

Special Appeal from a decision passed by the Additional Judge of Jessore, dated the 20th May 1871, reversing a decision of the Sudder Moonsiff of that district, dated the 28th June 1870.

Nullit Biswas (one of the Defendants) *Appellant,*

versus

Prosunno Moyee Dossee (Plaintiff) and another (Defendant) *Respondents.*

Baboo Bungshee Dhur Sein for Appellant.

Baboo Umbika Churn Ghose for Respondents.

Interest may be allowed in a suit for contribution, although no demand for interest may have been made before suit.

Jackson, J.—This was a suit for contribution. Two objections were raised in special appeal: the one being that interest has been allowed, although no demand had been made; the second is that the separate liabilities of the defendants have not been set out in the decree.

On the first point, the respondent adduces as authority the case of Golam Ahmed *vs.* Beharee Lall and others, to be found in Marshall's Reports, page 239, which shows that it is usual to allow interest in such cases, because such interest was accustomed to be given by the Common Law before the passing of the interest law.

As to the extent of the shares, the respondent has no objection to the modification of the decree of the Court below in that particular. The defendant's liability, therefore, will be according to the shares stated, that is to say, the present special appellant and the joint owners with him of the six-annas share, will be declared liable for their six annas, and the other defendant for his four annas share.

This is an alteration of the decree which might well have been made by the Lower Appellate Court on application to it for that purpose, and, therefore, I think the respondent should get his costs of this Court.

Glover, J.—I concur.

The 1st February 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Right of Occupancy—Act X of 1859 s. 6—Possession of Ryot's Vendor—Consent of Zemindar.

Case No. 1252 of 1871.

Special Appeal from a decision passed by the Judge of Rungpore, dated the 31st May 1871, reversing a decision of the Subordinate Judge of that district, dated the 15th May 1869.

Hyder Buksh and another (two of the Defendants) *Appellants,*

versus

Bhubendro Deb Koonwar (Plaintiff) *Respondent.*

Baboo Debendro Narain Bose for Appellants.

Baboos Kishen Dyal Roy and *Doorga Mohun Doss* for Respondent.

In order to establish a right of occupancy under Section 6 Act X of 1859, a ryot is not entitled to add to his own possession the possession of his vendor, even with the consent of the zemindar to the transfer to him.

Mitter, J.—We are of opinion that this special appeal ought to be dismissed. In order to establish a right of occupancy, it was necessary for the defendants to prove that they had been in possession of the disputed land continuously for a period of twelve years. The Judge in the Court below has found that they had been in possession for eleven years and three months only. It has been argued that the defendants are entitled to add to their own possession the possession of one Jesraj from whom they purchased the land in question. But under the provisions of Section 6 Act X of 1859, it appears to be clear that they are not entitled to do so. The possession of a father or other ancestor from whom a ryot inherits may be added in this manner, but not the possession of a vendor. It is true that the zemindar consented to the transfer, but such consent cannot give to the defendants any right higher than that possessed by their vendor; and as it appears from the facts of this case that the vendor was a mere tenant-at-will, and as under the provisions of the Section referred to, the defendants are not entitled to add to their own possession the possession of their vendor, this ground of appeal must fail.

The other ground as to the extent of the *jote* of Mednee Bewa does not appear to be made out. It is clear from the *jamma-wassil-bakee* papers of the time of the Court of Wards, which have been put in by the plaintiff as well as from other evidence, that Mednee Bewa and Kadir Buksh held two distinct *jotes*, although the former had originally purchased from the latter an undivided half share of his *jote*.

We, therefore, dismiss this appeal with costs.

The 2nd February 1872.

Present:

The Hon'ble G. Loch and W. Ainslie,
Judges.

Appeal (from Order dismissing Appeal for Default.)

Case No. 281 of 1871.

Miscellaneous Appeal from an order passed by the Officiating Judge of Patna, dated the 21st April 1871, *affirming an order of the Subordinate Judge of that District, dated the 7th October* 1870.

Shaikh Mahomed Jan and others (Judgment-debtors) *Appellants,*

versus

Mussamut Ameerun and others (Decree-holders) *Respondents.*

Mr. R. E. Twidale for Appellants.

Baboo Woomesh Chunder Bannerjee for Respondents.

An appeal does not lie from the order of a Judge dismissing an appeal before him for default of prosecution.

Loch, J.—A preliminary objection to the hearing of this appeal has been raised by the respondent that an appeal is not admissible from the order of the Judge dismissing an appeal before him for default of prosecution. Section 347 of the Procedure Code prescribes a mode by which cases dismissed for default can be restored to the file. The petitioner in this case, without following that course, has come up here in special appeal, urging certain points of law on which he considers the judgment of the lower Court should be set aside.

But we think that the preliminary objection taken by the opposite party is a sound one, and we therefore dismiss this appeal, but without costs.

The 5th February 1872.

Present:

The Hon'ble G. Loch and W. Ainslie,
Judges.

Estates of Lunatics—Court of Wards—Act XXXV of 1858—*Act IV of* 1870, *B. C.*

Case No. 318 of 1871.

Miscellaneous Appeal from an order passed by the Judge of Sarun, dated the 24th July 1871.

Baboo Chuckur Surun Narain Singh (Opposite party) *Appellant,*

versus

The Collector of Sarun, on behalf of Kowlbas Kooer (Petitioner) *Respondent.*

Baboos Mohesh Chunder Chowdhry and *Gopal Chunder Mookerjee* for Appellant.

Baboo Unnoda Pershad Banerjee for Respondent.

Where the mother of an alleged lunatic presented a petition to the Collector, and the Collector, after certain enquiries, forwarded it to the Judge for orders thereon, HELD that no application was regularly before the Judge under Act XXXV of 1858, for if the application was one by the mother, it was bad for want of verification; and if by the Collector, it was also bad because he was not the duly constituted agent of the lady and did not himself formally move the Judge under Section 8 of that Act; or if he acted under either

Section 19 or 27 Act IV of 1870, he had no authority to set the Civil Court in motion without the order of the Court of Wards.

Ainslie, J.—THIS is a proceeding under Act XXXV of 1858. It is observable at the outset that it is clear that no application was regularly before the Judge. Musst. Kowlbas Kooer, the mother of the alleged lunatic, presented a petition to the Collector, who, after certain enquires, forwarded it to the Judge for orders thereon. But the Collector was not the duly constituted agent of the lady for the purposes of this application, and he did not himself formally move the Court, as he was entitled to do under Section 8 of the Act, assuming that that Section is not modified by Act IV of 1870. If the application was one by the lady, it would be bad for want of verification as has been ruled in other cases; those rulings probably do not apply to the Collector acting on behalf of the Court of Wards, as it is admitted that it would be impossible to impute any improper or malicious motive in this matter to that officer. But then there is this difficulty, that under Bengal Act IV of 1870 the Commissioner of the Division is the Court of Wards, and under Section 19 the Collector was bound to make a report to the Court of Wards, and that Court under Section 24 can order the Collector to apply to the Civil Court under the provisions of Act XXXV of 1858, but there was no report to the Commissioner and no authority given to the Collector to set the Civil Court in motion, and consequently the proceedings are informal *ab initio.* It has been contended that the proceedings taken were under Section 27 Act IV of 1870, B. C., but if so (and certainly it does not appear that they were under this Section), they equally required the order of the Court of Wards before any steps could be taken in the Civil Court.

Under these circumstances, we are unable to express any opinion upon the merits of the finding recorded by the Judge below. The proceedings are null and void, and the finding of the 24th July 1871 is set aside.

The 6th February 1872.

Present :

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Disputed Possession—Possessory Award—Onus Probandi.

Case No 598 of 1871.

Special Appeal from a decision passed by the Officiating Judge of Midnapore, dated the 22nd February 1871, *affirming a decision of the Subordinate Judge of that district, dated the* 31*st May* 1869.

Rajah Luchmun Pershad (Plaintiff) *Appellant,*

versus

The Maharanee of Burdwan (Defendant) *Respondent.*

Baboos Sreenath Doss, Mohinee Mohun Roy, and *Bhowanee Churn Dutt* for Appellant.

Baboo Juggodanund Mookerjee for Respondent.

In a suit between two rival zemindars about certain lands hitherto occupied, but now relinquished, by Government for salt manufacturing purposes, the real question at issue was held to be whether these lands appertained to the zemindaree of the plaintiff or of the defendant; and as the latter was now in possession under a possessory award of the criminal authorities, the *onus* was on plaintiff to show that the lands belonged to his zemindaree.

Kemp, J.—THE planitiff and the defendant in this suit are zemindars, the one of Pergunnah Arungonuggur and the other of Pergunnah Soojamutee. In both these Pergunnahs the Government had occasion, in former years, to take certain lands described as *julpye* lands for the purpose of salt manufacture, and in the year 1864, or thereabouts, the Government no longer having occasion for these lands for salt manufacturing purposes, resigned their occupation of these lands. From the documents put in by the Ranee of Burdwan, the special respondent, it is clear that with reference to the lands coming under the description of *julpye* lands in her Pergunnah of Soojamutee, the Government, by a notice under Section 19 Act X of 1859, relinquished these lands, and intimated to her that henceforward she was to make such *bundobust* or settlement for these lands as she might deem proper " উচিৎ ও মোনাসেবের মত বন্দবস্ত আমলে আনিতে পারিবেক।"

The suit of the plaintiff is to this effect, that 80 beeghas 3 cottahs of land, appertaining to his Mouzah of Rampore, situated in his Pergunnah of Arungonuggur, belonged to that Pergunnah, and not to the defendant's, special respondent's, Pergunnah Soojamutee. He sues for possession and to set aside the award of the Deputy Magistrate awarding possession in favor of the defendant, which award was confirmed on appeal by the Sessions Judge.

Of course, the defendant being in possession under that award, the *onus* is on the plaintiff to prove his title to the land.

The suit involves a boundary dispute between two rival zemindars. It is alleged that there is a *khal* which divides the two Mouzahs of Rampore in the Pergunnah of the plaintiff and of Irashum in the Pergunnah of the Ranee.

The Judge has not tried the real point in issue between the parties,—namely, to which of the two Pergunnahs the disputed land belongs. He finds that "because the plaintiff "has not shown that the lands were settled "with him in 1864 when they were relinquished by Government, none of the inferences which the plaintiff asks the Court to "deduce from the *chittas* can properly "arise until the settlement upon which he "depends is proved or properly admitted, and "his suit ought to be dismissed."

It certainly is the case that the plaintiff in his plaint has alluded to a *daemee bundobust* or perpetual settlement made with him by Government in 1864, but it appears clear from the documents filed by the Ranee that no such settlement was made with the zemindars; the only thing done by Government was to notify to them that the lands of their respective Pergunnahs, hitherto occupied by Government for salt manufacturing purposes, were no longer required, that they were relinquished to them by Government, and that they were in future to make their own settlements for these lands with the ryots as they deemed proper. Therefore, the real question at issue is whether these lands appertain to the zemindaree of the plaintiff or to the zemindaree of the Ranee defendant; and, as already observed, the *onus* will lie on the plaintiff, as the Ranee is now in possession under a possessory award of the Criminal Authorities, to show that these lands belong to his Pergunnah of Arungonuggur.

With these remarks, we remand the case to the lower Appellate Court to try the question whether the lands in dispute form part of Mouzah Rampore in the plaintiff's Pergunnah of Arungonuggur, or whether they belong to Mouzah Irasbun in the Ranee's Pergunnah of Soojamuttee. Costs to follow the result.

The 7th February 1872.

Present :

The Hon'ble G. Loch, *Judge.*

Review of Judgment—Special Appeal—New point —Regulation VIII. 1819—*Sale of Putney in Separate Lots.*

Application for Review of Judgment passed by the Hon'ble Justices G. Loch and G. C. Paul, on the 26th April 1871, *in Special Appeal No.* 2089 *of* 1870.

Mr. Herbert Cowell, receiver of the Estate of Promotho Nath Deb (Respondent)
Petitioner,

versus

Mohadeb Mundul (Appellant)
Opposite Party.

Mr. J. W. B. Money and *Baboo Radhika Churn Mitter* for Petitioner

Mr. J. T. Woodroffe and *Baboo Bhowanee Churn Dutt* for Opposite Party.

It is not a sufficient ground for a review of judgment passed on special appeal that the point which was then raised and on which the Court's decision was based, was one not raised in either of the Lower Courts, and especially, as in this case, where the question was pointedly raised in the special appeal, and the respondent had ample time to prepare himself to meet the statement therein.

There is nothing in Regulation VIII of 1819 which will allow a *putnee* to be sold in separate lots, even though the whole *putnee* be sold by separate lots on the same day.

Loch, J.—This is an application for a review of our judgment of the 26th April 1871, on the ground that the decision come to by the Court on that day was under a mistaken knowledge of the state of the facts of the case; and it has been urged today that the point which was raised before the Court on that occasion, and on which the decision of the Court was based, was a point that was not raised in either of the Courts below. And Mr. Money, for the petitioner, has gone through the judgments of the Courts below, and certainly I do not find from the translations of those judgments that any issue was raised upon this point, but the opposite party informs me that there has been a mistranslation and that the point was raised. There is no doubt that in the special appeal to this Court the question was raised pointedly and the respondent had plenty of time to prepare himself to meet the statement therein made; and that statement was to the effect that, as only a portion of the tenure had been sold, the auction-purchaser could not obtain the benefits to which he would be entitled had the whole *putnee* tenure been sold, as provided for by Regulation VIII of 1819.

That question was fully contested before us when the case came up for hearing; and it appears to me too late to take the objection now raised, and of itself it is not a sufficient ground for admitting this application.

The second objection taken is that the sale of a *putnee* is legal if the whole of the *putnee* be sold, even if it be sold in separate lots, provided they be sold on the same day.

Now I can find nothing in the law (Regulation VIII of 1819) which will allow a *putnee* to be sold in piece-meal. The law speaks of the tenure being sold. But it does not say, the tenure or such parts of it as the zemindar may see fit and convenient to put up may be sold. It requires that the tenure should be sold, and no part of the law says that it may be sold according to the separate shares of the zemindars entitled to receive rent from the *putneedar:* and certainly very great inconvenience might arise if the tenure were divided and put up for sale in separate lots. The reason why the tenure, and only the whole tenure, is to be sold is perfectly clear, because the law gives an auction-purchaser such large privileges that he is able to set aside all the incumbrances which have been created by his predecessors: that of itself is sufficient to show how inconvenient it would be were a *putnee* put up for sale in piece-meal, for part might be sold and part not. If the view of the law I have taken be correct, it appears to me that the sale as conducted in this case, and it is admitted by Mr. Money that the *putnee* was sold in separate lots of 4 annas each) was not a sale as contemplated by the law, and therefore I see no reason for admitting this application for review.

The application is rejected with costs, fifty rupees being allowed for pleader's fees.

The 7th February 1872.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Case No. 348 of 1871.

Construction—Decree—New Plaint.

Miscellaneous appeal from an order passed by the Judge of Dacca, dated the 24th August 1871, *affirming an order of the Moonsiff of Behar, dated the* 13*th May* 1871.

Tarinee Churn Dey (Decree-holder) *Appellant,*

versus

Bungshee Buddun Dey and others (Judgment-debtors) *Respondents.*

Baboo Huree Mohun Chuckerbutty for Appellant.

Baboo Doorga Mohun Doss for Respondents.

The plaintiffs having been ordered to file a new plaint within three months, HELD that the Judge below was right in holding that the plaintiffs were required to file their plaint within three months of the final decree.

Jackson, J.—WE think we ought not to interfere with the decision passed by the Lower Appellate Court in this case. There can be no doubt that the order was that the plaintiffs should file a new plaint within three months; but as the plaintiffs were entitled to a special appeal on the whole question, and as they did go up in special appeal, we think that the Judge was right in holding that the plaintiffs were required by the decree to file their plaint within three months of the final decree; and having done so within that time, they are in time. We dismiss this appeal with costs.

The 9th February 1872.

Present:

The Hon'ble E. Jackson and Dwarkanath Mitter, *Judges.*

Jurisdiction—Suit for Rent on Land used for Building Purposes—Act VIII of 1869, *B. C.*

Cases Nos. 633 and 634 of 1871.

Special Appeals from a decision passed by the Additional Judge of Hooghly, dated the 6th March 1871, *affirming a decision of the Moonsiff of Sulkea, dated the 29th December* 1870.

Brojonath Koondoo Chowdhry (Plaintiff) *Appellant,*

versus

Gopeenath Shaha and another (Defendants) *Respondents.*

Baboo Ashootosh Dhur for Appellant.

Mr. C. Gregory for Respondents.

A suit can be brought under Act VIII of 1869, B. C., for arrears of rent due on account of land used for building purposes.

Jackson, J.—WE think that this case must be remanded to the Judge. As I understand the Judge's judgment, he has refused to try this case, because he states that it was instituted under Act VIII of 1869, and that Act VIII of 1869 is not applicable to lands used for building purposes. I understand that to be the whole of his judgment, and that he will not try the case and does not go into the evidence in the case because the suit is improperly brought under Act VIII of 1869. It seems to me that, under Section 33 Act VIII of 1869, jurisdiction is given to the Civil Courts in all cases which were formerly brought under Act X of 1859, and as regards all cases which did not fall within Act X of 1859 the jurisdiction of the Civil Courts still remains as it was before. The meaning of passing this law of 1869, or, at all events, one of the reasons of the Legislature for enacting that law, was to put an end to a great extent to collision and to the difficulties which arose in ascertaining the jurisdiction between the two Courts, Revenue and Civil. This suit having been brought in the Civil Court, the question can be determined whether the plaintiff is entitled to enhance the defendants' rent or not. It is true, as argued by the pleader for the respondent, that a notice was served under Act X of 1859, but this seems to us to be quite immaterial. It was quite proper that a demand should be made in some way, and the notice, whether given in the form prescribed by Act X of 1859, or any other form, is a sufficient demand for the enhanced rate. The plaintiff having brought his suit, it remains then for the Civil Court to decide whether he is entitled to what he demands from the defendants. The Court will have to look into the grounds upon which the demand is made, whether they are sufficient grounds, and whether sufficient evidence has been given of the existence of those grounds, and to decide whether the plaintiff is entitled to enhance the defendants' rent or not. We set aside the decision of the Judge, and remand the case to be tried.

The costs of this appeal to be costs in the suit.

Mitter, J.—I am of the same opinion. I do not see any reason why this suit should not have been tried as a suit under Act VIII of 1869. The rent claimed is alleged to be due on account of land, and it makes no difference whether the lease was originally granted for building purposes, or whether the land is situated in the heart of a town. Section 23 Act X of 1859 distinctly says, that all suits for ***arrears of rent due on account of land*** shall be brought in the Collector's Court and no where else; and as the jurisdiction of the Collector has been transferred to the Civil Court, there seems to be no reason whatever why the suit should not be tried by that Court when it is perfectly clear that the plaintiff is suing for the rent of the land and not for that of the buildings, which admittedly belong to the defendant. I have already expressed my opinion on this point at some length in a case* which recently came before me, and I do not therefore wish to say any thing further.

The 9th February 1872.

Present:

The Hon'ble E. Jackson and Dwarkanath Mitter, *Judges.*

Jurisdiction—Former Suit for enhanced Rent—Plea of Lakheraj—Present Suit for Declaration of Title to disputed Lands as Mâl Lands.

Case No. 510 of 1871.

Special Appeal from a decision passed by the Additional Judge of Hooghly, dated the 25th April 1871, *reversing a decision of the Moonsiff of Jehanabad, dated the 31st December* 1870.

Issur Chunder Roy and others (Plaintiffs) *Appellants,*

versus

Juggessur Ghose and others (Defendants) *Respondents.*

Baboos Jugodanund Mookerjee and *Kalee Mohun Doss* for Appellants.

Baboos Debendro Narain Bose and *Luckhee Churn Bose* for Respondents.

Plaintiff's former suit in the Revenue Court for arrears of rent at enhanced rates to which defendant set up a plea of *lakheraj*, was dismissed on the ground that the *kubooleut* propounded by plaintiff was not proved. HELD that plaintiff was now entitled to bring this action for a declaration of his title to the disputed lands as part and parcel of the *Mâl* lands of his zemindaree.

Mitter, J.—THE plaintiff in this case brought a suit in the Revenue Court for arrears of rent at enhanced rates.

The defendant set up a plea of *lakheraj*, and denied the existence of any relation of landlord and tenant between him and the plaintiff. The Revenue Court dismissed the suit upon the ground that the ***kubooleut*** propounded by the plaintiff was not proved, and the plaintiff has now brought this action against the defendant for a declaration of his title to the disputed lands as part and parcel of the *mâl* lands of his zemindaree.

The Lower Appellate Court has dismissed the suit upon the ground that there is no cause of action to justify its institution.

We are of opinion that, under the circumstances stated above, the plaintiff is entitled to bring this action in order to establish, if he can, that the lands in dispute are *mâl* lands of his zemindaree, and not the *lakheraj* lands of the defendant as alleged by the latter in the Revenue Court. The pleader for the respondent does not dispute the correctness of this position; and as we ourselves have no doubt on the point, we remand the case to the Lower Appellate Court for trial on the merits. The costs of this appeal will abide the ultimate result.

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* *Ante* p. 151.

The 15th January 1872.

Present:

Sir James W. Colvile, Sir Montague Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Settlement in Oudh—Proprietary right—Disputes between Grandsons—Ratio decidendi—Onus probandi.

On Appeal from the Judicial Commissioner of Oudh.

Hyder Hossain

versus

Mahomed Hossain and others.

In a dispute between two grandsons as to proprietary right in a village which had been registered in the name of a member of the elder branch of the family, the PRIVY COUNCIL held that the *ratio decidendi*, according to which the legal presumption was in favor of one grandson claiming against another, and the *onus probandi* placed on the one claiming to be sole possessor, was more consistent with equity and common sense than a hard and fast rule requiring the party who claims a joint interest to prove that the registered proprietor has duly accounted to him for his proportionate share of the profits.

THIS is one of the appeals that have lately been brought from judgments or orders of the revenue officers engaged in making the settlement of the land revenue for the province of Oudh. The present case has been before several of the revenue authorities who have passed conflicting decisions upon it.

In October 1864, the respondents claimed to be entitled, as proprietors, to one moiety of a village named Belowlie with its appurtenant hamlets, and to be treated accordingly in the settlement then in progress. This claim was originally advanced by distinct plaints or petitions in respect of different hamlets, but these were consolidated into one suit by an order of the Extra Assistant Commissioner Mahomed Hossain Khan, dated the 23rd of February 1866; and the subject matter of the litigation may be treated as the village Belowlie.

The title asserted by the repondents was, that the village had originally belonged to one Sheikh Aleemoolah, their great grandfather; that he had a daughter Khyreeyutoonissa, who left two sons, viz., Lootf Hossain, the father of the original appellant, and Enayut Hossain, the father of the respondents, who, as his representatives, were the proprietors of an undivided moiety of the village.

The case of the appellant was that, on the death of the common ancestor, Aleemoolah, the entire interest in the village had somehow become vested in his widow; that she, about the end of the last century, transferred it by deed of gift to Lootf Hossain, who thenceforward held it as sole proprietor up to the time of his death when it passed to his son, the appellant; and that during all that period the respondents and their father had no proprietary interest in it, being at most dependants of the other branch of the family.

It was admitted, or hardly disputed on the part of the respondents, that, after Aleemoolah's death, his widow first, and after her death, Lootf Hossain, and after him the appellant had been registered as the persons responsible for the revenue assessed from time to time on the village; and, so far, as the ostensible proprietors of it. But it was insisted that this was merely an arrangement for fiscal purposes, and that notwithstanding the registration in the name of one member of the family on behalf of the others, both branches continued jointly to possess the village, and to enjoy the revenues of it.

It is to be observed that a suit so framed, though tried by the Revenue Authorities, and in the course of proceedings for effecting a settlement of the public revenue, does not in the province of Oudh merely determine who is to be Lumberdar, or the persons entitled to engage for the payment of revenue, leaving the party excluded a remedy in the Civil Courts. Under the provisions of Act XVI of 1865, which, though passed after the commencement of this particular suit, seems to have a retroactive effect, such a suit involves a final adjudication on the question of proprietary right.

The following was the course of the litigation now brought under review of their Lordships:—

The issues originally settled in the suit were,

1st. Did the plaintiffs (the respondents) ever receive the profits of village or not?

2ndly. Did the plaintiffs live in common with the defendant, or separately?

3rdly. Did the defendant give the plaintiffs 881 rupees for their sister's marriage in 1264 F. or not?

4thly. Did Mussamut Hyat Bebee make over this village with others to the defendant's father Lootf Hossain, and cause the engagement to be executed in his name, in virtue of which he remained in sole possession without the partnership of Enayut Hossain, and after his father's death, did the defendant himself remain in uninterrupted possession, or not ?

On the 1st of February 1866, Mahomed Hossain the Extra Assistant Commissioner decided the case in favor of the respondents.

On the 19th June, 1866, this decision was reversed by the settlement officer, Major Chamier, on the ground that it was partly based upon the result of inquiries made out of Court, and the case was remanded for trial on the following issues :—

1. Whether up to 1263 F. (1856) commensality existed between plaintiff and defendant, and did plaintiff participate in the profits ?
2. If so, did the plaintiffs enjoy the said portion of profits by right or by favor ?
3, Whether estoppel is created by plaintiffs having enjoyed Seer ?

On the 7th May 1866, Mahomed Hossain having tried these issues again decided the case in favor of the respondents.

There was a second appeal to the settlement officer, who, on the 19th of June 1866, reversed the decision of this native officer and dismissed the respondent's claim.

This order was confirmed on appeal by the Commissioner of the Lucknow Division (Major Barrow) on the 21st of September 1866.

The cause in the ordinary course of things would next have gone before the Financial Commissioner, but Major Barrow having been intermediately raised to that office, it was transferred to the Judicial Commissioner, Sir George Couper, who, on the 16th of September 1868, proceeding mainly on a recent decision of the late Financial Commissioner, Mr. Davies, reversed the orders of Major Chamier and Major Barrow, and affirmed the decision of the Court of first instance in favor of the respondents.

This ruling was afterwards reviewed by Mr. Tucker, who succeeded Sir George Couper as Judicial Commissioner, and was confirmed by him on the 2nd December 1868.

These conflicting judgments, and the argument addressed to their Lordships on behalf of the appellant, clearly show that the question between the parties is not merely one of fact, but one involving the *ratio decidendi* in cases of the like nature.

The judgments of Major Chamier and Major Barrow proceed upon certain former rulings of the Revenue Courts in Oudh. These are not before their Lordships, but their effect seems to be that the principle of the settlement was to be based on the maintenance of the proprietary right as it existed prior to and at the time of the annexation of the province to British India in 1856 ; that if, under the Kings of Oudh, one member of the family had been registered as the sole owner of the estate, and the person responsible for the revenue assessed upon it, it lay upon those who claimed to be jointly interested in it to show not merely that they had received some indefinite and casual sums out of the profits, or even certain Seer lands by way of maintenance, but that the ostensible owner of the estate had accounted to them for the aliquot share of its profits receivable by the owners of the share claimed. These two officers seem accordingly to have come to the conclusion that, inasmuch as the proof of joint interest given by the respondents in the Court of first instance, to whatever it amounted, fell short of this, their claim ought to be dismissed, and the ostensible title of the appellant allowed to prevail.

The decision, however, of Mr. Davies, on which the Judicial Commissioners proceeded, is admitted on all hands to have qualified the former rulings. It is printed at p 39 of the Record.

In that case it appeared that the party claiming a joint interest against the party, who was the ostensible proprietor, had held 71 beeghas Seer land, and had also received sums averaging 86 rupees. And Mr Davies' judgment, after stating the question to be whether the respondent had, by the adverse possession of the appellant, been excluded from his inheritance under the Mahomedan Law, proceeds thus :—"Under the Mahomedan Law grandsons are entitled to equal shares. Under the custom of the country one shareholder represents the family before the Government, and manages the estate. It is by no means a general practice to give each sharer an account of his share of the profits at the close of the year. No safe inference against a shareholder can be made from the omission. It was very frequently the case for acknowledged sharers to take only a sufficient sum for their own expenses; but this involved no relinquishment of their rights, nor did any cause of action arise until some quarrel took place between the parties." And from these propositions he inferred, first, that there was a legal presumption in favor of a grandson claiming against another grandson, and that the *onus* of proof should properly be placed on the one claiming to be sole possessor contrary to law and custom ; and, secondly, that in the case before him the appellant had cut the ground from under his feet by paying to the respondent, in addition to Seer, a sum of money of fluctuating amount.

If their Lordships are called upon by the present appeal to overrule the decision of Mr. Davies, and to restore the rule supposed to be established by the earlier cases, they must decline to do so. That decision, after full discussion, was followed in this present case both by Sir George Couper and by Mr. Tucker; the principle which it lays down, having been thus sanctioned, has probably governed other settlement cases since decided; and it appears to their Lordships to be far more consistent with equity and common sense than a hard and fast rule requiring the party who claims a joint interest to prove that the registered proprietor has duly accounted to him for his proportionate share of the profits. In so far as it depends upon the custom of Mahomedan families holding lands within the former kingdom of Oudh, it receives some corroboration from the findings of the Mahomedan officer (presumably conversant with such customs) who tried this case, in the first instance before the date of Mr. Davies's judgment.

It remains to be considered whether the principle of that judgment has been correctly applied to the present case.

It was argued for the appellant that he has not been allowed an opportunity of proving the alleged deed of gift to his father. There was nothing, however, to prevent him from proving this deed, if he had the means of doing so, on either of the two trials before the native officer. He chose, however, then to rest his case on the order, or copy of the order of the record, which, at most, proves no more than that with the consent of the family at the time the village, which had been entered in the Revenue Register in the name of the widow of Aleemoolah, was, transferred into that of Lootf Hossain on the suggestion that he had been appointed by her as her successor. Their Lordships apprehend that such an arrangement was not uncommon; nor, if proved, would it under the ruling of Mr. Davies, or even according to the stricter rule of their earlier cases, be conclusive against the claim of those who might contend that they had nevertheless continued to retain a joint interest in the property. The decisions differ only as to the degree of proof required, and as to the party on whom the burthen of proof lies.

It is no doubt true that, before Major Chamier, the appellant's pleader proposed to give further evidence in support of his client's title under the alleged gift; and that that officer, who had decided the other issues in favor of the appellant, refused to admit it, stating, "I consider that the fresh plea of gift should not be entertained at this late stage of the case." But their Lordships are far from thinking that this refusal would have been improper had the decision of the Settlement Officer on the merits been the other way. And however that may be, it appears to them that no substantial injury has been done to the appellant by it. For, it is clear, that the real issue between the parties is, whether, notwithstanding the title registered on the revenue records, both branches of the family continued as a joint family to possess and enjoy the village. If that were made out, very little credit would be due to an ancient deed of gift, by whatever proof supported, since it would be inconsistent with the proved possession and enjoyment of the estate.

Have then joint possession and enjoyment been established in the decree which satisfies the ruling in Mr. Davies's case? Their Lordships are not insensible to the looseness of much of the evidence taken before the native officer. But they are of opinion that there was before him legal evidence which (if believed) would warrant his findings, at least to the extent that the Seer land was enjoyed by the respondents of right and not by favor, and that their *status* was not that of dependents but of co-proprietors, although the sums drawn by them from the profits may have fluctuated in amount, and not have been the subject of a regular accounting. This would satisfy the ruling of Mr. Davies, though it might not satisfy the requirements of the earlier cases on which Major Chamier and Major Barrow proceeded.

Their Lordships, in considering this appeal, have felt that in cases of this nature, wherein the procedure is somewhat loose, and the merits depend much upon local custom and local inquiry, it is even more necessary than it is on appeals from the decisions of the Civil Courts in the Regulation Provinces to act on the principle of not disturbing the judgment under appeal unless they are satisfied that it is substantially wrong.

Here, after full consideration of the arguments for the appellant, they have been unable to satisfy themselves that there is substantial error, either in the finding of the facts or in the principle of law that has been applied to them, and, therefore, they have come to the conclusion that, without calling on the other side, they ought to advise Her Majesty to affirm the Decree or Order of the Judicial Commissioner of Oude and dismiss this appeal with costs.

The 29th January 1872.

Present :

The Hon'ble F. B. Kemp, A. G. Macpherson, and E. Jackson, *Judges.*

Will—Bona fides—Succession (of Wife and Sons)—Issues—Judgment—Costs.

Case No. 190 of 1872.

Regular Appeal from a decision passed by the Subordinate Judge of Dacca, dated the 14th June 1870.

The Rev. Francisco de Assis, Vicar-General, and superior of the Portuguese Mission in Bengal (Plaintiff) *Appellant,*

versus

Louisa Dos Anjos and others (Defendants) *Respondents.*

Messrs. G. C. Paul and *Evans* and *Baboo Toolsee Doss Seal* for Appellant.

Baboos Kalee Mohun Doss and *Doorga Mohun Doss* for Respondents.

The plaintiff claimed under a will, and the Subordinate Judge having found the will not *bonâ fide*, ought to have decided the case on that issue only, instead of going into the other issues affecting the right of succession of the wife and sons of the testator. The judgment of the Subordinate Judge was therefore declared conclusive as to the matter of the *bona fides* of the will ; and his award of one set of costs to all the defendants, although they appeared by separate vakeels, was upheld, the defence being a common and not a separate one.

Kemp, J.—In this case, a cross-appeal has been filed by the respondents. The substance of this appeal is, that the Subordinate Judge was wrong in his decision upon the issues, with reference to which he holds that the will, if proved, would not be invalidated under the Succession Act by the existence of the wife and sons of the testator ; that the Subordinate Judge is wrong in law in holding that a wife is not a relation within the purview of section 105 of the Succession Act ; that the Subordinate Judge is wrong in law in holding that the defendants Nos. 2 and 3, Benjamin Frederick Dos Anjos and Alexander Frederick Dos Anjos, are not the legitimate sons of the late Roque Maria Dos Anjos ; that the Subordinate Judge is wrong in having allowed only one set of costs, inasmuch as the defence was separate, and the defendants appeared by separate vakeels.; and that the Subordinate Judge was further wrong in holding that the testator was competent to alienate the properties by bequest to the Church, contrary to the terms of the will of Doctor Clemente Dos Anjos.

Now in this case the Subordinate Judge having found that the will was not *bonâ fide*, he ought to have stopped there, for the Church claimed under this will, and if the will were not *bonâ fide*, the claim of the Church necessarily failed, and the case ought to have been decided upon that issue alone ; but the Subordinate Judge, like most Native Judges, being apprehensive that this Court might take on appeal a different view to that taken by him with reference to the will, went into the issues which are raised in the cross-appeal.

We think that he ought to have dismissed the case, finding, as he did, that the will was not *bonâ fide.* His decision upon the other issues is superfluous.

We have to-day in our judgment given our opinion ; two of my learned colleagues finding that the will has not been proved. I have gone somewhat beyond what my learned colleagues thought proper to do in this case, and have held not only that the will is not proved, but that it is a spurious will.

We think it unnecessary to enter into the questions raised in this cross-appeal, we give no opinion whatever upon these issues, finding as we do that the will, to say the least of it, is not proved.

Under these circumstances, the decision of the Subordinate Judge will not be conclusive between these parties upon any other matter than the matter which has been tried by us, namely, the *bona fides* or otherwise of this will.

With respect to costs, we think that the defence being a common defence, the Subordinate Judge was right in awarding only one set of costs.

The cross-appeal must be dismissed.

Macpherson and Jackson, J.J.—We concur.

The 2nd February 1872.

Present :

The Hon'ble F. B. Kemp and E. Jackson,
Judges.

Certificate—Childless widows of brother and nephew—Illegitimate sons.

No. 325 of 1871.

Miscellaneous appeal from an order passed by the Deputy Commissioner of Hazareebagh, dated the 21*st August* 1871.

Prodhan Ram and another (Objectors)
Appellants.

versus

Musst. Jerla Kooer and another (Petitioners)
Respondents.

Baboo Taruck Nath Dutt for Appellants.
No one for Respondents.

The childless widows of the brother and nephew of a deceased person are not entitled under the Hindoo law to be considered as the legal representatives of the deceased; and there being evidence in this case of the deceased having assigned his property to his illegitimate sons and acknowledged them as his sons, a certificate under Act XXVII of 1860 to administer to his estate was granted to them.

Kemp, J.—THIS is an application for a certificate under Act XXVII of 1860 to administer to the estate of one Shib Nath Singh deceased. The applicants were No. 1, the childless widow of Shib Nath's brother Lullit Ram, and No. 2, the childless widow of Beharee Singh, the son of Deendar Singh, another brother of Shib Nath. They were opposed in this application by the appellants who are the illegitimate sons of the late Shib Nath Singh. They urged that Shib Nath lived separately from his brothers and his brother's widows, that he assigned to them in his lifetime the whole of his property and acknowledged them to be his sons; and that under any circumstances the petitioners are no heirs at all to Shib Nath, and are not entitled to a certificate. Nobody appears for the respondent.

We think it clear that the childless widows of the brother and nephew of the deceased are not entitled under the Hindoo law to be considered as the legal representatives of the deceased Shib Nath.

The illegitimate sons of Shib Nath having applied for a certificate, and as there is evidence of the assignment to them of his property by their father and of his acknowledgment that they are his sons, we direct that a certificate be granted to them.

The decision of the Deputy Commissioner is reversed and this appeal decreed with costs.

The 2nd February 1872.

Present :

The Hon'ble F. B. Kemp and E. Jackson,
Judges.

Appeal—Act VIII of 1869 *B. C. s.* 102*—Sale in Execution—Decree for Rent below* 100 *Rs.*

No. 351 of 1871.

Miscellaneous Appeal from an order passed by the Judge of Dacca, dated the 22nd August 1871, *affirming an order of the Moonsiff of Fureedpore, dated the 5th June* 1871.

Deb Coomaree Dossee (Judgment-debtor)
Appellant,

versus

Gunga Dhur Dutt (Auction purchaser) and another (Decree-holder) *Respondents.*

Baboo Tara Nath Chuckerbutty for Appellant.

Baboo Grija Sunkur Mojoomdar for Respondents.

No appeal lies under Section 102 Act VIII of 1869 B. C. from the order of a District Judge on an application connected with the sale of a tenure in execution of a decree for arears of rent below 100 rupees.

Jackson, J.—A PRELIMINARY objection is taken by the respondent that no special appeal lies in this case. It appears that this was an application connected with the sale of a tenure in execution of a decree for arears of rent for an amount under 100 rupees, the decree having been passed by the District Judge. Section 102 of Act VIII of 1869 B. C. lays down that there shall be no appeal from the order of a district Judge in such a case, and as no special appeal lies, this appeal must be dismissed with costs.

The 5th February 1872.

Present :

The Hon'ble G. Loch and W. Ainslie,
Judges.

Mahomedan Law—Inheritance—Will—Defined Shares—Limitation—Trustee.

Case No. 145 of 1871.

Regular Appeal from a decision passed by the Subordinate Judge of Purneah, dated the 16th May 1871.

Rance Khajoorunnissa (Defendant)
Appellant,

versus

Mussamut Roheemunnissa and others (Plaintiffs) *Respondents.*

Mr. R. E. Twidale for Appellant.

Mr. C. Gregory for Respondents.

A Mahomedan testator by will desired that his moveable estate should not be divided or alienated by any of his heirs and directed his executor to appropriate the net income, according to a schedule annexed to his will, among certain specified persons divided into two classes, *viz.* those who took, and those who did not take, by inheritance. HELD that the intention of the testator was to endeavor to prevent any partition of the estate, and not to convert his heirs-at-law into mere annuitants taking grants from him.

HELD also that the executor, holding the estate in trust to pay the profits in certain defined shares to the heirs and their representatives, could not plead adverse possession against them, so as to bar their claim by limitation.

Ainslie, J.—THIS is a suit by one of the daughters of Rajah Syed Deedar Hossein against Mussamut Khajoorunnissa and others, heirs of the late Rajah Enayet Hossein, to recover Rs. 9,887-8, arrears of allowances payable under the will of Rajah Deedar Hossein to the plaintiff and her sister and mother, the two last being now dead. In respect of the allowance to the plaintiff herself, there is now no dispute; the questions before us are whether the allowances settled on the sister and mother pass by inheritance to the plaintiff, or lapsed on their deaths; and whether, if they did pass by inheritance, the claim is not barred by the Law of Limitation.

The Judge below has decided both points in the plaintiff's favor, and we think he has rightly decided them.

Rajah Deedar Hossein, by a will dated 19th Kartick 1247 Moolkee, appointed his eldest son, Enayet Hossein, sole executor, and directed that the immoveable estate should not be divided or alienated by any of his heirs, the entire undivided immoveable estate (one-third being first deducted under a *hiba-bil-ewuz* in favor of the eldest son in the testator's life-time) was to remain in the possession and under the management of the executor; and after payment of the Government revenue and other charges, the net income was directed to be appropriated according to a schedule attached to the will.

In the body of the will there occur these words :—" Wa bakee do sulo men, bâd adâi " dèn kurg khâhân, *âla kudr kisseh rusrudi* " *bu subeel turkah kumâri*, khod wusee, wa " jumlah furzundân zukoor wa inâs, wa zojah, " wa zuveer ool bukook, wa durmâha dâran " yani rufeekan wa malâzimân * * * bu- " mowjib tufseel zail diya kurenge." "(The " executor) shall give out of the remaining " two-thirds, after paying moneys due to my " creditors, according to the proportionate " shares by way of inheritance from me of " the executor himself and of all my children, " male and female, and of my wife and of " those who have rights, and also of the re- " cipients of salaries (or monthly allowances) " that is, friends and servants according to " the schedule given below."

Here the testator clearly has in mind that some of the persons specified are persons who take his estate by inheritance in certain known shares, or shares determinable under fixed rules. It is not quite clear where he draws the line, dividing these persons from the others specified ; but on turning to the schedule to which he refers, it appears that he has distinctly marked the two classes.

In this schedule he puts down the net income of two-thirds of his estates at Rs. 26,588-14-19-2 ; then he appropriates this under various heads, assigning to each the amounts noted marginally. The first of these is headed in the same terms as used in the body of the will, " Bu subeel turkah khod wasee, wa jame furzundân zukoor wa inas, wa zojeh mun moosee, wa zuveer ool bukook." And the second is headed, " Durmahadaran rufeekan wa mulâzimân wagahyrah." Thus all to whom the Rs. 21,000 per annum are assigned are those who take " bu subeel turkah," *i.e.*, by inheritance. These persons are then mentioned in detail ; each of 5 sons

Rs.
21,000
3,726
900
100
862-14-19-2
Rs. 26,588-14-19-2

is to take Rs. 2,400 per annum; each of 5 daughters is to take Rs. 1,200 per annum; his wife Rs. 2,100; and 4 *khadimahs* Rs. 900 among them.* Then, if we look at the amounts, we see that the sons and daughters are treated precisely on the terms on which they would inherit under the Mahomedan law, the sons taking double the shares of the daughters. The wife and *khadimahs* among them get rather more than the ⅛th share of wives (the wife rather less, if her share only is taken into account), and it is unequally distributed, but still there is no reason to doubt that the testator looked upon all these persons as entitled to *inherit*, and it is in evidence that his son Enayet Hossein, the executor, treated these assignments as heritable.

There really is no doubt as to the terms of the will; but if there were, it would be removed at once by considering what the position of the testator was. As a Mahomedan gentleman, he could not have been ignorant of the rules of inheritance of persons of his creed, and he must also have been aware that it was out of his power to alter the course of descent without the consent of his heirs, so that we must take him merely to have intended what his words show to have been his intention, namely, to endeavor to prevent any partition of the estate. There can be no doubt that his daughters acquired rights which were capable of being transmitted by inheritance, and his own acts show that their mothers were included among the heirs-at-law. The contention that the sums were granted merely as annuities cannot be supported. They were the profits of the shares which the testator believed to be the rights of the several persons named, claimable by them independently of any will; and the fact that they consented to leave the estate undistributed, as the testator desired, does not change their position, and convert them from heirs-at-law into mere annuitants taking grants from the testator.

This finding disposes of the question of limitation. The executor holding the landed estate in trust to pay the profits in certain defined shares to the heirs and their representatives, cannot plead adverse possession against those parties.

The appeal is dismissed with costs.

	Rs.
* 5 sons	12,000
5 daughters	6,000
Wife	2,100
4 khadimahs	900
	Rs. 21,000

The 6th February 1871.

Present:

The Hon'ble Louis S. Jackson and A. G. Macpherson, *Judges.*

Evidence—Estoppel—Co-sharers.

Case No. 850 of 1871.

Special Appeal from a decision passed by the Additional Judge of Jessore, dated the 6th June 1871, modifying a decision of the Moonsiff of Narail, dated the 30th May 1870.

Nobin Chunder Doss (Plaintiff) *Appellant,*

versus

Nim Chand Doss and others (Defendants) *Respondents.*

Baboo Grija Sunkur Mojoomdar for Appellant.

Baboo Chunder Madhub Ghose for Respondents.

A decision between a ryot and a body of co-sharers is not binding upon the several co-sharers *inter se.*

Jackson, J.—The plaintiff's suit was brought to recover a 4 annas 17 gundahs 1 kura 2 krantees and 4 biss share of a talook. The defendants set up limitation in respect of a portion of the share; and, besides the plea of limitation, the issue upon the merits framed in the Court of first instance was,—what is the plaintiff's share in the property in dispute under the Hindoo Law?

One of the defendants, named Shib Nath Doss, also set up in his written statement a previous *butwarra* between all the co-sharers. The Moonsiff noticed this allegation of *butwarra*, but regard being had to all the evidence, he thought that the plaintiff had failed to make out a right to more than 3 annas, 7 gundahs, and a fraction; and he gave a decree accordingly.

Both parties were dissatisfied with the decision of the Moonsiff, and both appealed to the Judge; and it was on the appeal of the defendant that the Judge cut down the decree of the Moonsiff to 2 annas 13 gundahs 1 kura and 1 krantee.

In coming to this decision, the Judge appears to have relied very mainly upon what took place in a previous suit brought in the year 1860 by one Khosal Mundul against the owners of the property. He set up a pottah granted by the several co-sharers; and the party in possession, it seems, claimed under a *pottah* granted by Shibnath, one of the co-sharers, exclusively. The Judge appears to have dealt with this suit as if it had been a suit between the party setting up the *butwarra* and the other co-sharers, and he makes it a reproach against the plaintiff that, in the present case, he makes allegations contrary to the statement which he made in that other suit, and, further, he uses the decision in that suit as if it were a decision binding upon the other co-sharers *inter se.*

One may have suspicions,—and it is a view of the case which presented itself to me as a possible one,—that that suit might have been brought, though colorably by a ryot claiming under a pottah granted by these parties, yet in reality by certain of the co-sharers against the others. But that is a mere *hypothesis*, and there is nothing to support it; and as the thing stands, it is a decision between a ryot and the body of the co-sharers. There is nothing, therefore, which makes that decision evidence between the several co-sharers, nor is there any ground for saying that the plaintiff in this suit has made statements at variance with those previously made.

The decision of the Judge, therefore, as far as it is grounded upon that piece of evidence, has no legal foundation, and the case must go back to him for re-consideration upon the rest of the evidence.

The defendants set up limitation, and the Judge appears to confirm that objection of theirs, so far as it relates to that portion of the property in dispute which the plaintiff claimed under one Ram Dhun; but it may be necessary to consider that plea as it affects the rest of the property. The Judge will, therefore, have to take that into consideration in disposing of the suit.

Macpherson, J.—I concur.

The 6th February 1872.

Present :

The Hon'ble Louis S. Jackson and A. G. Macpherson, *Judges.*

Mortgage—Estoppel.

Case No. 1074 of 1871.

Special Appeal from a decision passed by the Additional Judge of Jessore, dated the 16*th June* 1871, *affirming a decision of the Subordinate Judge of that district, dated the* 20*th May* 1870.

Sreenath Nag (Defendant) *Appellant,*

versus

Chundernath Ghose (Plaintiff) *Respondent.*

Baboo Doorga Mohun Doss for Appellant.

Baboo Ashootosh Dhur for Respondent.

Defendant, in consideration of money advanced by Shoshee Bhoosun, chose to enter into a mortgage with plaintiff, who now sues for possession after foreclosure of mortgage. HELD that it did not lie in defendant's mouth to object to the suit being brought by Shoshee Bhoosun in plaintiff's name.

Jackson, J.—THIS was a suit by Chundernath Ghose to get possession of immoveable property, after foreclosure of a mortgage executed by the defendant.

The defendant in his answer alleged that Chundernath Ghose had no interest whatever in the mortgage; that the money had been advanced by Chundernath's uncle, Shoshee Bhoosun Nag; and that the mortgage had been granted to him; but that, subsequently, on the defendant's application, Shoshee Bhoosun had agreed to allow further time for the payment of the money advanced; and that, on the faith of such agreement, the defendant had paid the sum of 1,300 rupees to Shoshee Bhoosun; that Shoshee Bhoosun afterwards, fraudulently failed to execute the necessary documents; and that the suit was now brought to obtain possession in contravention of the stipulations entered into.

The Subordinate Judge who tried the case appears to have gone into the question, whether the money belonged to Shoshee Bhoosun or the nominal plaintiff, and found that it belonged to the plaintiff. On the other points, he found against the defendant, and gave judgment for the plaintiff.

On appeal, the Additional Judge, without stating on what ground he came to that conclusion, states, as his opinion, that the defendant had borrowed the money from Shoshee Bhoosun, and that the mortgage deed was made out in the name of Chundernath. He then went on to consider whether the judgment of the Court below had been properly arrived at; and he notices an allegation of the defendant that he had been prejudiced by the refusal, or omission, of the Court below to examine his witnesses on the day fixed for the trial on which day he had them in attendance. Upon this point, the Judge found that there was no reason for discrediting that which the Court of first instance recorded, namely, that the witnesses were not in attendance, excepting two who had been duly examined. He, therefore, dismissed the appeal.

The defendant, in special appeal, seeks to show us, from an affidavit which he filed at the time of making his application for leave to appeal specially, that in point of fact his witnesses were all in attendance, and he says that the record shows the same thing.

This is a matter on which I conceive we are not at liberty to receive his affidavit, or to go into evidence. On this point, it was his business to have satisfied the Judge of the Lower Appellate Court.

Then the next point raised is that, as the Judge has found that the money advanced, in consideration of which the mortgage was affected, belonged not to the plaintiff, but to Shoshee Bhoosun, the suit ought to have been dismissed.

It is difficult to see how it lies in the mouth of the defendant, who, receiving the money himself from Shoshee Bhoosun, chose to contract with Chundernath, to object to the suit being brought in the same form. It is not suggested that Chundernath is claiming the money on his own behalf or setting up his own rights in opposition to those of Shoshee Bhoosun. It is clear that the transaction is one between the defendant and Shoshee Bhoosun throughout, and that this suit is one which Shoshee Bhoosun is conducting, although the name of Chundernath is used.

There is no ground, therefore, for our setting aside the judgment of the lower Appellate Court, and the appeal must be dismissed with costs.

Macpherson, J.—I concur.

The 8th February 1872.

Present:

The Hon'ble F. A. Glover and W. Ainslie, *Judges.*

Act XXVII of 1860—*Questions of Title—Regular Suit.*

Case No. 314 of 1871.

Miscellaneous Appeal from an order passed by the Judge of Gya, dated the 31*st August* 1871.

Shaikh Imamun (Objector) *Appellant,*

versus

Musst. Nunnoo (Petitioner) *Respondent.*

Mr. A. F. Lingham and *Baboo Boodh Sein Singh* for Appellant.

Mr. C. Gregory and *Moonshee Mahomed Yusoof* for Respondent.

Under Act XXVII of 1860, no question of title to any specific property can properly be tried. A party seeking to raise such a point should be referred to a regular suit.

Ainslie, J.—This is an application under Act XXVII of 1860 for a certificate by the widow for the administration to the estate of her deceased husband. The appellant before us appeared as an objector, and took exception to a certain statement in the petitioner's application as to certain properties belonging to the estate. The Judge has given a certificate to the widow, and against that there is no appeal. But the appellant objects to the finding the Judge has come to as to the title in the properties alluded to. All that we have to say is that, under Act XXVII of 1860, no question of title to any specific property can properly be tried. If a party comes into Court and seeks to raise such a question, the proper order to be made is to refer him to a regular suit. With the remarks of the Judge on a matter which was not properly before him, and which cannot be properly before us, we cannot interfere.

The appeal is dismissed with costs, one gold-mohur being allowed for pleader's fees.

The 8th February 1872.

Present:

The Hon'ble F. A. Glover and W. Ainslie, *Judges.*

Execution of Decree—Act VIII of 1859, *s.* 243 *—Sale of Immoveable Property—Time for Payment of Decree.*

Case No. 307 of 1871.

Miscellaneous Appeal from an order passed by the Judge of Gya, dated the 31*st August* 1871.

Baboo Ram Ruttun Neogy (Judgment-debtor) *Appellant,*

versus

The Land Mortgage Bank of India (Decree-holder) *Respondent.*

Moonshee Mahomed Yusoof for Appellant.

Mr. Fergusson and *Baboo Kalee Mohun Doss* for Respondent.

A Judge is not bound, under Section 248 Act VIII of 1859, to allow a judgment-debtor a year's time to pay his decree, without the debtor assigning some good or sufficient reason for the delay, *e. g.* that the money due to the judgment-creditor could be raised equally well in some other way than by immediate sale, and that the creditor would not by that arrangement be put to loss.

Glover, J.—THERE is no ground for this appeal. The Judge, under Section 248 of the Civil Procedure Code, refused the application made by the judgment-debtor for one year's delay in payment of the decree made against him at the suit of the Land Mortgage Bank. The debtor appeals on the ground that the Judge has not exercised a proper or reasonable discretion in rejecting his prayer for time. It is clear from the record that the debtor never offered the Judge any good or sufficient reason for the delay, and never attempted to make out even a *primâ facie* case. The Judge thought that there was no chance of satisfying the decree in any other way than by putting up the property for sale; and to get rid of this decision, the petitioner would have to show most distinctly that the money due to the judgment-creditor could be raised equally well in some other way than by immediate sale, and that the creditor would not by that arrangement be put to loss.

The appeal is dismissed, three gold mohurs being allowed for pleader's fees.

The 9th February 1872.

Present:

The Hon'ble E. Jackson and Dwarkanath Mitter, *Judges.*

Khas Possession—Dispossession—Onus Probandi.

Case No. 626 of 1871.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 9th March 1871, *affirming a decision of the Subordinate Judge of that district, dated the* 28*th April* 1870.

Rajah Run Bahadoor Singh (Plaintiff) *Appellant,*

versus

Kanoo Manjhee (Defendant) *Respondent.*

Baboo Hem Chunder Banerjee for Appellant.

Baboo Taruck Nath Sein for Respondent.

In a suit to recover *khas* possession and to dispossess, plaintiff must prove his cause of action.

In this case plaintiff claimed to oust defendant on the ground that he held under a three years' lease which had expired. Defendant alleged long hereditary possession, and also put in a lease which was granted to him by plaintiff in 1278 (1866), and which he had accepted under misrepresentation made to him by plaintiff. Defendant, although unable to prove his possession further back than 1856, had put forward some title under which he could establish his right to remain in possession, and plaintiff having failed to prove his cause of action, HELD that the Lower Court was quite justified in dismissing his suit.

Jackson, J.—WE think that there are no sufficient grounds for interfering with the decision of the Judge in this case. This was a suit for recovery of possession of the two Mouzahs Jubburdaho and Marah, the plaintiff admitting that the defendant was the tenant of these mouzahs, but asserting that he held under leases for three years which had been granted to him in the year 1270, and claiming that, as these three years had expired, he was entitled to recover *khas* possession, and to dispossess the defendant. The defendant on the other hand contended that the story of these three years' leases was a deliberate falsehood; that he and his father had held possession of these mouzahs for the last 60 or 80 years and that the plaintiff was therefore unable to dispossess him.

Both the Courts have come to the same conclusion, namely, as regards Mouzah Marah, the plaintiff was entitled to dispossess the defendant; but that as regards Jubburdaho, the plaintiff was not so entitled. As regards this mouzah, it was found that the plaintiff's allegation of a three years' lease was utterly devoid of foundation; that it was clear that the defendant had been in possession since 1856, but that to what extent he had been in possession prior to that year was uncertain, the defendant not having put in the old pottah or any earlier rent receipts, alleging that he had lost those papers during the Sonthal Rebellion. The defendant had also put in a lease for five years, which he said had been granted to him by the plaintiff in 1278, and which he stated he had accepted under misrepresentation made to him by the plaintiff. The Appellate Court was of opinion that, even under this lease, the plaintiff was not entitled to dispossess the defendant from Mouzah Jubburdaho.

On special appeal to this Court, it is said that even, although the plaintiff has not been able to prove his cause of action, still the defendant must put forward some title under which he can establish a right to remain in possession; and that if he cannot do so, he ought to be dispossessed, and the plaintiff restored to possession. We think that this deed of 1273, whether granted under misrepresentation or not, was quite sufficient to establish such a *primâ facie* title as would prevent the plaintiff from dispossessing the defendant at least as long as this lease would last. It is asserted before us that this lease was declared to be not genuine, but there does not seem to have been any distinct allegation to that effect, and it is very evident also from the documents filed in this case that the defendant had held possession for some time before that. Perhaps the Judge has not gone quite sufficiently into the case of the long hereditary possession of the defendant; but whether he did so or not, the plaintiff having failed in proving his cause of action, and the defendant having brought forward deeds which showed that he was entitled to remain in possession, the Lower Court was quite justified in dismissing the plaintiff's suit.

The special appeal is, therefore, dismissed with costs, and the question of the hereditary possession of the defendant will still remain an open question.

The 12th February 1872.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Alluvial Lands—Evidence—Admissibility and Weight of—Possession.

Case No. 581 of 1871.

Special Appeal from a decision passed by the Judge of Dacca, dated the 16th February 1871, *reversing a decision of the Subordinate Judge of that district, dated the 29th August* 1870.

The Collector of Furreedpore (Defendant) *Appellant,*

versus

Kalee Doss Hazrah (Plaintiff) *Respondent.*

Baboo Unnoda Pershad Banerjee for Appellant.

Baboos Romesh Chunder Mitter and Nulleet Chunder Sein for Respondent.

Plaintiff claimed certain *chur* lands, on the allegation that he had held it for 10 years since its formation, and that he had subsequently been dispossessed by Government; and the Lower Appellate Court decided in his favor on the strength of a map prepared by an Ameen in another suit to which the Government was not a party, and in disregard of the whole of defendant's evidence consisting of the depositions of public officers who had year after year gone to the land, measured it, surrounded it by pillars, and exercised other acts of possession. Case remanded to Judge for re-trial, with directions neither to reject, nor consider as binding, either the decrees obtained by either party, to which the other was not a party, or the proceedings of the revenue authorities, but to treat them as evidence and give them such weight as he thinks proper.

Per Jackson, J.—The evidence of Government having sent its officers to measure the land, and to surround it with pillars, is the very best evidence of possession of a lately formed *chur*.

Kemp, J.—THE plaintiff in this case is the purchaser of an estate in Dacca, No. 9274, Kathalberea, &c. The opposite party, the Government, represented by the Collector of Furreedpore, being the proprietors of an island *chur* called Hukeekutpore in Zillah Furreedpore. The plaintiff's case is that he had obtained a decree against Gour Chunder Doss, and in execution of that decree obtained possession of the disputed lands in 1271; that he held these lands up to 1273, Bysack, when he was ousted by the Government. He claims the land partly as portion of the lands decreed in the case of Gour Chunder, and partly as lands accreted to the lands thus decreed.

The Government's answer was that this land belonged to Hukeekutpore, that there had been proceedings between them and Gour Chunder, involving boundary disputes, in which repeated enquiries were made in several years, namely, in 1861, in 1862, and in 1865; that a Deputy Collector had been deputed to the spot to mark out the boundaries between the estate of Gour Chunder and the Government *khas mehal* of Hukeekutpore; that subsequently, after the Deputy Collector had fixed the boundaries, a Government officer was deputed to erect boundary marks, which are to this day existing; that the plaintiff never was in possession of these lands; that the Government have all along been in possession for a great number of years, certainly for more than ten years before this suit was brought by the plaintiff. We may mention here that the ouster alleged by the plaintiff is said to have been in 1866, and the present suit is not brought till 1870.

The first Court found against the plaintiff and dismissed his suit.

The Judge of Dacca, after stating that the first Court had admitted as evidence in favor of Government all the proceedings in which the Government were on the one side and Gour Chunder on the other, and to which the plaintiff was no party at all, and rejected as inadmissible all the proceedings in favor of the plaintiff between the plaintiff and Gour Chunder to which the Government was not a party, proceeds to state that he cannot concur with the Subordinate Judge in his finding. The Judge gets rid of the whole of the proceedings taken from time to time by the Revenue Authorities in fixing the boundaries between the two estates, 1st, by survey and map, and, 2ndly, by putting up boundary marks according to that map, by the observation, which is not a very intelligible one to us, that this was all performed by a Buxee of the Nazir, forgetting that this was done after a careful survey by the Deputy Collector in 1862. Then the Judge goes on, after eliminating all this evidence of proceedings between the Government and Gour Chunder, and between the plaintiff and Gour Chunder, by referring to a document on the record which he considers to be a very important piece of evidence in favor of the plaintiff, namely, the map of the 14th December 1865, prepared by order of the assistant in charge at Moonsheegunge. Now, in the first place, the Judge, in admitting this document, seems to have lost sight of the sound maxim which he himself lays down for his guidance, inasmuch as the Government were not in any way a party to this map of 1865; moreover, it appears that this map was made when a boundary dispute arose between the *malik* of Keshubpore, that is to say, Gour Chunder and the plaintiff; the subject of dispute, when that map was made in December 1865, was not the same as the subject of dispute in the present case, and the map was made for a different purpose; it may show the position of the land, but, as already observed, the Government, not having been a party to it, anything recorded by the Ameen in that map made in a case in which the land now in dispute was not the subject matter of the enquiry is not binding on the Government.

Then the Judge comes to what he considers to be the merits of the case, and he takes them to be simply this, that the Deputy Collector, finding that the channel of the Pudmah on the east of the *khas mehal* island of Hukeekutpore was drying up, thought it would be best to take possession of it all sharp; these are the words used by the Judge; then he goes on to say:—"I think "there is plenty of evidence on the record "to show that the river silted up first "from the east bank, the western side "of the channel remaining longest open, and "therefore under the present law the land "which formed in accretion to that on the "eastern bank belongs to the proprietor of "that bank, that is to say, to the plaintiff, "and this agrees, he says, with the state of "affairs as reported by the Ameen."

We think this is a most unsatisfactory decision. The Judge was bound to look at all the proceedings of different dates conducted by the Revenue authorities with reference to this land, and he was also, we think, bound to look to the fact that the Government was in possession, and had been in possession for at least ten years before the suit was brought, and that, although the plaintiff, according to his own allegation, was ousted in 1866, he brought no suit till 1870; there is no finding whatever as to whether any portion of this land is included in the decree obtained by the plaintiff against Gour Chunder, although the suit is on the basis that a portion of the land now claimed is included in that decree, and another portion an accretion to those decreed lands, and there is no weighing of the evidence whatever.

On the merits, we think this decision so unsatisfactory that we must remand the case to the Judge and direct him to re-try the case; in doing so, he will eliminate from the proceedings the document which he considers so important, namely, this map of the 14th December 1865; he will not consider as *binding* upon either party the decree obtained by the plaintiff against Gour Chunder, or the proceedings of the Revenue Authorities, but he must treat them as evidence, and give them such weight as he may think proper to attach to them and pass a fresh decision on the whole case upon a careful consideration of the evidence. Costs to follow the result.

Jackson, J.—I concur with Mr. Justice Kemp that this case should be re-tried. It is true that the lower Appellate Court has decided the two issues of fact which arise in the case in favor of plaintiff, and that we cannot directly interfere with those decisions; but it seems to me that the grounds upon which the Judge has come to his judgment on those issues contain errors in law.

The plaintiff claimed certain *chur* land, which he stated he had held for ten years since its formation, and from which he alleged that the Government had subsequently dispossessed him. The Judge thinks that the plaintiff has made out his case. His grounds are that, in another suit to which the Government was no party, a map was prepared by an Ameen, and it is there stated that the plaintiff was in possession of this land. The Judge considers this most important evidence, and he relies upon this map as proof that the plaintiff has been all along in possession, and upon it he rejects the whole of the defendant's evidence which consists of the depositions of Government officers who from year to year went to the land, measured it, surrounded it by pillars, and exercised other acts of possession. It does appear to me that the value which the Judge has given to this map is quite out of proportion to the value which should legally be put upon it. There may even be doubts whether it should be admitted in evidence at all. There is nothing to show upon what enquiry the fact was ascertained that the land therein stated to be in plaintiff's possession was in his possession. It was not the land then in dispute. There may, therefore, have been no enquiry at all about it. The plaintiff was a party to that suit. The fact may have been recorded in his statement. The defendant was not present at the time, and was no party to the enquiry. This statement of an Ameen on a point not directly before him ought not to over-ride all the direct evidence in this case. Again the Judge says that, when a *chur* has only lately formed, much trust cannot be placed in evidence as to its possession. All depends upon what that evidence consists of. If it is mere vague depositions of ryots to possession without any details as to how that possession was exercised, such evidence would be of little use. But here the Government is said to have sent its public officers to the spot and to have measured the land and again to have surrounded it with pillars. Such evidence, unless the Judge has some reason to believe it to be false, is the very best evidence of possession, and it would be good evidence whether the land was chur or cultivated land.

On the title to the land, the Judge has found in favor of the plaintiff, but he has not given the reasons which have brought him to the decision at which he has arrived. He seems to me to have proceeded more on the question of possession.

I entertain great doubts whether the Judge has arrived at a correct conclusion in this case, and I think that the errors in law which he has fallen into in considering the evidence may have led him to that conclusion.

I concur, therefore, in remanding the case to the Judge for a fresh decision on the whole case.

The 26th January 1872.

Present :

Sir James W. Colvile, Sir Joseph Napier, Sir Montague Smith, and Sir Lawrence Peel.

Mortgage — Foreclosure — Possession—Sale for arrears of rent (against heirs of mortgagor.)

On Appeal from the High Court at Calcutta.*

Forbes

versus

Baboo Luchmeeput Singh Doogur and others.

After appellant (mortgagor) had upon foreclosure of mortgage become absolute owner of certain *talooks* and obtained a decree for possession and been put into symbolical possession by the Zillah Court, the zemindar brought a summary suit for rent in the Collector's Court against the heirs of the mortgagee, who allowed judgment to go by default, and an *exparte* decree was made against them. In execution of that decree, the talooks were sold to the zemindar's *mooktear* at a grossly inadequate price. Both the zemindar and his *mooktear* had the fullest notice of the appellant's title and claim to possession before the decree for sale. HELD by the PRIVY COUNCIL (affirming in effect the authority of the Full Bench decision in 7 W. R. 260) that, under the Regulations in force at the time, and under the circumstances of this case, such a sale against the real owner was clearly invalid, and that no authority had been shewn to satisfy their Lordships that, by any known law or usage, zemindars had the power to sell tenures of this kind for arrears of rent as a right inherent in or incident to the tenure, or that any such power rightfully exists, unless by special stipulation, independently of the Regulations.

THIS is an appeal from a decree of the High Court of Calcutta on review, in effect dismissing a suit brought in the Zillah Court of Purneah in 1856 by the appellant, as mortgagee after foreclosure, to recover possession of certain talooks in Pergunnah Havalee, and to set aside a judicial sale of them made at the instance of Baboo Pertab Singh, the zemindar, under a claim for arrears of rent.

The main question in the appeal is, whether the sale of the talooks made to Sheikh Jowhur Ali, the respondent who alone appeared at the hearing, under a decree in a suit instituted by the zemindar against the heirs of Shah Ali Reza, the mortgagor, for arrears of rent, treating them as defaulting tenants, is a valid sale as against the appellant, the mortgagee, who was not a party to that suit.

Ali Reza a Mahomedan, held the property by an hereditary tenure created by sunnuds granted prior to 1798 to the ancestors of Ali Reza. These sunnuds are not set out in the present record ; but it has been certified since the argument, by the Registrar of the High Court, that they are the same as those printed in the record of the appeal in a former suit between the appellant and the representatives of Ali Reza. Their Lordships thought it right to ascertain with accuracy the contents of these sunnuds, inasmuch as the High Court based their judgment in a great degree on the assumption that the tenure was made saleable for arrears of rent by special terms contained in them.

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* From the Judgment of Bayley and Shumboonath Pundit, J. J., 7 W. R. 409.

It appears from the sunnuds, thus verified, that this assumption is unfounded; and it was admitted by the learned Counsel for the respondent that, if they were the same as those set out in the former record, this was so. By the sunnuds the mouzahs are given by way of *istamrar* to Hossein Reza and his descendants on a fixed and absolute jumma of 2,291 rupees.

On the 13th March, 1850, the appellant advanced to Ali Reza 39,500 rupees; and to secure this advance, the latter made in ordinary form, a conditional sale of the talooks to him, to be absolute if the money was not repaid on 13th March 1851.

It is necessary to advert shortly to the litigation which has been going on since 1851 in this and two contemporaneous suits

The mortgage-debt not having been paid, the appellant took proceedings to foreclose under Regulation XVII of 1806; and the foreclosure was completed in due course in August 1852.

Thereupon, on the 28th January 1853, the appellant commenced a suit against Ali Reza to obtain possession, which was defended on grounds impeaching the validity of the foreclosure. This suit passed through all the Courts, and underwent a great variety of fortune. The Zillah Judge on the 18th December 1854 (a day material to be borne in mind), made a decree in favor of the appellant for the possession of the talooks. On appeal to the Sudder Dewanny Adawlet, the suit was remanded, when the then Zillah Judge dismissed it, and the Sudder Court affirmed his decision; but both these judgments were reversed by Her Majesty on appeal, and the Order in Council declared that the appellant was entitled to the possession of the mortgaged premises as absolute owner. The case is reported in 10 Moore's Indian Appeals, 340.*

The Order in Council bears date on the 3rd February 1866.

Shortly after the decree of the Zillah Judge of the 18th December 1854, in the appellant's suit for possession, viz., on the 6th January 1855, the zemindar Pertub Singh brought a summary suit in the Collector's Court against the heirs of Ali Reza for arrears of rent. The heirs in that suit allowed judgment to go by default, and on the 26th February 1855, an *exparte* decree was made against them for the amount of the arrears claimed, viz., 712 rupees. On the 19th March 1855, the zemindar prayed that the decree might be put into execution and the talooks sold, and they were sold accordingly on the 26th day of April 1855, to the respondent Jowhur Ali for 1,000 rupees. This is the sale which it is sought to set aside in the present suit.

It is plain that, when this summary suit against the heirs of Ali Reza was commenced, they had no title or right whatever in the talooks. The appellant had become absolute owner, and, moreover, he had obtained the decree of the Zillah Judge for possession, which was ultimately sustained on the final appeal to Her Majesty.

On the 24th March 1856, the appellant commenced the present suit to set aside the sale and for possession against the zemindar, the purchaser, Jowhur Ali, and the heirs of Ali Reza.

His right to recover was at first opposed in the Courts below, on the ground that by the judgments given in India in the first of the above mentioned suits, his title, by foreclosure, had been invalidated; and, on this objection, decrees were made against him by the Zillah and High Courts. On the reversal of these judgments by the Queen in 1866, the appellant, in order to obtain the fruits of the long litigation at last decided in his favor, obtained a re-hearing of his case on review, and the High Court then pronounced the judgment against him, now under appeal.

The contention of the appellant is that the zemindar could only sell the interest of the heirs of Ali Reza (if any), and not the tenure and estate which had passed to him before the decree for sale; and he also impeached the sale on the ground that it was fraudulent and collusive; and on objections founded on various alleged irregularities.

In the view taken by their Lordships, it will only be necessary to consider the first point, viz. the right of the zemindar to sell, under the decree in the summary suit against the heirs of Ali Reza, the tenure then vested in the appellant.

The respondent contends that the sale was, by law, valid. He relies on the facts that some rent was in arrear, that Ali Reza's name was on the register, and his heirs in possession, and that the appellant did not tender the amount of the arrears.

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* W. R. (P. C.) 47.

But, on the other hand, it appears that if the heirs of Ali Reza were in possession, which is somewhat uncertain on the facts, their names were not put on the zemindar's register, and it also appears that, shortly after the commencement of the summary suit of the zemindar, and before the decree for sale, the officers of the Zillah Court, in pursuance of the decree of the 18th December 1854, gave the appellant symbolical possession by planting bamboos, which the zemindar's agents soon afterwards pulled up, and that the appellant's agent tendered the rent for December 1854 at the cutcherry of the zemindar, and that such tender was there refused, with the answer that Sazawals had been appointed, and that until they were removed, no rent would be received. It also appears that the appellant endeavoured to get his name placed on the register of the zemindar, and that before the sale he applied to the Zillah Judge for a *perwannah*, directing the zemindar to place his name on the register, who refused the order. The appellant did not then apply to the zemindar and it may be inferred that he did not do so because the above proceedings of the zemindar, who had then obtained the decree against the heirs of Ali Reza, had shown that such an application was useless.

It is apparent from these facts that the zemindar had the fullest notice of the title of the appellant and of his claim to possession before the decree for sale, and that having that notice, he proceeded, without notice to him, to obtain a decree for sale *exparte* against the heirs of Ali Reza. There can also be no doubt that the purchaser, Jowhur Ali (who was, in fact, the *mookhtear* of the zemindar, and purchased at a grossly inadequate price), had in the same way notice of the appellant's title and his proceedings. It requires very plain positive law to support such a sale against the real owner under a decree thus obtained.

The High Court, in the judgment under appeal, assume that the Sunnuds, in their terms, gave the zemindar power to sell the tenure itself free from incumbrances; but in the event of that assumption being unfounded, the learned Counsel for the respondent contended that the zemindar had that power either as an incident to the tenure, or by virtue of the Regulations.

No authority was shown to satisfy their Lordships that, by any known law or usage, zemindars had the power to sell tenures of this kind for arrears of rent, as a right inherent in or incident to the tenure, or that any such power rightfully exists, unless by special stipulation, independently of the Regulations.

A long minute commentary was made, during the argument upon the Regulations bearing on the subject from 1793 downward, with the view, on the part of the respondents, of showing that they authorized a sale of the tenure itself free of previous titles and incumbrances created by the defaulting tenant and his predecessors.

Their Lordships do not think it necessary to discuss in detail these Regulations, because they are disposed to agree in the main with the construction put upon them in a decision of the full High Court, which is directly opposed to this contention. The decision referred to was pronounced in an elaborate judgment of the full Bench of the High Court (the Chief Justice, Sir Barnes Peacock, presiding), in which the Regulations are fully collated and examined (Mahabooddeen *v.* Futtah Ali and another, 7 Weekly Reporter, 260). This, which may be regarded as the leading decision in India, has been followed by the Courts there (Tirthanund Thakoor *v.* Paresmon Jha, 13 Weekly Reporter, 449; Banerjee *v.* Debee and Others, 15 *ib.*, 287). It is true that the Courts in these decisions had to construe Act X of 1859, and not Regulation VII of 1799, which had then been repealed; but powers of sale analogous to those found in the Regulation of 1799, are provided in Section 105 of Act X of 1859, with this difference—that the language of the latter Act is more favorable to the contention of the respondent than that of the Regulation of 1799. The Chief Justice, in commenting on the Regulation of 1799, considered it to be clear that the power to sell the tenure itself free from incumbrances was not given by that Regulation.

The Regulations principally relied on by the respondent are Regulation VII. 1799, *s.* 15, *cl.* 7, and Regulation VIII. 1819. The part of the Regulation of 1799 relied on declares that "if the defaulter be a dependent talookdar, or the holder of any other tenure which by the title deeds or established usage of the country is transferable by sale or otherwise, it may be brought to sale by application to the Dewanny Adawlut, in satisfaction of the arrears of rent."

The language is not well adapted to meet the case of incumbered tenures, but the words, "if the defaulter be the holder of any tenure, it may be sold," may fairly mean that the tenure the defaulter holds, or has, such as it is in his hands, may be sold, and it does not seem to be a forced construction that the decisions above referred to have put on the statute, in holding that if the tenure has passed to another, and is no longer in him, the alleged manner enabling it to be sold for his debt, and that if he has an incumbered tenure, then only the interest which he has in it is subject to the power of sale.

The older Regulations of 1793, 1795, and 1797 were referred to for the purpose of showing the general object to have been to give the zemindar the same powers to recover rents from their dependent talookdars, as the Government had to recover the fixed revenue from them; but these provisions relate principally to powers of distress. The recital relied on in the Preamble of Regulation XXXV of 1795 (which relates to distresses, viz., that justice required that proprietors should have the means of levying their rents and revenues with equal punctuality as the Government), is not found in Regulation VII of 1799; and would not justify a construction of that Regulation which would give, by an inference, a power of sale of so stringent a kind as that contended for.

Regulation VIII of 1819, s. 11, no doubt gives an express power to sell the tenure free of all incumbrances that may have accrued upon it by the act of the defaulting proprietor, his representatives, or assignees; but the power so given is confined to the case of tenures where the right of selling or bringing to sale for an arrear of rent has been specially reserved by stipulation in the engagements interchanged on the creation of the tenure.

The preamble of the Act shows the existence of such tenures, and the Regulation treats them as a distinct class.

It has been already pointed out that the Sunnuds in this case do not contain this special power, and that the High Court was in error in so assuming.

The present case is stronger in favor of the appellant than that cited from 7 Weekly Reporter. In this case, before the zemindar took proceedings against the heirs of Ali Reza, the title of the appellant has passed beyond the stage of being an incumbrance only on the tenure. He had become the absolute owner of the tenure itself, and the heirs of Ali Reza, against whom the summary suit was brought, had no title or interest whatever left in it. They were not the holders of any tenure, to use the words of Regulation VII of 1799, and were certainly not "proprietors," in the words of the Regulation VIII of 1819.

The judgment below was also grounded on the fact that the heirs were in actual possession, and that the name of Ali Reza, their ancestor, was on the register. This was so, but they were holding possession wrongfully. Not only was their title gone, but a decree for possession had been obtained against them, and executed so far as it was possible to do so. Their possession, therefore, was in no sense lawful, and their mere *de facto* possession was known by the zemindar to be wrongful. With this knowledge the zemindar could not properly treat the heirs as holders of tenure, so as to affect the rights of the appellant, of whose title and efforts to obtain possession he had notice.

It is true the appellant did not tender the rent which was the subject of the suit against the heirs; but, on the other hand, when he tendered the rent due from the date of his decree, at the cutcherry, the prior rent was not demanded of him, and, on the contrary, he was told the zemindar's Sazawals were in possession, and no rent would be received. These facts, coupled with the other proceedings of the zemindar's agents, show that a further tender was useless, and therefore unnecessary, even assuming that such a tender ought to have been made to stop the proceedings in the summary suit against the heirs to which he was no party, which their Lordships are by no means prepared to affirm.

In recommending the reversal of the judgment under appeal, their Lordships in effect affirm the authority of the decision of the Full Bench in the case referred to from the 7th Weekly Reporter. It may be inferred from their judgment that the High Court in this case would have followed that authority, if the terms of the sunnuds had been correctly brought before them.

Their Lordships do not desire by this judgment to weaken any powers that zemindars may, by law, possess to enforce payment of their rents. What other powers and remedies the zemindar Pertab Singh had, and might have exercised, it is not necessary, nor is it now of any general importance to determine, for the remedies for arrears of rent are at present mainly provided by Act X of 1859 and subsequent Acts. The only question their Lordships are called upon to decide is as to the validity of this sale, and they have come to the conclusion that, under the Regulations in force at the time and under the circumstances of this case, this sale, for the reasons already given, was invalid.

Their Lordships think that the appellant is entitled to the mesne profits from the time of the sale to Jowhur Ali, as against him; and that in taking the account of such profits, all rent and arrears of rent due and payable to Pertab Singh and his heirs should be deducted and allowed. The appellant also claims to be entitled to a decree for mesne profits against the heirs of Pertab Singh, on the grounds (1) that the zemindar was acting in collusion with Jowhur Ali; and (2) that he persisted in the sale of the talooks, when he knew that the heirs of Ali Reza, who alone were defendants in this suit, had no interest at all in them. Their Lordships do not think it necessary to express any opinion on the charge of collusion; but considering that the zemindar proceeded to obtain a sale of the tenure, notwithstanding he had notice of the appellant's title, and of the order made by the Zillah Court for giving him possession, and that such sale has been the means of keeping the appellant out of possession, and the cause of this suit, and that he has persistently disputed the title of the appellant, they are of opinion that the decree for mesne profits should be against the heirs of Pertab Singh, as well as against Jowhur Ali, but that execution should not be had against such heirs in respect of them until after failure to obtain satisfaction from Jowhur Ali.

Their Lordships will therefore humbly recommend to Her Majesty that the decree appealed from be reversed, and that it be declared that the sale to Jowhur Ali was invalid, and should be set aside, that the appellant is entitled to possession, and to be registered as the holder of the talooks, and that he has been so entitled since the said decree of the Zillah Court of Purneah of the 18th December 1854: and that it should also be declared that the appellant is entitled to mesne profits from the time and in manner above mentioned; and further, that the respondents should pay the costs of the litigation in India, and if any costs have been paid in India they should be refunded, and their Lordships will direct that the appellant should have the costs of this appeal.

The 29th January 1872.

Present:

The Hon'ble Sir Richard Couch, *Chief Justice*, and the Hon'ble A. G. Macpherson, *Judge*.

Money-debt—Deposit of Shares—Promissory Notes—Substitution—Power of Attorney—Revocation—Lien—Sale of Securities—Evidence—Effect of Receipt.

Appeal from the judgment of the Hon'ble J. B. Phear, exercising the ordinary Original Civil jurisdiction of the High Court.

Alexander Stewart (Defendant) *Appellant*,

versus

The Delhi and London Bank Limited (Plaintiffs) *Respondents*.

Mr. Phillips (with him *Mr. Marindin*) for the Appellant.

The Advocate-General (with him *Mr. Woodroffe*) for the Respondents.

The question in this case was whether a right of lien and power of sale by virtue of a power of attorney over certain shares pledged with plaintiffs by defendant as security for the repayment of a loan originally secured by a first promissory note, was lost by the plaintiffs subsequently taking from defendant a second promissory note in lieu of the first which was receipted and returned. HELD that the original debt continued to exist; that the first promissory note and the shares were given as a security for that loan; that the second promissory note was also given as a security for the loan, no new debt being created; that the plaintiffs had a right to exercise the power given to them of selling the securities; that the act of the defendant in trying to prevent such exercise of power by revoking the power of attorney was unjustifiable; and that therefore the plaintiffs were right in coming to the Court to have that proceeding of the defendant set aside and declared inoperative.

Though a receipt on the back of a bill of exchange or promissory note *primâ facie* imports that the bill or note has been paid, yet the receipt is capable of being explained; and if it appears that the bill or note has not been paid, and that another bill or note was substituted for it, the Court will not be justified in concluding that the party who gave up the note in that way meant that the debt secured by the note was to be considered to have been paid.

DEFENDANT, being largely indebted to the plaintiff Company, had from time to time prior to the 22nd November 1865 deposited with the plaintiffs certain Joint Stock Companies' shares and share certificates as security for the repayment (as alleged by the plaintiffs) of all the moneys due or which might hereafter become due from time to time to the plaintiffs for principal and interest, and had executed several powers of sale and transfers and letters of pledge in favor of the plaintiffs. On the 22nd November 1865 defendant executed a power of attorney authorizing the plaintiffs to sell or dispose of the shares, and gave plaintiffs a promissory note for Rs. 1,90,000, with interest at the rate of 11 per cent. per annum. Between the 22 November 1865 and the 2nd January 18[illegible] plaintiffs caused their right of lien over the said shares to be registered by the several Joint Stock Companies concerned. On the [illegible] February 1866 defendant being found, on adjustment of accounts, to be indebted to the plaintiffs for Rs. 1,82,178-6, and being pressed for payment, gave them a second promissory note for Rs. 1,82,178-6, with interest at the rate of 12 per cent. per annum. On taking the second promissory note, the plaintiffs gave up the first, and put a receipt on the back of it. In April 1870 defendant wrote to the plaintiffs revoking any or every power of attorney given by him to the plaintiffs, publicly notified such revocation, and refused to pay the debt on the ground that it was barred by limitation. Plaintiffs being unable by reason of such refusal, revocation, and notice, to recover their debt, or to exercise their power of sale and disposal of the said shares, brought their suit for the amount of the debt (Rs. 2,55,760-1-7), and for a declaration of right of lien and power of sale over the said shares pledged by the defendant with the plaintiffs, and to obtain an order for the sale of such shares or some of them and for other relief incidental to the above.

The defendant's case is that the shares in question were deposited with the plaintiffs as a security for the debt secured by the first promissory note, and that the power of attorney was given for the purposes of that note only; the second promissory note being not a renewal but a fresh note.

The judgment of the lower Court was given as follows by:—

Phear, J.—This suit has a double aspect. The plaintiff seeks in the first place a decree for Rs. 2,55,000 and upwards, and in the second place asks for a delaration of a right of lien to the like amount upon certain shares deposited with him and the sale of them under an order of Court. It is conceded by the Advocate General that the suit for the debt is barred by the Statute of Limitations, so that the only question before me is whether or not the plaintiff has a right as against the defendant to have the shares set out in the plaint, the certificates of which are in his hand, sold to realize the debt or any portion of it. There cannot be any doubt on the evidence of Mr Stewart himself and the correspondence which has been admitted that these shares were originally deposited with the Bank to secure the repayment of a loan of Rs. 190,000; the repayment was further facilitated by a power of attorney which Mr. Stewart at the same time gave the Bank, enabling the Bank to sell these shares in Mr. Stewart's name as attorney for Mr. Stewart. I pointedly remarked this at the outset, because I think there has been undue importance attributed to the existence or giving of the power of attorney. If the power of attorney had not been given or it had been afterwards withdrawn rightfully, the share certificates might still remain in the hands of the Bank as security for the debt though the Bank in that case would not be able itself to take action in the way of selling the shares,—it would only be able to keep them from the owner till payment, or to come into Court and have its equity enforced against the owner *i. e.* the equity which arose out of the circumstances of the deposit of the certificates as security for the debt. To return, however, I repeat that, at the commencement, the Bank had a right at its pleasure to have the shares which were deposited by Mr. Stewart sold in order to realize the Rs. 1,90,000 which Mr. Stewart owed the Bank, and it had moreover under the power of attorney the means of procuring a sale of the shares without being obliged to seek the assistance of a Court of Equity. It is said on behalf of the defendant that at a certain subsequent date that original debt, for which these shares were deposited as security, was wholly extinguished, and that consequently the lien or right to hold these shares as security for the debt under the original contract came at the same time to an end. I have been utterly unable to see from the beginning of this argument how the facts of the case could afford any foundation for the contention that the original debt has been extinguished. I don't know more, certainly, than three ways in which a money debt can be put an end to,—first, by a sufficient release on the part of the creditor; second, accord and satisfaction or the acceptance by the creditor of something different from the money payment as a discharge of the debt; and the third and last, and most common, payment of the money. I need hardly say that in this Court the payment of a less sum is not a discharge of an obligation to pay the full sum. It is not pretended here that for any cause the Bank has released the debt. There is no pretext for saying, it has accepted a different thing in exchange for the debt. The argument of the defendant's Counsel is simply that what has really taken place amounts to a payment in specie of the debt, in other words that the money debt has been paid by money. But if I ask the question by whose money, the answer must be, by the Bank's own money. A debt has been paid off with the creditor's own money. This is the first time, I have met with such a proposition as this put forward seriously. Mr. Stewart may, no doubt, have *bond fide* thought that what occurred between him and the Bank was in effect a payment of the original debt and the simultaneous creation of a new debt. But I cannot help thinking that, if he had been the creditor instead of the debtor, his views would have been widely different. It does not need my dwelling on this point to show that the exchange of the new promissory note for the old promissory note was nothing more than a statement of account accompanied by a fresh promise to pay what was due; no debt was put an end to, though the statement of account might afford new cause of action. The Rs. 1,82,000 found to be due at that time is nothing more nor less to my perception than so much of the debt of Rs. 1,90,000 as remained unpaid and existing at the exchange of the notes. If that be so, the lien of the Bank over the title deeds clearly remains *pro tanto* the same as before that occurrence. The lien then only went to the extent of Rs. 1,82,000, while at first it was for Rs. 1,90,000; but even if the views I have expressed as to the nature of the renewal or rather exchanging of the promissory note be not strictly in accordance with the views of business men, assuredly the shares were long after this point of time treated as an existing security for the debt, whatever it was, that was due by Mr. Stewart to the Bank. It is quite impossible to hold that Mr. Stewart was ignorant of the assertion, from that time downward, made by the Bank in a way indeed more expressive than words, that these shares were held by it as security for the payment of the so-called new loan. Why, Mr. Stewart himself acted as broker of the Bank when, in assertion of that lien, they took a large portion of the shares into the market and appropriated the proceeds. I cannot then allow Mr. Stewart to go back and say, nevertheless, "you have no right of lien on these shares except that which you had originally, and which was put an end to when I took the new loan." I think, in short, that these share certificates are in the hands of the Bank, subject to a right of lien, arising out of the facts of the deposit of them originally made under an express agreement that they should be held as a security for the repayment of a sum of money, and the implied contract to be inferred from the acts of the parties themselves subsequent to the transaction of the so-called new loan that they should continue to be so held by the Bank. I come now to the only part of the case which has caused me hesitation of opinion. I think the transaction of the deposit with or without the power of attorney created a charge in favor of the Bank on the property represented by the share certificates. I think also that the consideration for the charge was good and substantial, and that consequently the charge remained valid till satisfied or put an end to in some way or another. If the charge involved an unqualified right, on the part of the Bank, to pay themselves a specified sum by the sale of the shares, nothing that occurred in respect to the collateral debt would put an end to the right. It is not however pretended that the right to sell in this case is an absolute charge on the property; it is a charge by way of security for the repayment of a debt. That debt has not been repaid, and my opinion has been from the commencement, that nothing short of payment of the principal debt would put an end to the right of the Bank to obtain repayment by a sale of the shares. If the right to recover the principal debt, is barred by the Statute of Limitations, that fact not only might have no influence on the right of the Bank, but might well enough strengthen the case of the Bank, because it might be presumed that the reason why the right to sue was allowed to be barred was, because the Bank relied on the right to secure the repayment by a sale of the securities. But Mr. Marindin has argued ingeniously that the Statute of Limitations not only barred the right to sue, but so extinguished the debt that there is nothing for which the Bank has a right to hold these shares as security; that their right not being an absolute right to raise so much money, but only a right to raise it on default of payment, the right has gone as soon as the obligation to pay has gone. I am disposed to think, Mr. Marindin's argument has been pushed too far. I am not aware of any authority to the effect, that the debt is actually put an end to by the operation of the Statute. I wish, however, to refresh my mind by a reference to the decided cases, one or two of which have not, I think, been referred to in argument. I will reserve judgment till Thursday, though I scarcely doubt that my decree will then be to the effect that the plaintiff's suit be dismissed so far as he seeks to recover the Rs. 255,000; but also that the plaintiff has a lien on the shares, and is entitled to have them sold, and that the plaintiff must be paid his costs on scale No. 2.

The next morning the Court said:—

On consideration I adhere to the view which I have already expressed.

I have often explained in this Court that I conceive the contract, which is to be inferred from the simple deposit of documents of title (not being negotiable instruments), amounts merely to the creation of a charge on the property. The depositee thereby acquires the right as against the depositor to have the property sold for the purpose of raising the sum of money in respect of which the deposit is made. Something more than the act of deposit is required in order to make the transaction an equitable mortgage, namely, something expressed or implied from which an agreement to execute a future mortgage or transfer may be inferred. And I have always considered Vice-Chancellor Kindersley's judgment in *Matthews* v. *Goodday*, 8 Jur., N. S., 90, authority for this position.

In the present case it seems to me there can be no doubt upon the point. At the outset unquestionably, Mr. Stewart not only gave the Bank a right to have the shares sold at any moment it chose for the purpose of repaying itself the money it had advanced, but also gave it a power of attorney by virtue of which it could effect the sale of the shares without having recourse to him, the owner. Mr. Stewart has since affected to take away this power of sale. I will not enquire whether he could lawfully do so or not, because the principal question is, whether or not the original right to have the money or any part of it realized by sale of the shares remains with the Bank. If it does, this Court will direct the sale even though Mr. Stewart may have effectually withdrawn from the Bank itself the power to make a sale in his name.

Now it is true that the charge upon the shares was never so to speak an absolute charge in favor of the Bank; it was a charge by way of security. Accordingly it has been argued that at the most it was a charge to secure the payment of a debt, that admittedly this debt has been barred by the operation of the Statute of Limitations, it therefore no longer exists, and the charge or right of sale which is measured by it must fall with it. Mr. Marindin said, in the words of the Vice-Chancellor in *Piggott* v. *Jefferson* (12 Sim., 27) "if the right to sue for the money is barred by lapse of time, how can you revive that right in another form." This argument is very ingenious but I think not sound. The decision in *Piggott* v. *Jefferson* turned upon the question whether or not the obligation of an executor (who had possessed assets of his testator) to pay a legacy remains, after the time for claiming the legacy had long passed, as against the executor, such a debt as properly comes within the scope of a general charge for the payment of his own debts created by the executor himself in his own will. The Vice-Chancellor merely held that it was not such a debt. For the success of Mr. Marindin's contention in the present case, it is necessary that I should so limit the charge upon the shares as to make it a right in the Bank to sell and recoup itself the money in default of payment by the borrower, which is to endure only so long as the right to recover the money itself by suit is not barred. But I think a limitation of this sort would be unreasonable and not according to the meaning of the parties. It seems to me clear that the charge created by deposit of the documents had the simple form of a right in the Bank to have the property sold and the money which had been advanced repaid out of the proceeds of sale unless and so far as it was not otherwise repaid. The money has not been repaid, and the right to come into Court to have this charge itself enforced is not barred.

The defendant appealed from the above judgment on the following grounds:—

First.—That the learned Judge held that the plaintiff Company had a subsisting and valid lien or charge upon certain share certificates and shares in the plaint mentioned whereas he ought not so to have held.

Second.—That the learned Judge held that the plaintiff Company were entitled to sell the said share certificates and shares and to apply the proceeds thereof in payment of their claim, whereas he ought to have held that the plaintiffs were not so entitled.

Third.—That the learned Judge held that, although the claim of the plaintiff Company to recover the debt in the plaint mentioned was barred by the law of limitations, the plaintiff Company were nevertheless entitled to relief; whereas he ought to have held that their right to relief was barred by lapse of time and their own laches.

Fourth.—That the learned Judge refused to order the plaintiff Company to pay over to the defendant the dividends received by them on account of the said shares since 1st February 1869, the date at which the debt claimed was barred by limitation, and refused to order the shares to be sold exclusive of the dividends still due thereupon; whereas for the purposes of doing complete justice between the parties, the learned Judge ought to have made both the said orders.

Fifth.—That the learned Judge held that the debt in the plaint mentioned was a subsisting debt, whereas he should have held that the said debt was extinguished by the law of limitations.

Sixth.—That the decree and judgment of the learned Judge are in other respects erroneous and contrary to law.

Mr. Phillips (for appellant) referred to *Bell* v. *Tidd* (6 Jur., 59—B. C.); and *Piggott* v. *Jefferson* (12 Simon, 26).

The Advocate-General (for Respondent) was desired by the Court not to address himself to the point as to the loan being a new loan, but to confine himself to the question as to the power of the Court to enforce this lien. He cited *Spears* v. *Hartly* (3 Espinasse, 81); and *Appavu Pillai* v. *Subraya Muppen* (2 Madras H. C. Rep. 474).

The judgments of the Appellate Bench were delivered as follows by—

Couch, C.J.—In this suit, the Delhi and London Bank, Limited, sought to recover from the defendant a sum of money which they alleged to be due to them from the defendant, or to have certain securities pledged by the defendant sold, and the proceeds applied in satisfaction of the money due to them. The plaint stated that the defendant, being largely indebted to the plaintiff Company from time to time prior to the 22nd day of November 1865, deposited with the said plaintiff Company then trading under the style and designation of the Delhi Bank Corporation, Limited, divers Joint Stock Companies' shares and share certificates as security for the repayment of all the moneys due or which might thereafter become due from time to time to the said plaintiff Company for principal and interest; that on the said 22nd day of November 1865, the defendants (who had theretofore pledged or deposited with the plaintiff Company, as security for the purpose aforesaid, the various shares and share certificates mentioned and described at the foot thereof, and had signed several powers of sale and transfer of the said shares and letters of pledge), signed, sealed, and delivered his deed-poll or power of attorney irrevocable.

That power of attorney, after reciting that, "whereas the said Alexander Stewart hath "this day deposited with the Delhi Bank "Corporation, Limited, the securities mentioned at the foot hereof as security for a sum "of money borrowed by him from the said "corporation mentioned in an agreement "between the said parties bearing even date "herewith, and it hath been agreed that the "said Alexander Stewart shall execute to the "said corporation such power of attorney in "respect of the said securities as hereinafter "is contained," authorised the plaintiffs "to "make sale and absolutely dispose of the said "securities or any of them, together or separately, and either by public auction or by "private contract, and to transfer or make "over the same when sold unto the purchaser "or purchasers thereof."

The plaint then stated that the plaintiffs caused and procured their right of lien over the said securities and the said deed-poll or power of attorney of the 22nd November 1865 hereinbefore set forth, which was made and executed for and on their behalf, to be registered by the several Joint Stock Companies of which the plaintiff Company hold such shares by way of security, and that after the execution of the power of attorney the defendant made and delivered to the manager of the plaintiff Company for and on behalf of the said plaintiff Company his promissory note in writing, and thereby promised to pay on demand to the manager of the plaintiff Company or order at the office of the plaintiff Company in Calcutta the sum of Rs. 1,82,178-6 with interest at Rs. 12 per cent. per annum thereon, and that he did not pay it, and it prayed that the defendant might be ordered to pay the debt due by him, or that the shares which were deposited as security for the debt or such of them as might be necessary should be sold, and the proceeds applied towards payment of the debt.

The defence set up to this claim on the part of the plaintiffs in the written statement of the defendant is that the shares and their certificates were not deposited as security for the repayment of all the moneys due, or which might thereafter become due from time to time, to the plaintiff Company for principal and interest as in the first paragraph of the plaint mentioned, but that the same were held by the plaintiff Company as security for a debt then due by the defendant to the plaintiff Company, and secured by a promissory note of the defendant dated the 22nd of November 1865 for payment to the Delhi and London Bank or order on demand of

Rs. 1,90,000, with interest at the rate of Rs. 11 per cent. per annum, that the power of attorney was given for the purposes only of the promissory note, and the defendant in the evidence which he gave set up the same defence and said that the second note was not a renewal but a fresh note. "No money," he said, "passed actually; my instructions were "to pay themselves and give me back my note. "No money passed. Instead of receiving it, "I instructed them to pay off my note. On "the original loan I received money and gave "securities. In February 1866, some of the "shares might be falling, others were not. "They pressed for payment. I made a new "loan: paid off the old. The old loan was "Rs. 1,90,000. I paid the difference. It was "paid by dividends. The second note certainly was not given on the footing of the "securities with the first loan. I gave a power "but not with the second loan. The second "loan was not on the same footing as the "first. The scrip was left with the Bank "to show. I held the scrip; the note was on "demand, and they could sue me. The second "loan was on my personal security and the "deposit of the scrip showing I was possessor "of so many shares."

Now the power of attorney in this case purports to be given as security for the debt mentioned in an agreement which was executed at the same time. There was no agreement, and the mistake probably arose from a printed form having been used. But it seems perfectly clear, from the nature of the first transaction, that both the power of attorney and the promissory note were given as security for the debt. Then when the Bank took the second promissory note, and gave up the first, although there is a receipt on the back of the note, we must look to the nature of the transaction to see whether it will bear the construction which the defendant seeks to put upon it. It is true that a receipt on the back of a bill of exchange or a promissory note *primâ facie* imports that the bill or note has been paid; but the receipt is capable of being explained; and if it appears that the bill or note has not been paid, and that another bill or note was substituted for it, the Court would not be justified in concluding that the party who gave up the note in that way meant that the debt secured by the note was to be considered to have been paid.

Now it would require very cogent evidence, it appears to me, to satisfy the Court that the plaintiffs having advanced money to the defendant, and having not only his promissory note but also the securities deposited with them, and a power of attorney authorizing them to sell those securities, would consent as the defendant says they did, to make to him a fresh loan merely for the purpose of paying off the old debt which was so secured on the security merely of his promissary note, and not retain the right which they had of selling the securities and paying off the debt. It would require very strong evidence to satisfy any one that the Bank agreed to such a transaction as that, and still less does it appear probable when we find that the power of attorney and the securities were retained by the Bank. The defendant seeks to account for the retention of the securities by the Bank by saying that they were left in the possession of the Bank as an earnest that he was possessed of the shares. It appears to me that that is a very bad reason to assign for it. The Bank being in that position, and having the securities in their own hands, was not likely to consent to advance its own money, without retaining their lien on the securities. What appears to me to have taken place was this that the Bank pressing the defendant for payment (as he admits it was doing) the second promissory note was substituted for the first, with an advance of one per cent. in the rate of interest; and on giving up the first note, by some inadvertence, the receipt was put on the back of it. The Bank could never have intended that the giving of the second note should be a satisfaction of the debt due on the first for which they held the securities. The conduct of the defendant himself, as appears from the correspondence, entirely supports this view. On the 8th of May 1867 (it is not necessary to notice the previous letters), the manager of the plaintiff Bank writes to the defendant:—

"DEAR SIR,—Adverting to my previous "letter on the subject, I have to inform you "that, unless you at once deposit in the Bank "approved security for half a lakh of Rupees, "and pay in cash all interest due on your "loan, the shares held as security will be "sold without further reference."

On the 18th June 1867 the Manager again writes to him:

"DEAR SIR,—"I beg to advise the sale of "your 20 shares in the Eastern Cachar Tea "Company at Rupees 51 per share; the proceeds, less brokerage commission and stamp "charges, will be credited to your loan "account."

On the 25th of July he again writes:

"DEAR SIR,—I beg to advise the sale, on "your account, of five shares in the Victoria "Tea Company at Rupees 40 per share; the "proceeds will be credited to your loan account, less commission and stamp charges."

On the 30th of November 1867, in a similar way, he advises the sale, on the defendant's account, of 50 shares in the Central Cachar Tea Company at 40 Rupees each. On the 18th of November, a sale of 10 shares more in the same Company; and on the 2nd of December, a sale of 140 shares in the same Company.

Thus, the defendant is informed that the plaintiffs, by their Manager, were selling these shares for the purpose of satisfying the debt due by him to them, and they could have a right to sell the shares in that way only by virtue of the power-of-attorney. If the case put forward by the defendant is the true one, and the shares remained in the possession of the Bank without any power of sale, they were doing what they had no right to do without first obtaining his consent. Now let us see what notice the defendant took of these letters. On the 2nd of December 1867 he wrote to the Manager of the Bank:

"DEAR, SIR,—In case of your selling off "any more of my shares, I shall feel obliged "by your submitting the rates to me from "time to time at which you are disposed to "sell, as to give me the chance of doing "better, if I can find a buyer."

There is no complaint that they were doing what they had no right to do, no suggestion that the power-of-attorney had ceased to be operative and did not apply to the debt which was then existing; but he writes as if he knew that they were justified in doing what they were doing, and he merely asks them to let him have notice of the rates at which they were disposed to sell, so as to give him a chance of getting a purchaser at more advantageous rates.

This correspondence appears to me to show that whatever impression may now exist in the mind of the defendant, or whatever impression may have existed in his mind when he put in his written statement, or when he gave his evidence, at the time he wrote this letter, he did not suppose that the second promissory note was given for a new debt, the power-of-attorney and securities merely remaining in the hands of the Bank, or that there was a complete payment of the original debt, and that they had no right to sell the securities. I consider that the original debt continued to exist; that the first promissory note and the shares were given as a security for that loan; that the second promissory note was also given as a security for the loan, no new debt being created; and that the plaintiffs had a right to exercise the power given to them of selling the securities; that the act of the defendant in attempting to prevent that by revoking the power-of-attorney was unjustifiable; and that therefore the plaintiffs were right in coming to the Court to have that proceeding of the defendant set aside and declared inoperative. They could not have removed the obstacle which the defendant interposed to their selling the shares without coming to the Court.

The decree of the learned Judge is in substance a right decree; but instead of declaring that "the plaintiff Company have a lien "over the shares in the several joint-stock "companies pledged by the defendant with "the plaintiff Company as in the plaint mentioned, and is entitled to have the said "shares sold, and to have the proceeds of "such sale applied in or towards payment of "the amount advanced on the security of "the said shares, or of what is still unpaid "in respect thereof," it ought to declare that the power-of-attorney in the plaint mentioned is valid and subsisting, and that the plaintiff Company are entitled to sell such shares and apply the proceeds of such sale in payment of the sum due. The remainder of the decree will stand as it orders an account to be taken of the sum due to the plaintiffs, and then with the consent of both parties it provides for the sale of the shares. I think the decree should be varied in this way, but as it was substantially right, and there was no ground for appealing to this Court upon the merits of the case, I think the appellant should pay the costs of this appeal on scale No. 2.

Macpherson, J.—I am entirely of the same opinion, and for the same reasons. I will only read one letter of a date later than those which have been read by my Lord the Chief Justice, which carries the case a little farther. On the 5th of December 1867, we find that the defendant Stewart actually sold 400 of the shares in the Central Cachar Tea Company, at 35 Rupees each, acting as in the matter not in his own behalf but as broker for the plaintiff Bank. His letter to the Bank is to this effect:

"I have this day by your order and on "your account sold (400) four hundred "shares in the Central Cachar Tea Company, "Limited, at 35 Rupees each, to Herbert "Knowles, Esq. for George Henderson, "Esq. London to be delivered and paid "for on the 30th or 31st instant." Then he sends in a formal bill, charging for his own brokerage at one rupee a share, and writes upon it— "Please pass to my credit in Pass Book sent herewith, and oblige." It appears to me that, after these letters, it is perfectly idle to raise the contention which has been raised in this suit, and there can be no doubt that the appeal ought to be dismissed.

The 2nd February 1872.

Present :

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Mesne Profits—Endowed Lands—Cause of Action—Idol Expenses.

No. 291 of 1871.

Miscellaneous Appeal from an order passed by the Additional Judge of Hooghly, dated the 25th May 1871, modifying an order of the Subordinate Judge of that district, dated the 10th December 1870.

Thakoor Doss Acharjee Chuckerbutty and another (Judgment-debtors) *Appellants,*

versus

Shoshee Bhoosun Chatterjee (Decree-holder) *Respondent.*

Baboo Nil Madhub Sein for Appellant.

Baboo Aubinash Chunder Banerjee for Respondent.

In calculating the six years' mesne profits which the decree-holder was entitled to recover in this case, the cause of action was held to have arisen at the end of the year in which the ouster took place.

In the case of endowed lands, the judgment-debtor is entitled to a deduction, from the amount of mesne profits ascertained to be due, of the expences incurred by him in carrying on the worship of the Idols.

Kemp, J.—THE plaintiff brought an action for possession of certain idols established by the family of both parties and also for possession of *debuttur* endowed lands with *wassilat.* He has also claimed offerings made by strangers to the idols. It appears that the plaintiff and defendant were co-sharers and the suit was for a moiety. The plaintiff obtained a decree, and the question of *wassilat* was left open for adjustment in the execution stage.

In execution of his decree the plaintiff got possession of the land, and an Ameen was appointed to ascertain the *wassilat.* He found that the *wassilat* amounted to 499 rupees 8 annas and 8 pie, and that there was a sum of Rs. 571-5 annas alleged to have been expended in the worship of the idols at the rate of 3 annas per diem ; of which the half share of the plaintiff amounting to Rs. 285-10-6 would have to be deducted from the mesne profits. The Subordinate Judge refused to allow any deduction on account of expenditure incurred in carrying on the worship.

The judgment-debtor then appealed to the Additional Judge, Mr. Wauchope, who found that the plaintiff was not entitled to *wassilat* for the period subsequent to the filing of the plaint, that he had only to look to the decree as it stood, and that if the Lower Court intended to award *wassilat* for a longer period, the decree-holder should have the decree amended. The Judge then goes on to say that he thinks the Lower Court was quite correct in making no allowance for the sums said to have been expended by the appellant in religious observances inasmuch as he had no right to the property, and there was no necessity for the judgment-debtor to make these religious observances. With the above modification, namely, as to the period of *wassilat,* the judgment of the first Court was affirmed.

In appeal two points are raised before us: 1st, that the decree-holder is not entitled to recover more than six years' *wassilat,* and 2nd, that the judgment-debtor is entitled to a deduction of the expenses which have been found to have been incurred by him in carrying on the worship of the idols.

On the first point, we think there is no ground for the contention. The ouster was on the 15th Srabun 1267, the suit was brought in 1273, and therefore according to a decision passed by Justices Bayley and Macpherson in the case of Byjnath Pershad *vs.* Badho Singh and others, reported in Volume X, Weekly Reporter, page 486, the cause of action arose at the end of the year 1267, and that being the case, the claim of the plaintiff does not extend over six years.

The first ground is, therefore, rejected.

On the second point, we think that the judgment-debtor is clearly entitled to deduction of the amount actually expended by him for the worship of the idols at the rate of three annas per diem, and one-half of the sum expended by him will therefore be deducted from the amount of *wassilat* ascertained to be due. This property being endowed, the judgment-debtor was bound to keep up the worship of the idols and to carry out the trust; having done so, we think he is entitled to a deduction. Had the plaintiff remained in possession, he would have had to carry out the trust, and he is not entitled to recover this sum which was expended for the purposes for which the endowment was made.

The judgment of the Lower Court must be modified to the above extent, and this appeal decreed with costs.

The 2nd February 1872.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Mesne Profits (not specified in Decree)—Act XIV of 1859.

Case. No. 262 of 1871.

Miscellaneous Appeal from an order passed by the Additional Judge of Hooghly, dated the 27th April 1871, *affirming a decision of the first Subordinate Judge of that district, dated the 19th November* 1870.

Hureehur Mookerjee (One of the Judgment-debtors) *Appeallant,*

versus

Mollah Abdoolbur and others (Decree-holders) *Respondents.*

Baboo Hem Chunder Banerjee and *Umbika Churn Banerjee* for Appellant.

Moulvee Syud Murhumat Hossein for Respondants.

In this case the decree did not specify the period or the amount for which mesne profits were awarded, and it was contended (upon the authority of 11 W. R. 200) that plaintiff was not entitled to any mesne profits at all. HELD that both the amount and period were left to be ascertained in execution, and that, as the suit was instituted after Act XIV of 1859, the decree-holder was not entitled to mesne profits for more than 6 years prior to date of suit.

Kemp, J.—The judgment-debtor is the appellant in this case. The decree was obtained on the 19th of May 1866. The original suit of the decree-holder was on the ground that the 131 beeghas of land in suit formed part of his Ayma lands, and that the defendant, the judgment-debtor, had ousted him from these lands. The defendant on the other hand stated that the lands were part of his Mâl lands. The first Court gave the plaintiff a decree for the whole 131 beegahs. The Appellate Court modified that decree and awarded to the plaintiffs 87 beegahs only.

It is this amended decree that the decree-holders are now seeking to execute. An objection was taken in the execution stage by the judgment-debtor, under Act XIV of 1859, to the effect that the plaintiff, the decree-holder, is not entitled to recover more than 6 years' *wassilat,* and it is contended that both Courts have given *wassilat* on the 20 beegahs which was found by the Ameen to be the quantity of land culturable, at the rate of 1 rupee per beegah from 1851 to 1869.

Against this decision the judgment-debtor has appealed on the ground, 1st, that the plaintiff is not entitled to any *wassilat* at all, inasmuch as the decree obtained by him does not specify any period during which he is to get *wassilat,* and in support of this contention a decision of the late Chief Justice Sir Barnes Peacock and Mr. Justice Mitter, reported in Volume XI Weekly Reporter, page 200, is quoted. 2nd, That even if the plaintiff is entitled to any *wassilat* he can only get it for the 6 years preceding the date of the suit. It appears to us on reading the proceedings that the 87 beegahs decreed were bounded by specific boundaries. The plaintiff in the first instance claimed 131 beegahs within the same boundaries, but on measurement, it was found that only 87 beegahs, and not 131 beegahs were comprised within those boundaries. The decree of the Court does not specify the period for which *wassilat* is to be awarded, nor does it specify the amount. Every thing is left and ordered to be ascertained in the execution stage. That being the case, as the period is not fixed, both the amount and the period were left to be ascertained in the execution case. There is therefore no ground for the first contention; and as the suit was instituted after Act XIV of 1859 came into operation, the decree-holder is not entitled to *wassilat* for more than six years prior to date of suit.

We therefore amend the decree of the Lower Court. The decree-holder will recover six years' *wassilat* prior to suit at the rate fixed by the Lower Court. Costs in excess to be paid by the respondent including the costs of this appeal.

The 2nd February 1872.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Sale in execution—Irregularity.

Nos. 330 and 331 of 1871.

Miscellaneous appeals from an order passed by the Subordinate Judge of Dacca, dated the 29th July 1871.

Nuddea Kishore Doss (Judgment-debtor) *Appellant,*

versus

Bungshee Mohun Doss and another (Decree-holders) *Respondents.*

Baboo Motee Lall Mookerjee for Appellant.

Baboo Rash Beharee Ghose for Respondents.

Certain properties were to be sold in execution of decree. As to some the sale took place as far as possible on the day fixed but was publicly put off to the next day, when, no higher price being obtainable, it was concluded at the price bid on the first day; while as to the alleged inadequacy of the price, that was found to be owing to several claims being advanced, among them one by his own wife, against the right and title of the judgment-debtor. HELD that there was no irregularity in the conduct of the sale which could prejudice the judgment-debtor, and that, even if there was any, it was for the benefit of the judgment-debtor.

Jackson, J.—This is an objection to the sale of certain properties on two grounds:—1st, because the sale was not completed on the day which was fixed by the proclamation for carrying out the sale, and 2nd, that the property was sold at an inadequate price. The Subordinate Judge has disallowed both these grounds. He has made enquiries into the circumstances connected with the sale and he found that every opportunity was given for bidders to come forward and bid for these properties; so much so that the sale was carried as far as it could be carried upon the day which was specially fixed for it, and was then openly and publicly put off to the next day in order to ascertain if any higher price could be obtained; and again, when the sale took place, on the second day, there being no higher bid, it was concluded at the prices bid on the first day.

As regards the inadequacy of the price, it appears that there were several claims against the right and title of the judgment-debtor to this property:—even his own wife put forward a claim to the property, and it is not therefore surprising that under such circumstances no very high price could be obtained, as parties purchasing might find themselves involved in litigation.

As regards two of the properties, it was stated that the sale was not even commenced on the day fixed for it. It appears that, when the Nazir found that there were no persons present who would give any real value for the property on the day fixed, he publicly postponed the sale to the next day. It was done for the benefit of the judgment-debtor and he cannot object to it. There, certainly, has been no irregularity in the conduct of the sale which could prejudice the judgment-debtor, and if there has been any irregularity it was made for the benefit of the judgment-debtor.

We, therefore, dismiss the appeal with costs.

The 2nd February 1872.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Partition—Separation by acts of Members of a Family—Limitation.

Case No. 599 of 1871.

Special Appeal from a decision passed by the Officiating Judge of East Burdwan, dated the 20th February 1871, *reversing a decision of the Moonsiff of Pothna, dated the 1st September* 1870.

Surbessur Methoor and others (some of the Defendants) *Appellants,*

versus

Gossain Doss Methoor and others (Plaintiffs) *Respondents.*

Baboo Bama Churn Banerjee for Appellants.

Baboos Chunder Madhub Ghose and *Grish Chunder Ghose* for Respondents.

The acts of different members of a family in allowing separate portions of the banks of a tank to be held severally for so long a time that no one can tell when such possession began, constitute a separation of the lands which cannot be disturbed at the instance of one member without proof that he has jointly or otherwise held possession of the lands in question within 12 years.

Jackson, J.—THE plaintiff preferred this suit for a partition of the four banks of a certain *lakkeraj* tank of which he alleged that he was an 8 as. 1 g. 2 k. sharer. The defendants contested the right of the plaintiff to have any partition of the northern and western banks, on the ground that they had been from time immemorial in possession of separate portions of these banks which lay between their houses and the tank. The first Court came to the conclusion, founded upon the evidence even of the plaintiff's witnesses, that the defendants had, as they alleged, been in possession of these respective portions of land lying between their houses and the tank for so long a time that nobody was able to ascertain when such possession commenced, and from this the first Court assumed that there had been a partition of these banks at some remote time. The first Court then went on to dismiss the plaintiff's claim to any partition of the northern and western banks, but decreed to him a partition of the eastern and southern banks of the tank. The Judge on the appeal of the plaintiff came to the conclusion that the Moonsiff had assumed that a partition had taken place at some remote period, without any foundation for such presumption, and granted the plaintiff's prayer, not only for a partition of the eastern and southern banks of the tank, but also for a division of the northern and western banks. From this decision of the Judge, the present appeal is preferred to us.

We have looked into the case with a good deal of care, because the matter is undoubtedly of some importance to the defendants whose houses abut on the tank; and the lands, which the plaintiff seeks to divide, seem to lie to a great extent between the defendant's houses and their family ghauts. It would appear from the map filed in the case that not only have several of the defendants taken possession of portions of the northern and western banks of the tank in front of their respective houses, but that even some of the plaintiffs have done the same thing, and each of the different families appear to have their own ghaut, thereby showing that they each have been using their own road across these banks down to the tank, and it is in evidence that each of them are in possession of trees planted in front of their respective houses. If the defendants choose to contest the plaintiff's right to a partition of lands which have been in their possession for so long a time that no one can tell when that possession began, they have a perfect right to do so. If the plaintiff could prove that he has, either jointly or in any other way, held possession of these lands within 12 years, his suit would not be barred by limitation; but if he can give no evidence whatever to that effect, and if he has allowed each of the defendants to take possession of and to occupy these lands as his own for so long a time, he cannot now obtain a re-partition. The acts in this way of the different members of the family constitute, as far as they have gone, a separation of the lands on the northern and western banks of the tank. It is possible that in this way the defendants collectively, or some of them individually, have obtained larger portions of the banks of this tank than they would have been entitled to, had the whole been brought into a hotch potch and a regular partition made, but this cannot be helped now.

The decree of the first Court, ordering that the southern and eastern banks alone should be partitioned between the co-sharers, and dismissing the plaintiff's suit for a partition of the northern and western banks, seems to us to be the proper order in this case. In carrying out that partition, consideration can be given to the extent of land which each person has obtained already on the northern and western banks, and allowance may be made, if it is the fact, as alleged by the plaintiff, that he has obtained less of the northern and western banks than he was entitled to, and he may obtain a larger share of the eastern and southern banks.

We think that the proper decree to be made is that which has been passed by the Moonsiff, and we therefore restore the decision of the Moonsiff, setting aside that of the Judge.

The costs of this appeal and of the Lower Court to be paid by the respondent.

The 5th February 1872.

Present:

The Hon'ble G. Loch and W. Ainslie, *Judges.*

Zar-i-Peshgee lease—Construction.

Case No. 148 of 1871.

Regular Appeal from a decision passed by the Subordinate Judge of Patna, dated the 15th April 1871.

Roy Gowree Sunkur (Defendant) *Appellant,*

versus

Baboo Bholee Pershad and another (Plaintiffs) *Respondents.*

Messrs. R. T. Allan and *R. E. Twidale* and *Baboo Debendro Narain Bose* for Appellant.

Baboo Rajendronath Bose for Respondents.

The words in a *sur-i-peshgee* lease "after the expiry of the term, it will be competent to me (the mortgagor) in the month of Jeith of any year I can to pay the *sur-i-peshgee* and cancel the lease" were held to do no more than bar mortgagors re-entering in the middle of any year, in the event of the mortgagee's occupation continuing after the expiry of the lease owing to mortgagor's default to pay off the loan, and that it contained no undertaking by the mortgagee to hold on until it suited the mortgagor to pay him off.

Loch, J.—The plaintiff in this case took a *sur-i-peshgee* lease of 1 anna out of 8 annas of Mouzah Jehangirpore Mungulpul from the defendant advancing to him a sum of 6,000 rupees.

Under the terms of the lease, the plaintiff had to pay Rs. 1,183-8 annas for Government revenue, Rs. 346-8 to the lessor year by year, and he was to receive whatever else remained of the profits in lieu of interest due on the *sur-i-peshgee.*

The period of the lease extended from 1272 to 1276 F. S.

The plaintiff states that he was put in possession of the property; that in 1868, or 1275-76 F. S., out of the property leased, the newly cultivated waste lands, jungles, &c., mentioned in the pottah, which were excluded from the former settlement, that is, the former Government settlement, together with the new accreted lands of the two Mehals mentioned in the pottah, were settled as two separate Mehals and taken out of plaintiff's possession, and thus a serious loss was sustained by him in the income of the *ticca* property; that he applied to the defendant for a refund of the *sur-i-peshgee* money, and that as the whole of the *ticca* property was not remaining in his possession and the term of *ticca* lease was to expire in 1276, he relinquished the *ticca* on the 1st Assar 1276 when the cultivation of the ensuing year began, and that he did so with the defendant's consent; that as the defendant has not refunded the amount of the loan, he now brings the present action to recover the principal with interest from him.

The defendant denies having in any way ousted the plaintiff. He says that in 1868 when the accreted lands were declared *towfeer,* a settlement was made with the proprietor of Mungulpul by assignment of rent, by which settlement the aforesaid proprietor continued in possession as before, and the plaintiff's possession of the said lands was in no way disturbed by any act of the defendant or that of the Government, and that under these circumstances, the settlement of the aforesaid lands could afford no ground to the plaintiff for relinquishing the leased property.

The Lower Court has given a decree for the plaintiff. On appeal before us, it is urged that even if by the new settlement the plaintiff, mortgagee, was obliged to pay additional *jumma* to the Government, yet when he made the arrangement he was perfectly aware of his liability to do so, and therefore there was no reason for throwing up his lease; that under the terms of his lease, he had no power to throw it up without the consent of the mortgagor; that the statement made by him that he relinquished with the consent of the mortgagor is not correct, as the mortgagor did not give his consent, but under the terms of the lease it entirely depended upon the mortgagor to cancel the lease at any time after the period entered in the lease had expired; that in fact it is a continuous lease entirely dependent for its conclusion upon the will of the mortgagor, and we were referred to a passage towards the close of the lease which are in these words:—"Should I fail to pay "the whole *sur-i-peshgee* at the appointed "time (*i. e.,* in the month of Jeith 1276 "F. S.) to the *sur-i-peshgeedar* and the term "expire, this deed with all the conditions embodied therein as above shall remain in "force" (and these are the particular words referred to,) "*and that after the expiry of the term, it will be competent to me in the month of Jeith of any year I can, to pay the sur-i-peshgee and cancel the lease.*"

Now it is pressed upon us that these words give the entire power into the hands of the mortgagor to continue the lease as long as he likes, and that the mortgagee could not in the face of these terms throw up the lease at the end of the period, viz., 1276, without the consent of the mortgagor, and if he did so, he could not bring an action to recover the principal lent to the mortgagor.

The statement made by the plaintiff that he had by this new settlement been put out of possession, does not appear to be supported by any evidence. But there is no doubt that the enhanced *jumma* that he would have *had* to pay would have been a very serious loss to the mortgagee, and would necessarily diminish the profits from the estate. For there can be no doubt from the pleadings of both parties that the lands which were newly settled, formed part of the lands which were included in the lease; and with this prospect in view it is not surprising that the mortgagee did at the close of the period refuse to continue to hold possession of the lands and gave them up.

But it is contended that, under the words above quoted from the lease, the mortgagee could not give the lands up, and that it remained with the mortgagor to pay off the loan at any time he pleased in any subsequent year.

We do not, however, read the words with that meaning. We think all that is intended by these words is that, after the expiry of the lease, the mortgagor, if the mortgagee still continued to hold possession as he had power to do under the terms of the lease, might, in any year at a particular time, that is to say, in the month of Jeith, pay the amount of the loan and so cancel the lease. But unless he paid in that particular month and allowed the year to commence, he could not interfere with the mortgagee's possession for the remainder of the year.

Looking at the lease in this way, we do not think it was a one-sided contract as we have been told it was. The lessee had, we think, perfect right, when he saw it was for his interest to do so, and after the period of the lease had expired, to give up the lands; and as the defendant failed to pay the amount of the loan as he agreed to pay, the plaintiff was entitled to sue to recover the amount.

We affirm the decree of the lower Court and dismiss this appeal with costs.

Ainslie, J.—The words relied on by the appellant do no more than bar the appellant's re-entering in the middle of any year in the event of the respondent's occupation continuing after the first specified term, owing to appellant's default to pay off the loan. There is no undertaking by the respondent to hold on until it suits the mortgagor to pay him off.

The 6th February 1872.

Present :

The Hon'ble Louis S. Jackson and A. G. Macpherson, *Judges.*

Suit for Rent—Defendant's own Accounts—Evidence—Admission.

Case No. 864 of 1871 under Act X of 1859.

Special appeal from a decision passed by the Judge of Twenty-four Pergunnahs, dated the 4th May 1871, *reversing a decision of the Deputy Collector of Barrasct, dated 23rd August* 1870.

Surbessur Ghose and others (Plaintiffs) *Appellants,*

versus

Chota Arizoollah Mundul (Defendant) *Respondent.*

Baboo Sreenath Doss for Appellants.

Mr. R. T. Allan for Respondent.

In a suit for rent, plaintiff relied on an entry in defendant's own account as Naib of the village as to the rate of rent payable by him, and the Judge, wrongly supposing that the account was signed by defendant in the first page only, whereas it was signed on every leaf including the one containing the entry in dispute, started with the theory that the leaf in question had been interpolated, and that defendant was unaware of it. The Judge's theory having been supported by a fact found to be incorrect,—HELD that, unless the signature were forged, and the leaf containing the entry not genuine, the entry was clearly an admission on defendant's part that the rent thereon mentioned was the rent paid by him.

Jackson, J.—IN this case, there was a disagreement between the plaintiff and the defendant as to the rate of rent which the defendant was bound to pay. The defendant produced a pottah, apparently more than fifty years old, and also a quantity of receipts, from which he showed that the rent due from him was at the rate of Rs. 56 annually, but the plaintiff produced the accounts of the village for the year 1268 delivered by the defendant himself, who was at that time the Naib of the village, and those accounts contain an entry of the defendant's rent at the rate of Rs. 64 and some annas which we are told are sicca Rs., and the equivalent of which is Rs. 68 and some annas in Company's Rs. as stated by the plaintiff.

The Judge in an early part of his judgment which is rather lengthy, disposes of this part of the evidence by saying—" The chief " evidence in support of the plaintiff's aver- " ments is afforded by the accounts of 1268, " because they bear the signature of the " defendant himself who was at that time " employed as a Naib in the estate; and on " that evidence alone I think that the plaint- " iffs would be entitled to a verdict notwith- " standing the pottah and earlier accounts, if " it were quite clear that he was aware of " the entry against himself. But of this " there may be some doubt, for it is possible " that the leaf which contains the entry in " question may have been inserted in the " account which is signed by him on the first " page only." Now the Judge here starts with a theory of his own as to the defendant being possibly unaware of the entry relied on by the plaintiff. That is not merely not alleged by the defendant, but it seems to be actually contradictory of his case; for it seems he denied the accounts in question altogether; that denial has been found against him; and from the circumstance of that false denial, I should say that the inference rather was that he knew of the entry against him. But the Judge supports his theory by a statement of fact which appears to be altogether incorrect. He says that the account is signed by the defendant on the first page only. Now it appears on inspection of the accounts that they are signed not only on the first page but on every leaf; and the leaf which contains the entry in dispute is signed just in the same manner as the other leaves are. Of course, it would be open to the Judge, if that particular signature was denied, to find that it was forged; but this he has not found, and unless the Judge finds that, the objection to this leaf and the entry upon it falls entirely to the ground. If the leaf be genuine, the entry in it is clearly an admission on the part of the defendant that he had been accustomed to pay the amount of rent set down there.

Therefore, I think, the case must go back to the Judge in order that he may re-consider this matter in view of the fact I have stated. No doubt, the Judge does go at considerable length into the rest of the evidence, and seems to find, on the whole, in favor of the defendant; but it must be remembered that he starts with this strong impression on his mind that the defendant's accounts had a leaf interpolated in them which was not authenticated, which showed an entry of which the defendant was not aware.

Macpherson, J.—I concur.

The 7th February 1872.

Present:

The Hon'ble Louis S. Jackson and A. G. Macpherson, *Judges.*

Special Appeal—Act VIII of 1859, s. 374—New point of law.

Application for review of judgment passed by the Hon'ble Justices Louis S. Jackson and A. G. Macpherson, on the 14th August 1871, in Special Appeal No. 134 of 1871.

Lalla Jowahir Lall Pandey (Appellant) *Petitioner,*

versus

The Court of Wards on behalf of Shiva Sunkur Pershad Sahoo, minor (Respondent) *Opposite-party.*

Mr. W. A. Montriou for Petitioner.

Baboo Unnoda Pershad Banerjee for opposite party.

The High Court ought not, under Section 374 Act VIII of 1859, to allow a point of law to be argued in special appeal when it was not distinctly raised in the first Court nor alluded to in the lower Appellate Court.

Jackson, J.—In this case, I must say that I feel bound to refuse compliance with the application which has been made before us to-day.

The application proceeds upon the ground that we refused to allow a particular ground of special appeal to be argued before us, because the position of law upon which that ground of special appeal rested did not appear to have been submitted to the lower Appellate Court.

The learned Counsel, who argued this application, has referred to Stephen on Pleadings, and to the practice of the Courts of Westminster Hall on demurrer.

It appears to me, that in considering the applicability of those rules to the present case, we must bear in mind the peculiar functions of this Court in dealing with special appeals. It is my opinion that the Legislature intended, and intended for excellent reasons, that parties to suits in the Mofussil Courts should argue out the whole of their case, whether upon points of law or upon points of fact, in the Court of first instance and in the Appellate Courts which deal with facts; and therefore it is that the duty of this Court in special appeal is only to deal with errors in the decision of the lower Appellate Court upon points of law or questions similar to those involving points of law. It might be useful that the High Court should in special appeal have the power of dealing with the whole case on the record, but I do not think Section 374 of the Code of Civil Procedure can be so construed as to give that power.

The argument of Mr. Montriou on this occasion has been simply, I think, a more formal and more elaborate attempt to persuade this Court to do that which vakeels have in innumerable instances applied to me and other Judges of this Court to do, that is to say, to permit either the appellant or the respondent, as the case may be, to mend his hand in this Court, and to argue matters of law and mixed questions of law and fact, which might and ought to have been, but were not, raised and pressed in the Court below.

I must say, after hearing what has been said, and looking at the judgment and decision in the Court below, I remain of the same opinion that I was before, that this point was not so pressed. The issue framed in the Court of first instance was not one which really raised the question whether the plaintiff's father had by his own personal expenditure and trouble recovered this property out of the hands of strangers, and so deduced it to his possession, and made it self-acquired. The issue fixed was an alternative one, namely, whether the property was acquired by the ancestors, or whether the plaintiff's father had by borrowing money acquired that property, by which I understand acquired in the first instance.

I think that if we were to admit this application, and sanction the argument upon which it is sought to rest it, we should be laying down a most inconvenient and dangerous precedent. I think, therefore, that this application ought not to be allowed.

It should be added that this is not a case in which we should have been at all disposed to be harsh towards the special appellant, because he appears to be in the unfortunate position of a man who is compelled to give up property for which he has given consideration, by reason of circumstances which it was not in his power to ascertain.

Macpherson, J.—I also think that this application should be refused. The issue upon which Mr. Montriou states the case mainly turns was not distinctly raised in the first Court; and if it had been intended to rely upon it at all, it ought to have been distinctly and expressly raised there. Before the Judge in appeal, that issue was never alluded to. I say that it was not alluded to, because there is nothing to lead me to suppose that it was alluded to; while, being of so much importance as Mr. Montriou states it was, it clearly was the business of his client, when before the Judge, to have brought it prominently before him, and to have obtained his decision upon it. It was none the less incumbent upon him to bring it forward, because in the Judge's Court he happened to occupy the position of respondent. The issue was as important to him when respondent before the Judge as it was when he was in the Court of first instance. On the ground that the issue was not raised distinctly in the first Court, and that it further was not alluded to in the second Court, I think that the discretion we exercised in refusing to allow the question to be raised for the first time and argued here in special appeal was properly exercised, and I see no reason whatever for interfering.

The 8th February 1872.

Present:

The Hon'ble F. B. Kemp, and E. Jackson, *Judges.*

Municipal Act III of 1864—Digging of Tank —Conservancy—Jurisdiction.

Case No. 597 of 1871.

Special appeal from a decision passed by the Judge of Hooghly, dated the 17th March 1871, reversing a decision of the Moonsiff of Sulkea, dated the 18th July 1870.

Bhyrub Chunder Banerjee (one of the Plaintiffs), *Appellant.*

versus

Mr. G. E. Makgill, Chairman to the Municipal Commissioners of Howrah (Defendant), *Respondent.*

Mr. Woodroffe, and *Baboos Romesh Chunder Mitter, Umbica Churn Banerjee,* and *Bhowanee Churn Dutt,* for Appellant.

Baboo Jugodanund Mookerjee, for Respondent.

By Section 19 of the Bye-laws of the Howrah Municipality, framed under Section 84 Act III of 1864, B. C., and confirmed by the Lieutenant-Governor, it is within the discretion of the Municipality to refuse permission for the excavation of a tank, and the Courts have no power to interfere with the *bonâ fide* exercise of such discretion.

Kemp, J.—This suit was instituted by the plaintiff with the view to establish his right to excavate a tank on land admittedly belonging to him and to recover damages from the Municipal Commissioners of Howrah, such damages having accrued, as he alleges, from their withholding their consent to his excavating this tank on his land. It appears that the plaintiff applied to the then Chairman of the Municipal Commissioners, Mr. Tottenham, for permission to excavate this tank. This petition is dated the 15th March 1869. In the petition applying for permission no particular grounds are given why the petitioner desires to obtain the permission of the Municipality.

Mr. Tottenham in the first instance recorded a remark "that as there had been another tank lately sanctioned in that locality, he would like to see the proposed site before allowing any more." Mr. Tottenham inspected the place and recorded the following order:—"Having inspected the place I find that there are several other tanks in the immediate neighbourhood and that the excavation of another is not only unnecessary but *very undesirable*." The application appears to have been renewed to another Chairman of the Municipality, Mr. Makgill. In that petition which was presented in January 1870, the petitioner states that the land is low land, and that owing to the people of the neighbourhood committing nuisances on the land at night it remains in a filthy state, and that the petitioner is therefore desirous of excavating a tank for the purpose of raising the low land. Upon this Mr. Makgill, apparently after visiting the spot, passed the following order:—"The land is surrounded "with three or four tanks already; the excavation of another would be no improvement "to the land but rather the reverse. I have "no objection to his applying to deepen some "of the surrounding tanks."

Upon this, the plaintiff brought the present suit. The Moonsiff gave the plaintiff a decree. On appeal, this decision has been reversed by the Judge. The Judge held that by Section 19 of the Bye-laws of the Howrah Municipality which have been framed under Section 84 of Act III of 1864 and have been confirmed by the Lieutenant-Governor, the Municipality were empowered to grant or to refuse permission to the plaintiff to dig the tank, and that having refused permission on the ground that the tank would not improve the locality "on sanitation principles,"—these are the words used by the Judge,—he reversed the decision of the Moonsiff and decreed the appeal.

In special appeal, it is contended that it is not for the plaintiff to show that the excavating of the tank would be an improvement, or even that it would not militate against sanitation principles, but that it was for the Municipality to show that the excavating of the tank would be contrary to sanitation principles.

This case is governed by Act III of 1864 B. C. This Act provides for the better provision for the conservancy, inprovement, and watching of towns and other places in the Provinces under the control of the Lieutenant-Governor of Bengal. Under Section 15 of the said Act the funds of the Municipality are to be appropriated to the maintenance of sufficient Police Officers, to the repair of roads, streets, drains and tanks, and generally for all things necessary for the purposes of conservancy. Then under Section 84 of the Act, it is enacted that it shall be lawful for the Municipal Commissioners to make Bye-laws, subject to the confirmation of the Lieutenant-Governor under Section 85. Section 19 of the Bye-laws so framed runs thus—"No person shall dig or make, or "cause to be dug or made in any place, any "tank, pond, well, ditch, watercourse or "other excavation without the written per"mission of the Commissioners." In this case the application was first made to Mr. Tottenham, and it is his order which, we think, must be looked upon as the governing order in this case. Now Mr. Tottenham admittedly visited the spot, and after inspecting the place he found that there were several other tanks in the immediate neighbourhood, and that the excavation of another was not only unnecessary but very undesirable. It is in evidence that there are other tanks in the immediate neighbourhood of this proposed tank; some witnesses say that within 10 or 12 haths there are 3 or 4 small tanks or pools. We, therefore, think that it was within the discretion of the Chairman of the Municipality acting under these Bye-laws, Section 19, to prohibit the excavation of this tank, whether on the ground that it would militate against sanitation principles, or on the ground that it would be no improvement to the locality on sanitation principles. We therefore, see no ground to interfere with the decision of the lower Court and dismiss this appeal with costs.

Jackson, J.—I concur in this judgment; but I wish to add that, had this case rested solely on the orders of Mr. Makgill, I am not at all prepared to say what decision I would have arrived at. But I look to Mr. Tottenham's original order as the principal order in the matter, and Mr. Makgill's order is only supplementary to that passed by Mr. Tottenham. Mr. Tottenham distinctly says that he went to the spot and saw the state of the locality, and he came to the *bonâ fide* conclusion that it was against sanitary principles to allow the plaintiff to excavate any other tank in the locality as there were several other tanks close by. At least this is what the Judge understood his order to amount to, and it is what I understand it to be. I understand his order to mean that under sanitary principles it would be objectionable to allow the excavation of this additional tank. It seems to me that Mr. Tottenham's order was quite within the law and within the discretion given for sanitary purposes to the Municipal Commissioners, and that we have no power here to try the question whether he was right or wrong. I have no doubt that upon such a point a great variety of opinions could be given and that doctors would differ. The Municipal Commissioners have this species of direction under the law, and the Courts are, to my mind, bound to uphold them in so far as they act *bonâ fide* and within the spirit of the law and not arbitrarily.

I am not prepared in this case to say that the Municipal Commissioners have gone in any way beyond the law. I therefore think also that this appeal must be dismissed with costs.

The 9th February 1872.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Butwarra—Assent by Guardian of Minor—Bona fides.

Case No. 1017 of 1871.

Special appeal from a decision passed by the Officiating Judge of Bhaugulpore, dated the 12th May 1871, *affirming a decision of the Subordinate Judge of that district, dated the 24th March* 1870.

Baboo Huree Pershad Jha (Plaintiff) *Appellant,*

versus

Muddun Mohun Thakoor and another (Defendants) *Respondents.*

Baboos Hem Chunder Banerjee and *Chunder Madhub Ghose* for Appellant.

Mr. R. E. Twidale and *Baboo Debendro Narain Bose* for Respondents.

The effect of the *butwarra* proceedings in this case, to which plaintiff's guardians assented during his minority, being apparently to have taken away a quantity of land from the infant, and handed it over without consideration to the only male of the three persons who had assented to those proceedings,—HELD that the proceedings would not bind plaintiff unless it were found that his guardians had acted *bonâ fide* and with a due regard to his interest.

Markby, J.—IN this case, it appears that there was a property consisting of several mouzahs, each numbered separately on the Collector's roll which belonged to a Hindoo family living jointly. In the year 1256, when the plaintiff Huree Pershad was very young, a private partition was come to; it being agreed that the property was divisible in the following proportions:—6 annas to the defendant Teeluknath; 5 annas to the plaintiff Huree Pershad; and 5 annas to one Debee Pershad who is now dead. It was also agreed that if it should be found on measurement that either of the parties was in possession of *Kamut* lands in any one mouzah to a greater extent than his share, he should either relinquish such lands or give an equivalent of lands in another mouzah. It was subsequently found on measurement that the defendant Teeluknath held 68 beegahs of *Kamut* lands in Mouzah Dowlutpore in excess of his share, and consequently, Teeluknath gave up 28 beegahs out of his share in Mouzah Tetanyah and 40 out of his share in Rumzanpore; this arrangement being confirmed by an *ikrar* of the year 1257. The 28 beegahs in Tetanyah fell to the share of plaintiff Huree Pershad.

Six or seven years afterwards, for some reason or other which has not been stated, Debee Pershad applied on behalf of himself and as guardian of Huree Pershad, who was still a minor, for a partition of Mouzah Tetanyah only. Pending these proceedings, namely, in December 1857, Teeluknath took possession of the 28 beegahs which had been given to Huree Pershad as an equivalent for the excess lands held by Teeluknath in Dowlutpore as above stated. On the 15th April 1858, Teeluknath, Parbutty, the widow of Debee Pershad, and Kallyan, as mother and guardian of Huree Pershad, put in a petition assenting to the partition of Tetanyah as proposed by the Collector, which made over these 28 beegahs to Teeluknath; and on the 11th June 1858 the proceedings were declared final.

The plaintiff Huree Pershad came of age in May 1866, and on the 26th day of August 1869 he commenced this suit, which is brought to recover possession of the 28 beegahs of land in Tetanyah allotted to him under the *ikrarnamah* of 1256 as above stated, with mesne profits. He relies entirely on the *ikrarnamah*, and alleges that during his minority Teeluknath had the management of his property, and that he got possession of this land, because the plaintiff's mother, who was at that time plaintiff's guardian, was entirely under Teeluknath's control.

The defendant Muddun Thakoor, who purchased Teeluknath's interest in Tetanyah, relies in his written statement on the Collector's *butwarra,* and says he knows nothing of the *ikrarnamah.* He affirms that the Collector's *butwarra* having been assented to by all the parties interested is conclusive, and cannot now be questioned. The defendant Teeluknath admits that he has sold his whole interest to the defendant Muddun Thakoor, so that his defence is not of much importance.

At the trial, Teeluknath refused to produce the *ikrarnamah* of 1257, though the Moonsiff thinks he had it in his possession, but for obvious reasons wished to conceal it. The Moonsiff found that the *ikrarnamah* of 1256 and 1257 had both been executed, but he thought that possession of the land now in dispute had not been given to Huree Pershad. He thought the suit in this view was barred by limitation, but he also dismissed the suit on the ground that the Collector's *butwarra* was final, and could not be impeached.

The District Judge on appeal agreed with the Moonsiff that the suit ought to be dismissed on this latter ground, but he at the same time expressed an opinion, based apparently on very good reasons, that possession of the land in dispute was given to the plaintiff who was ousted in 1265 during the *butwarra* proceedings as above stated.

It has been contended here in special appeal that both the lower Courts were wrong in holding that the Collector's *butwarra* was final.

Had this been a proceeding between persons of full age and competence, we should have had no hesitation in holding that the Collector's *butwarra, assented to as it was by all concerned,* was final; but we think that a point which was fairly raised in the plaint, and which under the circumstances of this case ought to be considered, has been overlooked. The plaintiff at the time of the *butwarra* proceedings was a minor, the only male of the three persons who assented to the petition was Teeluknath; and the effect of these proceedings was, as far as it has been shown to us, to take 28 beegahs away from the infant, and to hand them over without consideration to Teeluknath. We do not wish it to be supposed that we affirm this to be the real character of the transaction. But this is how it now stands before us, and we think that the plaintiff has a right to call for some explanation of a transaction which has this apparent character.

We think, therefore, that the case should be remanded to enquire whether in the *butwarra* proceedings the guardians of the plaintiff Huree Pershad acted *bonâ fide* and with a due regard to his interest? If they did, then this suit ought to be dismissed. If they did not, then the *butwarra* proceedings do not bind the plaintiff, and he ought to be put in the same position, as far as possible, as if they had not taken place.

We think the question of costs should be disposed of when the suit has been finally determined and the conduct of the parties more fully ascertained.

The 9th February 1872.

Present:

The Hon'ble E. Jackson and Dwarkanath Mitter, *Judges.*

Collusive petition—Fraud—Registration—Evidence.

Case No. 561 of 1871.

Special Appeal from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 9th February 1871, *affirming a decision of the Moonsiff of Hazareebagh, dated the* 11*th August* 1870.

Kalee Doss Gossain and another (Plaintiffs) *Appellants,*

versus

Mooktakeshee Thakooranee and others (Defendants) *Respondents.*

Baboo Anund Chunder Ghossal for Appellants.

Baboo Bunsghee Dhur Sein for Respondents.

The Court were unable to understand what the Judicial Commissioner meant by saying that a petition by which a widow transferred her rights to the plaintiff was a collusive document in the absence of proof of any attempt at fraud thereby against third parties; but as the petition upon which the plaintiff's right to bring this suit stood was unregistered; HELD that it could not operate as a transfer of the widow's rights or be used in evidence before any Court.

Jackson, J.—WE do not understand what the Judicial Commissioner means in this case by saying that the petition by which the widow Bama Soonduree is said to have made over all her rights to the plaintiff is manifestly a collusive document. The plaintiff's right to sue is founded upon this petition. It does appear that in a former suit this petition was given in by the widow; and taking it for granted that this petition does contain a transfer of her rights to the plaintiff, we do not understand how it can be said in any way to be a collusive petition. It does not appear in any way that in the case in which it was adduced any fraud was attempted against any third parties in consequence of this petition; on the contrary the attempts to oust other parties which were made in that suit appear to have been given up upon the filing of this petition, and all we can say at present is that we cannot understand what the Judicial Commissioner means by saying that this is a collusive petition.

If the case depended upon this one point alone, it would have been necessary to remand it to the lower Appellate Court to try the issues which arise in it between the parties ; but it is manifest upon the face of the case that the plaintiff's right to bring this suit stands upon this petition which is not registered. It is necessary under Act XX of 1866, as found by the first Court in this case, that this petition should be registered before it can in any way operate as a transfer of the widow's rights or before it can be used in evidence before any Court, and there seems to have been no demand or attempt to register this document. On the basis of this document in its present unregistered state, the plaintiff has no right to come into Court, and it is therefore unnecessary to remand the case to the lower Appellate Court for a retrial. The appeal is dismissed with costs.

The 12th February 1872.

Present:

The Hon'ble A. G. Macpherson and F. A. Glover, *Judges.*

Special Appeal—Suit for Rent—Purchaser from Tenant—Party to Suit.

Case No. 764 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Purneah, dated the 11th April 1871, *reversing a decision of the Moonsiff of Arrariah, dated the 30th December* 1870.

Mussamut Oognee Chowdhrain (one of the Defendants) *Appellant,*

versus

Shaikh Keramutoollah (Plaintiff) *Respondant.*

Baboo Taruck Nath Sein for Appellant.

Moonshee Mahomed Yusoof for Respondent.

In a suit for rent the lower Appellate Court decreed the suit as against the tenant but dismissed it as against his vendee who had wrongly been added by the first Court as a defendant in the suit, and who now specially appeals praying for a declaration of her liability for rent as purchaser from the tenant. HELD that the appeal would not lie.

Macpherson, J.—IN this case, the plaintiff, as landlord, sued one Towfa Lall for rent. Towfa Lall pleaded that he had sold his tenure to one Mussamut Oognee Chowdhrain; and Oognee, on the application of Towfa Lall, was added as a defendant in the suit.

The lower Appellate Court has given a decree against Towfa Lall, and has held that Oognee ought not to have been made a party to the suit; that the plaintiff was not entitled to recover rent from her; and that the suit as against her should be dismissed.

Oognee now comes in on Special Appeal, praying that it may be declared that she is liable for rent as purchaser from Towfa Lall.

It appears to me that the appeal will not lie. Although it might have been an object to her to succeed in the lower Courts and to have her position recognized as purchaser from Towfa Lall, yet the only real issue that had to be tried was whether Towfa Lall was, or was not, liable for rent. That being so, the Subordinate Judge was right in holding that Oognee should not have been a party, and that the suit should simply have been dismissed if Towfa Lall was not liable.

I think that this appeal must be dismissed with costs ; but in dismissing it we think it right to say that Oognee will not be precluded from taking any steps which she may be advised to take to establish her position as purchaser from Towfa Lall, and that what has occurred in this suit is not conclusive against her.

Glover, J.—I concur.

The 12th February 1872.

Present :

The Hon'ble A. G. Macpherson and F. A. Glover, *Judges.*

Suit "struck off"—Judgment by Default—Act VIII of 1859, *s.* 114—*Fresh Suit.*

Case No. 744 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Gya, dated the 24th February 1871, *affirming a decision of the Moonsiff of that district, dated the 4th August* 1870.

Khoob Lall Singh (Plaintiff) *Appellant,*

versus

Toolsee Singh and others (Defendants) *Respondents.*

Mr. R. E. Twidale for Appellant.

Baboos Nil Madhub Sein and *Umbika Churn Bose* for respondents.

A suit "*number kharij* or struck off" is not a passing of judgment against the plaintiff by default under

Section 114 Act VIII of 1859, precluding him from bringing a fresh suit in respect of the same cause of action.

Macpherson, J.—This case must be remanded to the first Court for trial.

The Lower Courts are of opinion that, in a former suit for the same cause of action, the Court passed judgment against the plaintiff by default, and that therefore the plaintiff is precluded from bringing a fresh suit in respect of the same cause of action. If the former suit had been disposed of properly under Section 114 of Act VIII of 1859, that is to say, if the Court had passed judgment against the plaintiff by default, no doubt the plaintiff would be precluded from bringing this fresh suit. But the words of the decree in the former suit are not words passing judgment against the plaintiff by default. The words are that the suit be "*number kharij*" or struck off. What the precise meaning of the words "*number kharij*" may be, we do not know; but it is impossible to say that, in using those words, the Court "passed judgment against the plaintiff by default;" and it appears to us that if the penal provisions of Section 114 are to be enforced, it can only be upon a judgment passed strictly under Section 114, a judgment, that is to say, which on the face of it is a distinct judgment against the plaintiff. It is impossible for us to say now, what the intention of the Judge was when he ordered the suit to be "struck off." If he intended the final disposal of the matter under Section 114, he should have used the words of that Section, and should have expressly passed judgment against the plaintiff. The case must be remanded to the first Court for trial. Each party will pay his own costs of this appeal.

The 12th February 1872.

Present:

The Hon'ble Sir Richard Couch, *Knight, Chief Justice.* and the Hon'ble Dwarkanath Mitter, *Judge.*

Practice—Stamp Duty—Number of Stamps to be used.

Case No. 31 of 1872.

Regular Appeal from a decision passed by the Subordinate Judge of Backergunge, dated the 12th October 1871.

Huro Monee (Defendant) *Appellant,*

versus

Kristo Indro Shaha and others (Plaintiffs) Respondents.

Baboo Doorga Mohun Doss for Appellant.

No one for Respondents.

A petition of Regular Appeal bearing 19 bi-color stamps of the value of 465 rupees was held to be sufficiently stamped under the rule as it at present stands.

Note by the Deputy Registrar.—The full stamp fee leviable in this Regular Appeal (Rupees 465) has been paid in by 19 bi-color stamps, *viz.* :—

6	of Rupees 50 each	... 300
1	,, ...	... 32
1	,, ...	... 30
1	,, ...	... 20
1	,, ...	... 25
2	,, 8 each	... 16
1	,, ...	... 9
1	,, ...	... 6
1	,, ...	... 4
2	,, 2 each	... 4
1	,, ...	... 18
1	,, ...	... 1
19		465

The Governor-General of India in Council, under the power vested in them by Section 26 Court Fees' Act (VII) of 1870, have by Notification in the *Gazette of India* (see *Gazette* of March 19th, 1870, page 194) directed as follows:—

"When the exact amount of any fee "chargeable under the said Act can be denoted "by *a single* impressed bi-color stamp, such "fee shall be denoted accordingly. When the "exact amount of the fee cannot be denoted "by a single bi-color stamp, the next lower "available bi-color stamp shall be used, and "the deficiency made up *by one or more* ad-"ditional stamps which may either be bi-color "or adhesive."

And it has been ruled in para. 3 of the Circular of the Government of India, published at page 1013 of the *Gazette of India* of 30th December 1871 that "a document "stamped otherwise than in accordance with "the Notification referred to *is not properly* "*stamped* within the meaning of Section 28 "of the Court Fees' Act, 1870."

As this Regular Appeal has *not* been stamped in accordance with the Notification referred to, *viz.* that published in the *Gazette of India* of 19th March 1870, I beg the orders of the Court as to whether it is to be admitted notwithstanding.

Order.

Couch, C.J.—The Rule to be made under Section 26 of the Court Fees' Act by the

Governor-General in Council is a Rule to determine whether the stamps to be used to denote any fee chargeable under this Act is to be impressed or adhesive, or partly impressed and partly adhesive. This is not a rule of that nature, but it is in reality a rule to be made under Section 27 of that Act which says that the Local Government may from time to time make rules for regulating the supply of stamps, and the number of stamps to be used under this Act. This really is a rule regulating the number of stamps to be used, and it ought to have been made by the Local Government, and not by the Governor-General of India in Council; and until such a rule is made by the Local Government, the decision which is made by Mr. Justice Ainslie and Mr. Justice Paul to be found in XVI Weekly Reporter, page 153, applies. We consider this petition is sufficiently stamped as the rule at present stands.

The 12th February 1872.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Putnee—Ijara—Rent—Suit.

Case No. 624 of 1871.

Special Appeal from a decision passed by the Judge of Dacca, dated the 24th February 1871, *affirming a decision of the Moonsiff of Manickgunge, dated the* 12*th December* 1870.

Raj Chunder Roy Chowdhry and others (Objectors) *Appellants,*

versus

Unnoda Pershad Mookerjee and another (Plaintiffs) *Respondents.*

Baboos Kalee Mohun Doss and *Kashee Kant Sein* for Appellants.

Baboos Sreenath Doss and *Bipro Doss Mookerjee* for Respondents.

One of several grantors of a *putnee* pottah cannot get rid of the *putnee* as to a share in the *putnee*, by a suit as *ijaradar* of that share for rent against the ryots. The *putnee* must be upheld until set aside by a regular suit.

Kemp, J.—We think that the decision of the Judge in this case is wrong. The first objection taken in special appeal is that no appeal will lie under Section 102 of Act VIII of 1859. We overrule this objection as the Court of first instance clearly did decide on a question of right.

It is necessary to go somewhat into the facts of the case to be able to understand the position of the parties. It appears that the intervenor, the special appellant before us, obtained a *putnee* pottah in the year 1252 of the whole 16 annas of the zemindaree from Bamun Doss Mookerjee, Gowree Pershad Mookerjee, and Unnoda Pershad Mookerjee. Subsequently, it appears that one Shya Monee obtained a decree for a 4 annas share of the zemindaree, and she afterwards leased her 4 annas share to Unnoda Pershad Mookerjee, one of the grantors of the *putnee* pottah to the intervenor. Unnoda Pershad then sued the ryots for rent, not as zemindar, but as *ijaradar* of Shya Monee's share in the *putnee*. The ryots set up a defence that they had all along paid rent to the intervenor, the *putneedar*. The Court, however, rejected the intervention of the *putneedar*, and decreed the suit against the ryots, and this decree the Judge has affirmed.

It appears to us very clear that the *putneedar* not having been a party to the suit of Shya Monee, and this not being a suit by Unnoda Pershad Mookerjee as *putneedar*, but as *ijaradar* of the share obtained by Shya Monee under her decree, Unnoda Pershad is not entitled to get rid of the *putnee qua* this 4 annas share by a suit in this shape, and the *putnee* must be upheld until set aside by a regular suit.

The appeal is, therefore, decreed with costs.

The 14th February 1871.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble W. Markby, *Judge.*

Land Acquisition—Act X of 1870 *s.* 30—*Appeal —Assessors differing—Evidence (Mode of recording)—Act VIII of* 1859 *s.* 172.

In the matter of the Land Acquisition Act, 1870.

William Heysham, *Appellant,*

versus

Bholanath Mullick, *Respondent.*

The Advocate-General (with him *Mr. Lowe*) for the Appellant.

Mr. Woodroffe (with him *Mr. Marindin*) for the Respondent.

An appeal does lie under Section 30 Act X of 1870 whenever there is a difference of opinion between the Judge and the Assessors whether the Assessors agree with each other or not.

Semble.—In cases under that Act, the evidence should be recorded by the Judge according to the provisions of Section 172 Act VIII of 1859.

THIS was an appeal from the decision of N. H. Thompson, Esq., under the Land Acquisition Act of 1870.

Certain land was ordered by the Justices of the Peace in Calcutta to be taken for a Municipal market. Pursuant to notice issued by the Collector under Section 9 of the Act, all the persons interested in the land attended, and out of the six claimants four accepted the amount of compensation tendered. The other two claimants insisted on a reference of their matters to the determination of the Court, one of these two claimants being the respondent in this case to whom the Collector had tendered Rs. 71,512-6-4.

One of the assessors (Mr. W. Clark, the Engineer to the Justices) took the sum which the claimant was deriving as rent from the land, *viz.* Rs. 424 per mensem, as the basis for estimating the market value of the land. Estimating the gross annual value of the land at Rs. 5,088, he deducted therefrom Rs. 710 or 12 per cent for taxes and collection charges, leaving a net annual value of Rs. 4,378, and he was of opinion that the claimant should be allowed 16 years' purchase of that net annual value or Rs. 70,048.

The other assessor (Baboo Jodoololl Mullick) was for estimating the value of the land with reference to the probable rental which would be derived if the whole land was let out, allowing one-sixth as space for openings and bye-ways. From the evidence it appeared to him that the land had been let on an average at Rs. 3-8 per cottah, which, after deducting 12 per cent at 16 years' purchase, would give Rs. 591 per cottah; and deducting 1-6th of the whole land (2¼ beegahs) on account of lanes and openings, the price per cottah would still be about Rs. 500. Deducting from this again Rs. 50 per cottah for the land occupied by a filled-up tank, he thought that the claimant should be paid Rs. 1,47,000 as the market value of his land.

The award of the Judge was as follows:—

I regret that I am unable to agree with either of the estimates prepared by the assessors in this case. I think the estimate of Baboo Jodoololl Mullick is considerably in excess, while that of Mr. Clark falls somewhat short of what appears to me on a careful consideration of the evidence to be shown to be the market value of the land. I think also that the valuation of the Collector is in this instance rather below the mark. His valuation proceeds on the assumption that the land is as fully let as it might reasonably be expected to be, but I think this has been shown not to be the case. I consider there is ground for believing that, if fully let, the land might reasonably be expected to yield about 1-6th more than its present rental. Calculating on this basis, and after deducting 12 per cent for taxes and collection, the net annual rent of the land would amount to Rs. 5,232.

Allowing, as on the evidence I think myself warranted in doing, 18 years' purchase of this amount to be the market value of the land, the price to be given will be Rs. 94,176. This valuation gives an average of about Rs. 320 per cottah, which I consider to be fully as much as from its position, and from the character of the ground, it could fairly be expected to fetch in the market.

I accordingly award to the claimant under the 1st Clause of Section 24 of Act X of 1870 a sum of Rs. 94,176 as the market value of the land in question. No sum falls to be awarded under any other Clause of the said Section, but under Section 42 a further sum of Rs. 14,125, being 15 per centum on the amount awarded, will be paid to the claimant in consideration of the compulsory nature of the acquisition.

The entire sum therefore payable to the claimant will amount to Rs. 1 08,301 with interest as provided in Section 42, at the rate of 6 per cent per annum from the date when possession of the land was taken.

I allow a further sum of Rs. 1.492 2-5 to the claimant as his costs in the proceedings before this Court, and I further allow to each of the assessors a fee of Rs. 300 for their services.

Mr. Woodroffe said he had to submit an objection against this appeal being heard. No appeal could arise in this matter for two reasons. This was an appeal from the decision of Mr. Thompson under Act X of 1870. The part of this Act which related to the present case was Part III. Section 18 enacted that certain matters be stated for the information of the Court by the Collector in making a reference under Section 15 of the Act. The reference was made in this case. The Act then provided for the service, by the Court, of a notice on the persons interested; for the appointment of assessors, one by the Collector and the other by the persons interested; for the appointment of assessors by the Judge in the case of failure of nomination of either of such assessors; for the appointment of assessors in the event of any of the assessors dying, desiring to be discharged, refusing or neglecting to act. Sections 24 and 25 pointed out what the Judge and assessors should, and what they should not, take into consideration in determining the amount of compensation to be awarded for the land acquired under the Act. Section 27 enacted that the opinion of each assessor be given orally, and should be recorded in writing by the Judge; and Section 28 provided that "In case of a difference of opinion between the Judge and the assessors or any of them upon a question of law or practice or usage having the force of law, the opinion of the Judge shall prevail, and there shall be no appeal therefrom."

29. "In case the Judge and one or both of the assessors agree as to the amount of compensation, their decision thereon shall be final."

30. "In case of difference of opinion, between the Judge and both of the assessors, as to the amount of compensation, the decision of the Judge shall prevail subject to the appeal allowed under Section 35."

What had happened in this case was not that the Judge had differed from both the assessors, but that the assessors had differed from each other, the Judge agreeing with one that the amount tendered by the Collector was insufficient, and he contended that it was not intended by Section 30 that there should, under such circumstances, be an appeal.

The second reason submitted was that the Act, by Section 36, pointed out the manner in which evidence should be taken, incorporating the provisions of the Civil Procedure Code so far as they were applicable. By Section 172, the Judge hearing the case was required to take down the evidence in writing, and to sign those depositions. These provisions had been disregarded. No such depositions had been taken in this case, and there was no proper evidence on the record to go to their Lordships; all the evidence there was in this case was the rough notes taken by the Judge, which were in some parts substantially incorrect and even they are not signed. There is no provision exempting the Judge from complying with the provisions of Section 172 and other Sections of Act VIII of 1859, and there is an express provision in Act X of 1870 that he should so comply. It had been decided *In the matter of Adjudhia Prasad*, 7 Ben. Law Rep., p. 74, that where no evidence had been taken down in writing as provided by Section 72 of the Insolvent Act, the evidence could not be gone into on an appeal under Section 73 of that Act. He (Mr. Woodroffe) thought that it had been ruled on the other side of the Court that Judge's notes were not evidence. The notes taken by the Judge in this case had not been read over to the parties, nor had they been signed. They were only such as the Judge took for his own information and guidance to help him to fix the matter in his memory, and assist him in coming to his decision. It was in no sense a compliance with the terms of Section 172. There was also a similar decision of the Bombay High Court *In re Lakhmidas Hausraj*, 5 Bom. H. C. Rep., O. C., 63. There could therefore, under the circumstances of the present case, be no appeal.

Mr. Marindin (on the same side) said that the Section giving the appeal said distinctly that "in case of difference of opinion between the Judge and *both of the Assessors* as to the amount of compensation the decision of the Judge shall prevail subject to the appeal allowed under Section 35." It provided for the case where the two assessors had agreed to one rate of compensation, and the Judge differed from both of them. In this case the Government Assessor had given a sum considerably less than the Collector himself had tendered, and the other assessor had given a sum in excess of the other assessor; and the Judge had taken a middle course. His decision was certainly supported by the opinion of the Assessor who awarded a larger sum, *i. e.* to the extent that it went. He (Mr. Marindin) would therefore support his learned friend's contention on this ground that it was clearly not intended to give the appeal in every case of difference of opinion, but only where the Judge differed from both the assessors as to the amount of compensation.

The Advocate General contended that the first reason given in support of the objection to the appeal being heard, was not supported by the wording of Section 30. The Section required that there should be unanimity of opinion between the Judge and the assessor as to the *amount of compensation* to be awarded. The words of the Section are:—"In case of difference of opinion between the Judge and both the assessors *as to the amount of compensation*, the decision of the Judge shall prevail, subject to the appeal allowed under Section 35." The words of the Section were express, "in case of difference of opinion between the Judge and both of the assessors as to the amount of compensation". In the present case there was a difference of opinion between the Judge and both the assessors as to the amount of compensation, for the Judge awarded a lac of Rupees, one assessor 70,000 rupees, and the other 147,000 rupees. As to the second point the learned Advocate General contended that the terms of Section 172 of Act VIII of 1859 had been practically complied with. The Judge's notes of the evidence signed by him had been sent up as part of the record in the case. *The case of Ajudhia Prasad* was an appeal under the Insolvent Act which contained very stringent provisions that notes of the evidence should be taken by the clerk.

Mr. Woodroffe.—The provisions in Act VIII of 1859 were equally stringent.

The Advocate General.—But Act VIII was applicable only "so far as may be" to proceedings under Act X of 1870. Section 35 of the latter Act provided that "every appeal under this Section shall be presented within the time and in manner provided by the Code of Civil Procedure for regular appeals in suits." In the present case the appeal had been presented precisely in the manner prescribed. As to the evidence not having been recorded according to the Code of Civil Procedure, the claimant had himself appealed, and in his cross-appeal he made no objection of that sort, but merely insisted that the Judge's award was erroneous and contrary to the weight of evidence.

Mr. Woodroffe objected to one of the grounds of cross-appeal being used as an argument in favor of the present appeal.

Couch, C. J.—If we hold that the direction as to taking down the evidence is imperative, I do not see how we can avoid declaring that the whole proceeding is irregular, and that there is no award. Could it not be arranged between the parties to consent to the Judge's notes of the evidence being taken as the record of evidence, supplemented by the notes of the evidence taken by Counsel. This being the first proceeding under the Act, the point may have been overlooked by the learned Judge.

It was ultimately agreed by the parties to accept the Judge's notes of the evidence together with those taken by Mr. Trotman the claimant's Attorney, as the evidence given before the Judge at the hearing.

Mr. Lowe followed the Advocate General, and contended, as to the first point, that no appeal lay *at* all; that the decision of the Judge was final where the Judge had agreed with one or both of the assessors as to the *amount* of compensation. This was apparent from Section 33 which enacted that, where the amount awarded did not exceed the ***sum tendered*** by the Collector, the costs of all proceedings under Part III of the Act should be paid by the person interested, but where the amount awarded exceeded the sum so tendered, such costs should be paid by the Collector.

Mr. Woodroffe replied.—He was at a loss to understand how, as argued by the learned Advocate General, when one of the assessors agreed with the Judge, there was a character of finality in the proceedings, any more than when the Judge awarded 5,000 rupees, and one of the assessors valued the subject-matter of dispute at 8,000 rupees, and the other at 5,001 or 5,005 rupees. He did not think that it was intended to throw facilities in the way of appeal in such inquiries as these for the acquisition of land under Act X of 1870; and it appeared to him that it was a very good and sufficient reason for saying that there should be no appeal where one of the assessors agreed with the Judge to the extent that the Judge went but gave something more. As to Section 33 referred to by Mr. Lowe, Mr. Woodroffe thought that, under the words of that Section, no appeal would lie where the amount awarded exceeded the sum tendered. In conclusion, he would refer to the difference of dates between the Judge's award and the opinions of the assessors. The Judge's award bore date the 20th December 1871, and the opinion of one of the assessors was marked October 1871, while that of the other was without date.

Couch, C. J.—The case of the two assessors differing as to the amount of the compensation, and the Judge also entertaining a different opinion as to the amount of the compensation, is quite as likely if not more likely to arise, than the case of the assessors differing from each other, and the Judge agreeing with one of them. Certainly, unless the language of this Act was very clear in excluding such a case as that, I should not come to the conclusion that the Section did not apply to it.

Now the two Sections 29 and 30 appear to be intended to embrace all the different cases which would arise. Section 29 provides:—"In case the Judge and one or both of the "assessors agree as to the amount of compensation, their decision thereon shall be final." The other Section appears to provide for cases where the decision of the Judge should prevail. If we were to adopt what has been contended for by the respondent, that this Section and Section 35 do not apply where the assessors do not agree, and there is only a difference of opinion between the Judge and both the assessors, there would clearly be in this Act no direction as to what is to be done in that case. I think the Act should be read as meaning a difference of opinion between the Judge and assessors whether the assessors agree with each other or not. The Sections 29 and 30 so read will include all the different cases which can arise. Unless the language of the Act were very clear, I should not be disposed to put such a construction on it as to deprive the parties of the right of appeal when the Judge did not agree with the assessors, and the latter did not agree with each other. In my opinion there is as much reason for giving an appeal when the Judge differs from the assessors when they differ from each other as when they agree. I take the Act to mean that the award shall not be final whenever there is a difference of opinion between the Judge and the assessors. For these reasons I think that an appeal does lie in this case.

Markby, J.—I concur.

The case was then argued on the merits, both as to the appeal and the cross appeal, and the judgment of the High Court was delivered as follows by—

Couch, C. J.—This case comes before us under the provisions of the Land Acquisition Act 1870, in consequence of the Judge of the Small Cause Court having differed from the assessors as to the amount of compensation to be awarded, and both parties have appealed from the decision of the learned Judge.

We have considered the matter, and the opinions of the learned Judge and both assessors. One of the assessors, Mr. Clark, in giving his opinion, takes the present rent as a correct basis for estimating the value of the land, and gives 16 years' purchase after deducting 12 per cent for taxes and collection charges. He takes the rent at Rs. 424, which, according to the evidence, is produced by one-half of the land which is the subject of compensation. Baboo Jodoololl Mullick, the other assessor, estimates the value of the land upon the probable rental if the whole was let, allowing $\frac{1}{8}$th for lanes and bye-ways, and deducts the 12 per cent and gives 16 years' purchase on the amount of the rental after the deduction. He also deducts 50 rupees per cottah for 100 feet by 120 feet which he considers to be the extent of the land occupied by the filled-up tank. Both the assessors take the rent at Rs. 424. We think that shows that they understood the witnesses who were called as proving, although there was some discrepancy, that that was the gross rental, and that taxes and the cost of collection ought to be deducted from that amount. It is also to be mentioned that Jodoolall Mullick, the assessor whose opinion is very favorable to the claimant, and who is disposed to allow him all that he could possibly be entitled to, takes no notice of the *salami:* and as that does not appear in the books of the claimant, we think the assessors were right in disallowing it, and we ought not to take it into consideration. The learned Judge of the Small Cause Court takes another view of the mode in which the amount of compensation ought to be assessed. He takes the present rent of one-half of the land, and adds $\frac{1}{6}$th which is equivalent to the rental of $\frac{1}{12}$th more of the property let at the same rate. In fact he treats the matter as if the value of the land was to be calculated on the supposition that $\frac{7}{12}$th only of it would constantly be let at the same rate as the half which is now let. He, in like manner, deducts 12 per cent for taxes and collection charges, evidently sharing in the view of the assessors that that amount ought to be deducted from the rent of Rs. 424. But he goes beyond Jodoolall Mullick with respect to the number of years' purchase and gives 18 years. Now with regard to that we think that the learned Judge has gone too far. Heeralall Seal, one of the witnesses for the claimant, although in his examination-in-chief he put it as high as 18 years, says, in cross-examination, that at an average rate the land could have been bought at 14 or 15 years' purchase.

We think, on the evidence, that 16 years' purchase would be a fair allowance. But in saying that 16 years' purchase is a fair allowance in this case, we must not be understood as laying that down as a rule in cases of this kind. Every case must depend on its own circumstances, on the evidence given, and the nature of the property. The number of years' purchase which it would be right to allow with regard to one sort of property might not be a fair allowance for other kinds of property, and we wish to guard ourselves against being understood as laying down any rule as to the number of years' purchase which ought to be allowed. On the evidence we think that 16 years' purchase is sufficient to allow in the present case.

The other question which has to be considered is as to the deduction which should be made from the total quantity of land for what may be supposed to be generally unlet; and what would be required for lanes and bye-ways. Mr. Rowe, one of the witnesses for the Justices, says that in tenanted lands about ⅙ is usually taken up by lanes and vacant lands. And it seems to us that the allowance of the learned Judge of the Small Cause Court for the land which may be expected to yield a rent is not sufficient. He has allowed too little, as Jodoololl Mullick has allowed too much, Jodoololl Mullick having deducted for only lanes and bye-ways. We are of opinion that ⅔ of the land might reasonably be expected to be let, upon an average number of years, although half only is now let; and in estimating the amount of compensation to be allowed, we think it right to take ⅔ of the land as let; and as the part unlet would probably be the worst part of the land, the ⅔ may fairly be expected to produce a rental at the same rate as the half now produces.

Applying these principles to the case, the result is this; the present *rental* of half the land is Rs. 424 a month. If to that we add one-third, which is equivalent to ⅙ of the whole land, we get the rental of ⅔ of the whole. That sum is Rs. 14,133, making a total of Rs. 56,533, as the monthly rental of the land! That makes an annual rental of Rs. 6,783·96, being little short of Rs. 6,784. Deducting from that 12 per cent. for taxes and collection charges, amounting to Rs. 814·07, we have Rs. 5,969·89, which at 16 years' purchase is Rs. 95,518·24, and that is the amount of compensation which we think ought to be awarded. If to that the 15 per cent is added, the amount is Rs. 1,09,845·97, which is the sum we consider ought to be awarded.

In the Court below Rs. 1,492-2-5 was allowed to the claimant as costs, and to each of the assessors Rs. 300. As we, in fact, give to the claimant more than the learned Judge gave, it is equally proper that he should have his costs. I do not know whether under the Act it is necessary for us to make any order about those costs, but, in case of any doubt, we confirm the allowance of costs. With regard to the costs of the appeal, we think the parties should pay their own costs.

The 8th January 1872.

Present:

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Civil Court Ameens—(Acting Appointments)—Jurisdiction.

In the matter of
Doorga Doss Doss, *Petitioner.*

Mr. C. Gregory and *Baboo Sreenath Banerjee* for Petitioner.

The High Court has no authority to interfere in the case of a person who is not confirmed in an acting appointment of Civil Court Ameen for which the Judge considers some other candidate to be more fit.

Jackson, J.—We are clearly of opinion that this is a case in which this Court has no authority to interfere. The Government of Bengal has referred the petitioner to this Court on the ground that by Act XII of 1856, Section 3, "Civil Court Ameens shall "be appointed by the Judge of the district "with the sanction of the Court of Sudder "Dewanny Adawlut," the powers of which Court have descended to this Court. It is not necessary now to consider whether those powers are affected by any general language of Act VI of 1871, which subjects district Courts, in matters relating to the appointment and dismissal of Ministerial Officers, to the general control of the Local Government only. But even supposing that Act VI of 1871 had not been passed, and that it has no reference to the present matter, the case is one in which we could not interfere because the petitioner has not been dismissed, but has only not been confirmed in an acting appointment for which the Judge considered some other candidate to be more fit.

This application must, therefore, be rejected; and in rejecting it, we think it right to remark upon the improper insinuation contained in the petitioner's petition to the Local Government in which he says, that he has been removed from his place not because he was not fit to hold it, but because the favored candidate who was preferred to him had "somebody to recommend him." We think this a most improper insinuation, and one which would make this Court more reluctant to interfere than it would otherwise have been even if it were clear that we had authority in the matter.

The 15th January 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble Louis S. Jackson, and F. A. Glover, *Judges.*

Act VIII of 1859 *s.* 270—*Limitation*—*Act XIV of* 1859, *s.* 1, *c.* 5—*Suit to set aside Summary Decision.*

Case No. 257 of 1870.

Regular Appeal from a decision passed by the Subordinate Judge of Nuddea, dated the 8*th September* 1870.

Dwarkanath Biswas (Defendant) *Appellant,*

versus

Roy Dhunput Singh Bahadoor (Plaintiff) *Respondent.*

Mr. G. C. Paul for Appellant.

Mr. R. T. Allan and *Baboo Unnoda Pershad Banerjee* for Respondent.

A suit to receive the proceeds of sale in execution of a decree alleged to have been drawn out by defendant by virtue of an order of a Civil Court under Section 270 Act VIII of 1859 is in reality a suit to alter or set aside a summary decision of a Civil Court, and is governed by the limitation of one year prescribed by Clause 5, Section 1, Act XIV of 1859.

Couch, C.J.—In this case, an application was made before Mr. Rivers Thompson, then an Acting Judge, in which the father of the present plaintiff, being a decree-holder, was a party, the debtors were parties, and the present defendant was a party as a petitioner. It is called by Mr. Rivers Thompson a "suit for priority of application of sale proceeds of properties sold in execution of decree" and was an application to the Court under Section 270 Act VIII of 1859, which directs that "whenever property is sold in execution of a "decree, the person on whose application "such property was attached shall be entitled "to be first paid out of the proceeds thereof, "notwithstanding a subsequent attachment "of the same property by another party in "execution of a prior decree."

Mr. Rivers Thompson having heard the case, made an order that the decree of the present defendant, who was the petitioner, should be first satisfied, and that such amount having been paid, should there be any balance left, the same might be applied to satisfy the decretal amount of the other decree-holder, the present plaintiff, who has now brought a suit just within six years of the making of this order. In this he alleges that, on the 17th March 1864, the Judge unjustly held a summary trial under the provisions of Section 270 of Act VIII of 1859, and on proof of prior attachment by the defendant, made an order for paying the money to him; that an appeal was preferred against that order to the High Court which was first set aside, but upon review of the judgment a decision was passed to the effect that no appeal would lie from the order; and therefore the order stood. Then he says, "under cover of the aforesaid order of the Judge, the defendant drew from the Court, the sum of Rs 13,801, constituting the proceeds of the sale." Now, he cannot by using the words "under cover" alter the effect of what was done. It was not under cover, if by that is meant under pretence of the order that the money was drawn out. The money was received by the defendant by virtue of that order by which the Judge directed that the decree of the defendant should be first satisfied. Then he goes on to say, "the right of the de- "fendant to receive the money was not "legally superior to that of Sett Gopaul "Chand inasmuch as the prior attachment "of the former was groundless and opposed to "law, and that consequently the title of Gopaul "Chand under the mortgage was the stronger "one," and he winds up by saying, "your petitioner has every right to receive the sale proceeds in satisfaction of the debt due under the decree of Sett Gopaul Chand."

Now, the whole frame of this plaint, and the case put forward in it, shows that what he alleged was, that the money was wrongly and improperly ordered to be paid to the defendant. The defendant received the money under the order; and as long as the order stands, he has, as between these parties, a right to appeal to it and say, "the money which you claim and say belongs to you, the Court has ordered to be paid to me and I am entitled to keep it." The plaintiff, whatever grounds he may have for saying that he has a better right to the money than the defendant, can only get it by having the order set aside on the ground that it is an order that ought not to have been made by the Court. It cannot be treated as a nullity, because there was jurisdiction in the Court making it to determine the question, who was to be first satisfied. The suit is in reality a suit to set aside the order. The order is in the plaintiff's way, and he cannot get the money without having it set aside. Therefore it seems to me that it comes clearly within Clause 5 Section 1 of the Limitation Act. And this view of the case is supported by the language of Sir Barnes Peacock in the case in the 9th Weekly Reporter, p. 514, and also by the decision of Mr. Justice Norman in the case in XVI Weekly Reporter, p. 11. That the suit ought to have been brought within one year, and that so long a period as six years for bringing it ought not to be allowed, is to my mind apparent from the objections which the defendant now raises. Most of them are in effect objections that the Judge in making that order had taken a wrong view, and the present suit is really an appeal from his decision.

It seems to me that the suit is clearly one to set aside the order and is barred by the Law of Limitation. I do not think we need consider the other questions or come to any determination upon them. The decree appealed from must be set aside and the suit be dismissed with costs.

Jackson, J.—I also think that the present suit is one to which the 5th Clause of Section 1, Act XIV of 1859, applies.

It has been contended that this is not a suit expressly to set aside a summary decision of the Civil Court made in the proceedings in execution. Probably it is, in effect, a suit to alter or set aside a summary decision; but if not, it appears to me that the words of that Clause should be construed as if the Clause were expressed somewhat in this way, "suits "to which a summary decision or order of "the Civil Court would be a complete answer "must be brought, when such suits are main-"tainable, within the period of one year," and it is clear that the order of the Civil Court would be a complete answer to the plaintiff's suit if not set aside. The decision of the Full Bench to which we were referred* answered one of the questions suggested by the wording of the 5th Clause, "when such suit is maintainable." I think the decision of the Full Bench went no farther than that.

An argument might be drawn against the construction which I propose to put upon the 5th Clause from the wording of the 7th Clause of that Section, which is to this effect—"To suits by any party bound by any "order respecting the possession of property "made under Clause 2, Section 1, Act XVI "of 1838, or Act IV of 1840, if any person "claiming under such party, for the recovery "of property comprised in such order—the "period of three years from the date of the "final order in the case." It may be argued from that, that when the Legislature meant to impose a limitation upon the bringing of a suit where a summary award had been made by a particular Court that limitation would be expressed in that way. But there seems to be a good reason for that, because in that Clause the Legislature was dealing with somewhat different *materia*. In that case, the order which the party was to be bound by, affected only the possession of the property, and the suit was to be brought to determine the *rights* of parties; and then if we look back to Clauses 3 and 4 of the same Act, we find that they are expressed in the same terms as Clause 5, and, consequently, if the contention of the respondent in this case were worth anything, parties would be enabled to defeat the operation not only of Clause 5 but also of Clauses 3 and 4 by saying that the suit was not for the purpose of setting aside the sale of property or attachment and so on, but to recover the property notwithstanding the order. But it could not have been the intention of the Legislature that these Clauses should be got round in that way, and therefore I have no doubt that the Clause applies, and that the suit is barred, having been brought long after the period of one year.

As to the argument which was used, that the enquiry in this regular suit included several matters which were not within the purview of the enquiry before the Judge in the execution proceedings, it appears to me that not one of the arguments which were used before us this day but would have been a valid argument to use before the Judge to convince him that this particular sum ought not to have been paid to the defendant.

Glover, J.—I concur.

The 23rd January 1872.

Present:

The Hon'ble Louis S. Jackson and
F. A. Glover, *Judges.*

Case No. 151 of 1871.

Mesne Profits—Interest—Ekrarnamah.

Regular Appeal from a decision passed by the Subordinate Judge of Jessore, dated the 18th April, 1871.

Sokhee Monee Debia (Defendant) *Appellant,*

versus

Brijoraj Mookerjee and others (Plaintiffs) *Respondents.*

Mr. R. T. Allan and *Baboo Bhowanee Churn Dutt* for Appellant.

Baboo Doorga Dass Dutt for Respondents.

Although the common practice is to make interest payable from the date on which the mesne profits are assessed, yet there is no rule of law by which a party is debarred for suing for the recovery of mesne profits with interest.

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* 9 W. R., 514.

An *Ekrarnamah* executed between plaintiffs and defendants, by which plaintiffs undertook to satisfy any claims to mesne profits that might be advanced by the parties dispossessed was held to be no protection to defendants in the case of parties dispossessed by plaintiffs.

Jackson, J.,—THIS was a suit for the recovery of an amount of *wassilat*, together with interest, which the plaintiffs had been made to pay, but which was justly due by the defendants. The appeal here relates merely to the amount of interest which has been adjudged. It is contended that the defendants were not liable to pay interest from the date mentioned,* because according to the procedure in execution of decrees, these defendants could only have been made to pay interest from the date on which the *wassilat* should be assessed.

That, no doubt, is the common practice in cases of execution, but the party at whose suit the *wassilat* was recovered, might have brought a suit against these defendants for the recovery of the *wassilat* in question with interest. We are not aware of any rule of law by which that party is debarred from recovering it. The objection as to interest therefore cannot be sustained.

It is also contended that the defendants were protected by the express terms of an *Ekrarnamah* executed between them and the plaintiffs, by which the plaintiffs undertook to satisfy any claims to *wassilat* that might be advanced by the parties dispossessed:—but this was a case of parties dispossessed by the plaintiffs. This was a case not apparently contemplated by the parties. We do not think, therefore, that the *Ekrarnamah* applies, and this objection, consequently, also fails.

The appeal will be dismissed with costs.

The 23rd January 1872.

Present:

The Hon'ble Louis S. Jackson and
F. A. Glover, *Judges.*

Jurisdiction—Discretion — Act VIII of 1859, *s.* 97—*Withdrawal from suit—Permission to bring fresh suit.*

Case No. 970 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Tipperah, dated the 26*th May* 1871, *reversing a decision of the Moonsiff of Toobgeebograh, dated the* 31*st March* 1870.

Ram Kanye Dutt (Plaintiff) *Appellant,*

versus

Haroo Chunder Mojoomdar (Defendant)
Respondent.

Baboo Bykuntnath Doss for Appellant.

Baboo Kashee Kant Sein for Respondent.

A Lower Appellate Court has no power to interfere with the discretion of a first Court under Section 97 Act VIII of 1859 in allowing a plaintiff, whether before or after the settlement of issues and before or after the acceptance of evidence upon the issues, at any time before final judgment, to withdraw from the suit with liberty to bring a fresh suit for the same matter.

Jackson, J.—THE decision of the Lower Appellate Court appears to be unwarranted by the provisions of Section 97 of the Code of Civil Procedure.

The plaintiff, it seems brought his suit to recover land, the suit being in the nature of a boundary suit. The plaint contains a description of the boundaries: and during the progress of the suit, the Civil Court Ameen was deputed to hold a local investigation; and upon measuring and examining the ground, he found that the boundaries in the plaint were incorrect, and did not truly represent the matter to which the suit related. On this being discovered, he obtained the leave of the Court to withdraw his suit with liberty to bring a fresh suit for the same matter. After having so obtained leave, he brought this suit.

The Subordinate Judge remarks, — "I "think their present plaint in the amended "form inadmissible, not because no amended "plaint is allowable—on the contrary Act VIII "sanctions such a plaint, and this Court "has often returned to plaintiffs their plaints "for alteration; and on occasions where "plaints were not bodily returned, permission "has been given to supply the omissions or "alter the errors in the plaint by means of a "separate petition—but all this can be legally "done either before the settlement or be"fore the acceptance of the evidence upon "the issue. Here the issue was settled on "the 8th November 1869, the Ameen "reported on the 6th January 1870, and the "Court and the plaintiffs have accepted that "report as evidence; it was unjust to the "defendant to permit the plaintiffs to adjust "their future plaint with the present evidence "before the Court."

Whether it was unjust or not was a matter of discretion. The law is quite explicit that,

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* From 7th September 1867 to date of decree.

" if the plaintiff at any time before final judg-
" ment satisfy the Court that there are suffi-
" cient grounds for permitting him to with-
" draw from the suit with liberty to bring a
" fresh suit for the same matter, it shall be
" competent to the Court to grant such per-
" mission," &c. Here the Court did think fit to grant such permission, and the suit was accordingly brought. The Subordinate Judge, therefore, was wrong in reversing the decree of the Court below on that ground. His decision, therefore, must be set aside, and the case will have to go back to his Court to be tried on the merits.

The 25th January 1872.

Present:

The Hon'ble Louis S. Jackson and
F. A. Glover, *Judges.*

Mortgage—Notice of Foreclosure—Representatives of Deceased Mortgagor.

Case No. 974 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Jessore, dated the 26th June 1871, reversing a decision of the Sudder Moonsiff of that District, dated the 15th December 1870.

Ram Chunder Halder (Plaintiff) *Appellant,*

versus

Jonab Ali Khan and others (Defendants)
Respondents.

Baboo Ashootosh Dhur for Appellant.

Baboo Bhowanee Churn Dutt
for Respondents.

It cannot be said that, if a notice of foreclosure addressed to a deceased mortgagor has reached the hands of his representatives, they have not had notice, nor that they were debarred from paying or were not required to pay the amount of the mortgage upon receiving that notice.

Jackson, J.—The objection in this case, which was over-ruled by the Court of first instance, but which prevailed in the Appellate Court, was, that there had been no proper issue of the notice of foreclosure under the Regulation.

The mortgagors, it appears, were one Oozeer Ali along with two Mahomedan ladies, and the notice of foreclosure was issued in these three names. It appears that between the date of the mortgage and the application, Oozeer Ali had died, and that his representatives were the Mahomedan ladies in question, and Jonab Ali, the defendant. Jonab Ali received the notice and signed it on behalf of the two ladies, but not for himself or as representative of Oozeer Ali. So it was contended that the notice not being expressly directed to Jonab Ali, the terms of the law had not been complied with and the suit must fail.

It seems to me that, if not literally, at any rate substantially, the directions of the law were complied with. The law says that the notice shall direct the mortgagor or the representatives of the mortgagor to pay the money, and if the mortgagor has died, his representatives are entitled to the notice; but it cannot be said that, if a notice addressed to the mortgagor has reached the hands of his representatives; they have not had notice; nor can it be said that they were debarred from paying or were not required to pay the amount of the mortgage upon receiving that notice.

I think the decision of the first Court was right, and that the Subordinate Judge ought not to have set aside the judgment upon such a ground, which, in my opinion, was excessively technical. I think the decision of the Lower Appellate Court must be set aside with costs.

Glover, J.—I concur.

The 12th February 1872.

Present:

The Hon'ble A. G. Macpherson and
F. A. Glover, *Judges.*

Review—Time for—New evidence—Local investigations (to ascertain relation of Man and Wife)—Sunday Notice—Sagaye Marriage—Maintenance.

Case No. 775 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Sarun, dated the 27th March 1871, *reversing a decision of the Moonsiff of Chuprah, dated the 11th July* 1870.

Jhubhoo Sahoo (Defendant) *Appellant,*

versus

Mussamut Jusoda Kooer (Plaintiff)
Respondent.

Mr. M. L. Sandel and *Baboo Rughoobuns Sahoy* for Appellant,

Moonshee Mahomed Yusoof for Respondent.

An application for review of judgment, if out of time, cannot be admitted without special and sufficient cause being shown for the delay.

Nor can a review be admitted for the purpose of having a further investigation when there is nothing to show that the further evidence sought to be laid before the Court might not have been produced at the original trial.

In a case where the issue is whether two persons bear the relation of man and wife, a Judge is not justified in going himself to the village where the parties live, in order to make enquiries among their neighbours; much less in holding such local investigation on a Sunday, and without due notice to one of the parties.

Quære.—Whether a *Sagaye* wife is entitled to maintenance.

Per Glover, J.—Time for obtaining copies of judgments should not be allowed in applications for review.

Macpherson, J.—This is a suit for maintenance brought by the plaintiff who alleged herself to be the wife of the defendant. The plaintiff's case is that she had made a *Sagaye* marriage with the defendant: and the chief issue was whether she was so married to the defendant or not.

In the first instance, both the Lower Courts dismissed the plaintiff's case, holding that no marriage had been proved. The judgment of the Subordinate Judge confirming the Moonsiff's decree of dismissal is dated the 29th October 1870. On the 28th January 1871, that is, ninety-one days after the date of the order dismissing the suit, an application was made to the Subordinate Judge to review his judgment; and, on the same day, notice was ordered to be issued to the defendant to appear on the 8th February to show cause against this application for review. The notice was served on the defendant on the 7th February, the day before the matter was to come on. Apparently, however, it did not come on on the appointed day. But on the 20th March, the Subordinate Judge took it up, and after hearing the parties' vakeels, admitted the review and made an order fixing the 27th March for re-hearing the case, and stating that on the 26th March he would himself go to the spot and make enquiries amongst the neighbours,—notice of which latter arrangement was to be given to the defendant. Below this order we find some words which purport to be signed by the defendant's pleader, to the effect that he would appear if his client permitted him to do so. On the 26th March, the Subordinate Judge carried out his intention of going to the spot and making enquiries amongst the neighbours of the plaintiff and defendant. On that occasion the defendant did not appear. On the 27th of March the Subordinate Judge took up the matter in Court, and the defendant then appeared and put in a petition objecting to the proceedings of the day before, which he said were taken behind his back; and the defendant applied for time to appoint a pleader in order that he might be properly heard. The Subordinate Judge refused his application, and proceeded then and there to dispose of the case on the ground that sufficient notice had been given.

The Subordinate Judge's own account of the transaction is as follows :— "A petition "for review of judgment having been admitted "for a further investigation as to the point "whether a *Sagaye* was actually made "between the plaintiff and defendant, the case "was restored to its original number. On "enquiries which I held by repairing in "person to the quarter where the plaintiff "lives, it appeared from the statements of "the persons who reside around the house in "which both the plaintiff and defendant used "to live before they quarrelled with one "another, that the defendant had actually "made a *Sagaye* with the plaintiff; and that "as they afterwards quarrelled with one "another, the defendant left the plaintiff. It "also appears that amongst the low class "Hindoos a *Sagaye* is secretly made simply "with the consent of man and woman of the "same caste without requiring the attendance "or assemblage of other persons of the same "caste."

In appeal, it is contended that the Subordinate Judge, having dismissed the suit on the 29th October 1870, acted illegally in admitting a review, inasmuch as the petition for review was not presented until the lapse of ninety-one days from the date of the judgment.

It seems to me probable that the application for review was out of time, and therefore that the Subordinate Judge was wrong in admitting it without special and sufficient cause being shown for the delay. But the proceedings of the Subordinate Judge must be set aside for a much more substantial reason. The Subordinate Judge was not warranted by law in admitting a review, as he did, merely for the purpose, as he himself says, of having a further investigation, when there was nothing whatever to show that the further evidence which the plaintiff sought to lay before the Court might not have been produced at the original trial. It is patent on the face of the proceedings that the sole object of the review was to supplement the case previously made by the plaintiff and that the whole of the evidence which was admitted on review ought to have been given at the original trial if at all. I think, on the authority of the case reported in XVI Weekly Reporter, page 7, and the various cases there quoted, that the Subordinate Judge was not warranted in granting a review under the circumstances.

I think further that even if the Subordinate Judge did not act illegally in granting a review, the whole of the subsequent proceedings are bad from their extreme irregularity.

In the first place, the Subordinate Judge went and held a local investigation. Now, it may be that in a case involving questions depending on the relative positions of places or the like, the Court may find it necessary to view the spot to which the controversy relates, but even in such cases it is by no means desirable that the Judge should be too ready to make himself a witness in the cause. But there is no authority that I know of, which in a case where the issue is whether two persons bear the relation of man and wife to each other, will justify the Judge in going himself to the village where the parties live, in order that he may make enquiries amongst their neighbours. If the Subordinate Judge wanted additional evidence and considered that he was legally justified in reviewing it; the only course open to him was to summon witnesses and examine them in Court; and he had no right whatever to betake himself to the spot and hold his Court, as it were, at the door of the plaintiff's house.

Moreover, the day which he selected for this irregular proceeding was the 26th of March, which was a Sunday. When he fixed that day—a day on which he could not compel the attendance of witnesses and suitors,—the defendant's vakeel stated that he could not attend unless his client permitted him to do so. Notwithstanding that there was no other notice to the defendant than what was then given to his vakeel, the Subordinate Judge held the local investigation; and when on the Monday following the defendant came in and asked to be heard, he was told that he ought to have attended on the Sunday.

I have no doubt that the Subordinate Judge believed that he was acting for the best, and in a manner that would enable him to arrive at a just and true conclusion, and I give him the fullest credit for his good intentions, and for the pains which he certainly bestowed on this matter. Nevertheless, he should remember that he occupies a position in which his duty consists in deciding cases between parties, not according to his own notions of what is right merely, but according to what is right and to the law of procedure laid down for his guidance. If a Judge chooses to make a law of procedure for himself and gives the go-by to the Procedure Code, his labor is merely thrown away.

The proceedings of the Subordinate Judge are quite irregular, and the appellant is well entitled to ask us to set them aside and to restore the judgment of the 29th of October 1870.

Furthermore, there is no distinct finding as to what is the legal effect of the connexion known as a *Sagaye* marriage; and it seems to me very questionable whether in law a Sagaye wife is entitled to maintenance. On these questions, however, I express no opinion.

The appeal will be decreed; the decision of the Lower Appellate Court is reversed, and the order of the 29th October 1870 is restored and affirmed.

The respondent will pay all the costs, both of this appeal and of the Lower Appellate Court.

Glover, J.—I am of the same opinion. With reference to the argument of the respondent's pleader that his client should have been allowed time for procuring copies of judgments, I find that Section 333 of the Civil Procedure Code which relates to appeals is express upon this point and does allow a deduction of time; but Section 377 which has reference to applications for review contains no such provision; and the absence of such provision shows, I think, that it was never intended that time for obtaining copies of judgments should be allowed in applications for review.

The 12th February 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble Dwarkanath Mitter, *Judges.*

Mesne profits—Jurisdiction—Error in decree—Right of other persons.

No. 266 of 1871.

Miscellaneous appeal from an order passed by the Subordinate Judge of Jessore, dated the 4th July 1871.

Prosunno Coomar Ghose and others (Judgment-debtors) *Appellants,*

versus

Mathoora Mohun Ghose (decree-holder) *Respondent.*

Baboo Bungshee Dhur Sein for Appellants.

Baboo Bhowanee Churn Dutt for Respondent.

Appellant having been declared entitled by an order of the High Court to receive back a portion of the *Wassilat* which respondent had received under a decree incorrectly drawn up and to which he was not entitled, HELD that respondent ought to give it up and cannot set up that some other person is entitled to it; and that the Judge was wrong in considering that he was at liberty to take into account that appellant was not entitled to it but that somebody else was entitled to it, and on that ground to say that respondent should keep it.

Couch, C.J.—WE think that the High Court, when it made the order of the 8th March 1869, did recognise that there had been a mistake in drawing up the decree in 1864, which did not correspond with the judgment; and it then made an order that that decree of the year 1864 was really to be treated as a decree for 2 annas 6 gundahs, 2 cowries 2 krants, as if it had corresponded with the judgment. It is true that no alteration was actually made in the decree itself, but we do not think that the respondent can ask us to treat this order as not having any effect, and that we should abide by a decree which was not correctly drawn up.

Then the case stands thus—the respondent has received a portion of the *Wassilat* to which he was not entitled, and if he is not entitled to receive it, he cannot set up that some other person is entitled to it. As between him and the present appellant, if he is not entitled to it, he ought to give it back to the appellant. Whatever rights there may be in other persons, he can only receive that which the Court by its order of March 1869, has declared him to be entitled to. The Judge, we think, was wrong in considering that he was at liberty to take into account that the present appellant was not entitled to it, but that somebody else was entitled to it, and on that ground to say that the respondent should keep it.

We think the order of the Lower Court must be reversed and that a 4 annas 13 gundahs 1 kerra and 1 krant share of the *Wassilat*, when ascertained, refunded to the appellants with costs.

The 15th February 1872.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Estoppel—Arbitration award—Intervenor.

Case No. 658 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of West Burdwan, dated the 22nd March 1871, *reversing a decision of the Moonsiff of Radhanuggar, dated the 23rd December* 1870.

Haree Perhad Mundal and others (Defendants) *Appellants,*

versus

Boishtub Doss Laga Bawajee (Plaintiff) and another (Defendant) *Respondents.*

Baboo Bhowanee Churn Dutt for Appellants.

Baboos Chunder Madhub Ghose and *Romanath Bose* for Respondents.

An arbitration award is not binding on an intervenor as a decree in a suit disposed of by a regular trial.

Jackson, J.—THIS case is somewhat intricate, and it is somewhat difficult to arrive at the bottom of it without going into detail to the facts. It appears that the plaintiff brought a suit alleging himself to be the owner of 20 beegahs of which he was dispossessed in 1271, on the 15th Bysack. The Courts have differed in opinion as regards the plaintiff's right, but the Appellate Court has found in favor of the plaintiff. It appears that there was some litigation in connection with these 20 beegahs in 1830 when they were put up for sale, and the rights of the plaintiff's tenants in this tenure were then purchased by the present special appellant, but this sale was subsequently set aside.

It is said now that the plaintiff, notwithstanding that the sale had been set aside, put in a petition into Court by which he confirmed the sale in favor of the present special appellant. As the sale had already been set aside, it certainly seems a very extraordinary manner of again restoring the sale, and the Appellate Court does not believe the evidence upon the point; the Court does not believe the petition which is said to have been then put in, and says that it has not been in any way proved; and certainly it is not shown that from that time down to the year 1860, that is, for nearly 30 years, the special appellant continued to hold these lands as tenants of the plaintiff; there is no evidence, as we understand, to that effect, and no receipts of rent have been put in for any of these 30 years.

With regard to what happened in 1860, it seems that there was another law-suit. It appears that one Brohmo Moyee brought a suit which was referred to arbitration, and Brohmo Moyee obtained a decree. The special appellants now claim to hold the half of these lands under documents executed by Brohmo Moyee. The Appellate Court is of opinion that these proceedings do not establish the title of the defendants, and the special appeal to this Court has reference more specially to these proceedings. It is alleged that the decree then passed bars the plaintiff from bringing this suit, and that the suit is also barred, because his objections in execution as to possession were rejected; and therefore Section 11 Act XXIII of 1861 applies, and no further suit can be brought.

It does not appear to us that these objections were urged before the Appellate Court, and they do not seem to have been pressed before the Moonsiff; but it is admitted that, on the face of the award, there is no direct determination on the part of the arbitrators as between Brohmo Moyee and the present plaintiff. It is true that the present plaintiff intervened as against Brohmo Moyee, and that he was made a defendant in that suit; and had the case been regularly tried by the Court and a decree passed, there is very little doubt that it would have been binding against the plaintiff. But it does not appear that the suit was disposed of by a regular trial; it was referred to arbitrators; the arbitration award is on the record, and it is not denied that there is nothing in that award deciding any matter as between Brohmo Moyee and the present plaintiff. We cannot, therefore, hold that there has been any such determination between Brohmo Moyee and the plaintiff as would bar the institution of the present suit.

No sufficient ground has been shown to interfere with the decision of the Lower Appellate Court and we therefore dismiss this appeal with costs.

The 16th February 1872.

Present:

The Hon'ble G. Loch and W. Ainslie, *Judges.*

Attachment—Official Assignee—Striking off of Attachment pending Appeal.

Case No. 833 of 1871.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Shahabad, dated the 7th August 1871.

Shew Narain Singh (Decree-holder) *Appellant,*

versus

A. B. Miller, Official Assignee to the estate of Sheoburt Sahoo and others (Judgment-debtors) *Respondents.*

Baboo Nil Madhub Sein for Appellant.

Mr. R. E. Twidale for Respondents.

An attachment made by a decree-holder prior to a vesting order in favor of the Official Assignee, must have preference to the claim of the Official Assignee.

An order striking off an attachment pending an appeal does not release the property from attachment.

Loch, J.—In this case it appears that the appellant before us attached certain property of his judgment-debtor on the 4th June 1868, that, on his applying to the Lower Court for the sale of that property in execution of his decree, he has been opposed by the Official Assignee, who urges that, as the property of the judgment-debtor has vested in him, the decree-holder cannot bring that property to sale.

The Subordinate Judge, in disposing of this case, refers to the former proceeding of the 4th November 1868, by which it was declared that the Official Assignee had charge of the properties of the judgment-debtor and directed the parties to apply to the Official Assignee for the liquidation of their claims. With reference to this proceeding, the Lower Court has refused to grant the application of the decree-holder, considering the view he has taken of the case is supported by the judgment of the High Court of the 5th June 1871.*

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* The 5th June 1871.

Present:

The Hon'ble J. B. Phear, *Judge.*

Aga Mohamed Ali Shiraji.

versus

S. E. Judah.

Mr. Marindin, for the Judgment-creditor.

Mr. Evans for the Official Assignee.

This was an application, on behalf of the plaintiff, judgment-creditor, for the payment to him out of Court of the sum of Rs. 1,546-1-2, which had been paid into Court as the proceeds of a sale in execution of the decree

We can find nowhere in the record the date of the order by which the property of the debtor was vested in the Official Assignee. But, on a reference to the proceeding of the 4th November 1868, we find that the Official Assignee there stated that petitions had been presented by the insolvents to the High Court in Calcutta on the 29th June and on the 8th July 1868, declaring that they were insolvents and applying to have their property put under the charge of the Official Assignee. But on what date the order for vesting the property in the Official Assignee was made, does not appear from that proceeding. It was no doubt the duty of the Official Assignee, when opposing the decree-holder in this case, to have clearly set forth the date on which the insolvent's property was placed under his charge. As far as we can gather from that proceeding of the 4th November 1868, which is our only guide, it appears that the attachment made by the decree-holder was prior to the vesting order in favor of the Official Assignee; and as ruled in the Full Bench judgment of the 13th September 1870, reported at page 33 of XIV Weekly Reporter, it is clear that the attachment made by the decree-holder must have preference in such a case to the claim of the Official Assignee, who took charge of the property under an order of a subsequent date; and the case quoted by the Subordinate Judge is in conformity with the judgment passed by the Full Bench.

It is said on the other side that the attachment made by the decree-holder in June 1868, has ceased, because the case was struck off in December of that year. It is true, for the convenience of the Court, it was struck off, because at that time there happened to be an appeal pending, and the Court could not proceed with the execution. But the order nowhere releases the property from attachment, and therefore this objection is not sound.

We think that the order of the Subordinate Judge must be set aside, and that the decree-holder must be allowed to proceed against this property in execution of his decree.

This appeal is decreed with costs, sixteen rupees being allowed for pleader's fees.

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in the suit. The decree was obtained on 15th August 1870, and an order for execution of the decree on 8th September. In pursuance of such order, certain immoveable property belonging to the defendant, was attached by the Sheriff on 9th and 10th September. On 14th September the Sheriff was directed by the Court to sell. The sale was advertised to take place on 1st December. On 30th November, the defendant filed his petition in the Insolvent Court and the usual vesting order was made. On 1st December the sale took place and the proceeds amounting as above were paid into Court, and the sale was confirmed by order of Court on 11th March 1871.

Phear, J.—I think Mr. Marindin's answer to Mr. Evan's objection is the right one. Section 49 of the Insolvent Act gives power to the Court in which the matter of litigation is pending to stay proceedings in the suit, or, if the suit has come into the execution stage, to set aside or suspend such execution. I do not think that it was intended by that Section to give the Court power merely on the occurrence of insolvency to set aside a sale which has rightly and duly taken place upon process of execution. Obviously the rights of the purchaser come in at that stage, and there is no provision or suggestion made in Section 49 for bringing the purchaser before the Court. No doubt, the Court always has power to set aside a sale which has taken place in execution, if it is satisfied that there has been anything like fraud or any other irregularity in regard to the sale, such as would vitiate it in the view of a Court of Equity. But the mere filing of a petition of insolvency by the judgment-debtor of course amounts to nothing of this kind. If this construction be a true one, then it follows that the sale in execution having taken place, and the money having been paid into Court, the Official Assignee is in the same position with regard to that money as any other person who is interested in the decree. He can only get at the money by the regular course of proceedings under the execution Sections of Act VIII of 1859. And that seems to have been the view taken in the case cited by Mr. Marindin of *Winter* v. *Gartner* (1 B. L. R., O. C., 79). The money has rightly come into Court as the result of the execution proceedings. There is no ground upon which I can undo these. The money is therefore in Court, to be distributed according to the provisions of Act VIII of 1859. Under these provisions the debtor himself, had there been no insolvency, would have been entitled only to the surplus after payment of the attaching creditors. And clearly, unless Section 49 gives me power to alter the rights of parties to this fund, I cannot pay out to the Official Assignee more than I could have paid to the judgment-debtor himself in the case supposed. But I think, the power to suspend or set aside an execution which is given by Section 49 does not extend so far as this. I think the true view is, as I have stated in the Full Bench case of *Anund Chunder Pal* v. *Punchoo Lall Soobolah* (14 W. R., Full Bench Rulings, 33) that proceedings in execution are proceedings by which the judgment-creditor seeks to establish a right to have his money paid out of the property of the judgment-debtor. When he has obtained the order for sale, he has substantially established a charge on that property to the extent of his judgment-debt; and although the Court might, no doubt, in some circumstances, see sufficient reason to recall an order for sale, I think, that it would always be a strong step for the Court to take at that stage of the proceedings.

Generally the rights of all parties may be said to be finally determined by the order for sale, except so far as there may be priority of claims to be settled, to be paid out of the proceeds according to the enactments of the Civil Procedure Code. So that, had the Official Assignee in this case any right to step in after the order for sale, but before the sale had actually taken place, and had he done so, the burden on him necessary to be discharged before he got a stay of the proceedings under Section 49 of the Insolvent Act, is, I think, heavier and different in character from what it would have been if he had come in before the order for sale. In the case before the Full Bench, the judgments which were delivered were given in contemplation of the interference of the Official Assignee before the order for sale. None of the Judges appear to have contemplated his coming in after the order for sale had been made. In this case not only had the order for sale been made, but the sale had actually taken place before he made this application.

I think then that the right of the judgment-creditor to have the money paid out to him has been made out. No order for costs against the Official Assignee.

The 16th February 1872.

Present:

The Hon'ble G. Loch and W. Ainslie,
Judges.

Execution—Decree for Possession—Eviction of Defendant—Act VIII of 1859, s. 224—Payment of Rent.

No. 294 of 1871.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Sarun, dated the 17th June, 1871.

Thomas M. Gibbon (Decree-holder)
Appellant

versus

Sheo Purshun Misser (Judgment-debtor)
Respondent.

Mr. G. C. Paul and *Moonshee Mahomed Yusoof* for Appellant.

Baboos Mohesh Chunder Chowdhry and *Gopal Chunder Mookerjee* for Respondent.

An application in execution of a decree for possession, asking for the eviction of the defendant, is quite different from an application for possession under Section 224 Act VIII of 1859. Although the lower Court rightly refused to grant the former application,—HELD that there were no grounds for refusing the latter application, except as to that part in which the decree-holder asked for an order to issue to the ryots to pay rent to him, which order would be beyond the purview of that Section.

Loch, J.—THIS is an application for execution of a decree of the High Court, bearing date the 2nd July 1868. The terms of the decree are in these words:—

"It is ordered and decreed by the said "Court that the decree of the lower Court "be reversed, and it is declared by the said "Court that the *bekhirt* tenure set up by the "defendant is void and invalid, and that "the pretended letter confirmatory thereof, "dated the 17th Assar 1282 F. S., is ficti- "tious and of no effect, and it is further "ordered and decreed by the said Court that "the plaintiff do recover possession of the "lands and mouzahs claimed in the plaint by "receipt of the rents and profits thereof pay- "able to and derivable by him as zemindar of "the same, * * *."

An application for execution was presented on a former occasion, and the Subordinate Judge considers that the present application in its terms, and prayer is similar to the former one, and he therefore cannot admit it as it is opposed to the High Court order dated the 2nd June 1870.

On referring to that order, we find that the Court considered that the application to the High Court on the part of the decree-holder was ill-advised, there being a final decree in that case which the local Court was bound to carry into execution at the instance of the decree-holder in such lawful manner as the decree-holder required. The appellant, *viz.* the decree-holder, had not asked the lower Court to execute the decree in any Specific mode as he was bound to do, under Section 212 of the Civil Procedure Code, if he needed the assistance of the Court. If he had in any decree done so, it would appear that he had asked for the eviction of the defendant without having shown that the defendant's possession was such that under the decree plaintiff was entitled to evict him, and so far as the lower Court had refused the appellant's application on this ground the lower Court would appear to be right.

The decree-holder now comes up and asks the Subordinate Judge to give him possession under the provisions of Section 224 Act VIII of 1859, and for some reason the Subordinate Judge has considered this to be a similar application to the one made previously in which application was made for the eviction of the defendant, and he accordingly refused the application.

We think, looking at the terms of the decree, that there are no grounds for refusing the application now prayed for so far as the petitioner prays that possession may be given him as provided by Section 224 Act VIII of 1859. The Subordinate Judge's attention is called to the terms of Section 224, which provides that where the land is "in the occupation of ryots or other persons "entitled to occupy the same, the Court "shall order delivery thereof to be made by "affixing a copy of the warrant in some con- "spicuous place on the land or other im- "moveable property and proclaiming to the "occupants of the property by beat of drum "or in such other mode as may be customary, "at some convenient place or places, the "substance of the decree in regard to the "property."

We think that the Subordinate Judge ought to comply with the application for execution in the terms of this Section, taking care to make known on the spot what are the terms of the decree. The decree-holder has asked in his application that an order may issue to the ryots to pay rent to him. But as such an order is beyond the purview of this Section, of course that part of the application cannot be complied with. The

Judge will confine himself strictly to the terms of this Section in executing the decree.

The order of the lower Court is set aside, and this appeal is decreed with costs, ten gold mohurs being allowed for pleader's fees.

The 16th February 1872.

Present:

The Hon'ble G. Loch and W. Ainslie, *Judges.*

Hindoo law—Joint family property—Brother's widow—Certificate under Act XL of 1858—*Guardianship of minors.*

Case No. 826 of 1871.

Miscellaneous Appeal from an order passed by the Judge of Bhaugulpore, dated the 12*th August* 1871.

Baboo Sheonundun Pershad Singh (Objector) *Appellant,*

versus

Mussamut Ghunsham Kooeree (Petitioner) *Respondent.*

Mr. R. T. Allan and *Baboo Ram Churn Mitter* for Appellant.

No one for Respondent.

Under the Mitackshara law a brother's widow is not entitled to the management of her husband's share of a joint family property. Order giving her a certificate under Act XL of 1858 set aside, but certificate of guardianship allowed to stand.

Lock, J.—THIS is a case of a joint Hindoo family governed by the Mitackshara law. It is clear under that law, that the widow of the brother is not entitled to the management of a portion of the property, equal to her husband's share. The order of the Judge giving her a certificate under Act XL of 1858 to manage the estate is set aside, but the certificate appointing her guardian to the persons of the children will stand.

We allow no costs.

The 16th February 1871.

Present:

The Hon'ble A. G. Macpherson and F. A. Glover, *Judges.*

Inheritance—Limitation—Reversioners or next heirs.

Case No. 846 of 1871.

Special Appeal from a decision passed by the Additional Judge of Tirhoot, dated the 27*th April* 1871, *affirming a decision of the Moonsiff of Seetamurhee, dated the* 23*rd January* 1871.

Greedharee Singh and others (Plaintiffs) *Appellants,*

versus

Mussamut Indro Kooer and others (Defendants) *Respondents.*

Baboos Kalee Prosunno Dutt and *Hem Chunder Banerjee* for Appellants,

Mr. C. Gregory and *Baboos Mohesh Chunder Chowdry* and *Nil Madhub Sein* for Respondents.

Limitation reckons against the reversioners or next heirs of a deceased person only from the death of the widow or the immediate heirs of the deceased.

Macpherson, J.—IN this case the plaintiffs sued to recover certain property which had belonged to one Lall Dutt who died in 1252, they claiming as his grand nephews. They came into Court stating that Lall Dutt had a son, Mulkee Singh, who died in his father's life-time, but left a widow Indro Kooer; that the plaintiffs are the heirs of Lall Dutt: and that Indro Kooer by their permission held the property in lieu of maintenance. They now sue to recover possession on the ground that she is making away with the property.

Indro Kooer in her written statement stated, amongst other things, that the family was not a joint family; that is to say, that Lall Dutt was not joint in estate with the plaintiffs or those whom the plaintiffs represent; that Lall Dutt died leaving a widow, and that she (Indro Kooer) had with the consent of that widow taken Lall Dutt's estate by right of inheritance, and had her name registered with the consent of Lall Dutt's widow in the Collector's books.

The Court of first instance (the Moonsiff) held that the plaintiffs had failed to prove that the family was a joint family, and also that they failed to prove that the defendant Indro Kooer had got possession of Lall Dutt's property by their permission in lieu of maintenance; and as Indro Kooer had admittedly been in possession for more than 12 years the Moonsiff considered the suit barred by limitation and dismissed it on the ground that so long as Indro Kooer lived, the plaintiffs could not recover.

On appeal to the Judge, the question of limitation was again raised, and it was argued that the family being separate, and Lall Dutt having left a widow, Lall Dutt's widow, Ranee Chowdrain, would in the first instance be his heiress, and Indro Kooer could not take at all, and the right of the plaintiffs to sue would not arise until the death of Ranee Chowdrain.

The Judge disposed of the point by saying that that line of argument had not been raised by the plaint, that it was contrary to the case made by the plaint, and that there was no evidence given of the fact of the widow's death: and the Judge confirmed the judgment of the Moonsiff.

It appears to us that the case ought to be remanded and re-tried. It is true that in the case as originally started by the plaintiffs, they relied on their right as members of a joint family of which Lall Dutt was also a member; and they more particularly based their claim on the fact of Indro Kooer's being in possession by their permission in lieu of maintenance. But Indro Kooer herself in her written statement showed that Lall Dutt left a widow, Ranee Chowdhrain, so that by no possibility could she (Indro Kooer) be the heiress of Lall Dutt; and that being so, it appears to us that when the Moonsiff found that the family was not a joint family, it was necessary for him to enquire into the question as to who was the actual heir of Lall Dutt when he died, before he could say whether the plaintiff's claim was barred or not. On the facts stated for the defence, the plaintiffs are *primâ facie* the next heirs on the death of Lall Dutt's widow.

It appears to us that the raising and deciding of the issue as to who was really Lall Dutt's heir became necessary from the cases respectively put forward by the parties, and that it was impossible to do justice between them without deciding it.

If the plaintiffs are to be held strictly and literally to the terms of their plaint, no doubt the question as to who was the heir of Lall Dutt (if the plaintiffs were not his immediate heirs) would not arise. But when the plaint is read along with the written statement and the defence set up therein, the issue does arise distinctly.

As this question never occurred to the mind of the Moonsiff, and no issue was raised on it, we do not see that the plaintiff should be thrown over now because there is no formal proof of the date of the death of Ranee Chowdhrain, and we think that they ought now to be allowed an opportunity to give evidence on this point.

The case must be remanded in order that it may be re-tried. The Courts below will decide distinctly who was the heir of Lall Dutt; and, if Ranee Chowdhrain is found to have been his heiress, then the Courts will decide on what date she died, and the fresh evidence to be taken must have reference to this point only. If the first Court finds that the plaintiff's suit is not barred by limitation, it must go on and try the other questions that arise in the case and decide it upon the merits.

Each party will pay his own costs of this appeal.

The 16th February 1872.

Present :

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge.*

Certificate to Collect Debts of Deceased person —Particular Debts—Joinder.

Case No. 287 of 1871.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Twenty-four Pergunnahs, dated the 31st July 1871.

Pran Khan (Petitioner) *Appellant,*

Baboo Bhoobun Chunder Dutt for Appellant.

A certificate under Act XXVII of 1860 cannot be limited to particular debts.

It is no ground for appeal against an order granting such a certificate that the Judge joined with the appellant another person who had an interest in the debts to be collected.

Couch, C.J.—THE appellant has no ground for preferring this appeal. He asked for a certificate under the Act, and that is a certificate to collect the debts due to the deceased. The certificate cannot be limited to particular debts. The Judge, in granting the certificate to collect the debts due to the deceased, has acted rightly in joining with the appellant the other person who has an interest in those debts. If there is anything not due to the deceased and which may have become due to the appellant after the death of the deceased, he does not require a certificate for that.

The appeal must be dismissed.

The 19th February 1872.

Present :

The Hon'ble G. Loch and W. Ainslie, *Judges.*

Mahomedan Law—Sale by Guardian of Minor —Necessity—Maintenance of Litigation.

Case No. 144 of 1869.

Regular Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 18th March 1869.

Mussamut Syedun (Defendant) *Appellant*,

versus

Synd Velayet Ali Khan (Plaintiff) *Respondent*.

Mr. R. T. Allan and *Baboo Unnoda Pershad Banerjee* for Appellant.

Messrs. C. Piffard and *R. E. Twidale* and *Moonshee Mahomed Yusoof* for Respondent.

The question of legal necessity does not necessarily arise in cases of sale under the Mahomedan law, though it may properly be an element for consideration when the conduct of the guardian is called in question. The Mahomedan law looks to the benefit of the minor, and permits the guardian to dispose of moveable property if it be for the benefit of the minor.

In this case a sale made to carry on important litigation was held *bonâ fide* and for the benefit of the minor, the decision in Grose's case (12 W. R., Original Jurisdiction, p. 13) not being applicable.

Loch, J.—This suit was instituted by the plaintiff to have his right declared to be registered as a co-decree-holder in a decree obtained by Shah Mahomed Bassein, husband of the defendant, against Maharanee Wuzeerunissa on 10th May 1852, on the allegation that the defendant Syedun, the widow of Mahomed Bassein, had, on behalf of herself and as guardian of her minor son, sold a moiety of the said decree to him under a deed of sale of 5th August 1862, to enable her to carry on certain litigation for the benefit of herself and her minor son.

Both in the Lower Court and in this Court, it was found that the defendant Syedun had executed the deed of sale, but a contention was raised that Syedun had no authority to sell property belonging to the minor, unless for some purpose recognized as necessary by the Mahomedan law; and on 7th February 1870, this Court remanded the case for the trial of the following two issues:—1st, whether under Mahomedan law any necessity existed at the time of sale which entitled defendant as guardian of the minor to sell the property? and, 2nd, if such necessity existed, did the plaintiff satisfy himself as to the existence of such necessity, and was the sale made in good faith and for a fair consideration?

The Subordinate Judge decided the first issue in favor of the plaintiff. He held that the sale was for the benefit of the minor, and that there also existed a necessity, *viz.* to carry on important litigation which entitled the guardian to sell; but on the second issue, he held that the bargain was an unconscionable one; and quoting the case of Grose, reported in XII Weekly Reporter, (Original Jurisdiction), page 13, he concluded that plaintiff was entitled to recover only the sum originally advanced by him, with interest at 12 per cent., from the date of the *kobalah* to the date when the money (Rs. 24,000) was attached by him.

Both parties object to the finding come to by the Lower Court, and the case has now come before us for final disposal.

The question of legal necessity does not necessarily arise in cases of sale under the Mahomedan law, though it might properly be an element for consideration when the conduct of a guardian is called in question. The Mahomedan law looks to the benefit of the minors, and permits the guardian to dispose of moveable property if it be for the benefit of the minor. Now it would be difficult to say that the sale in this case was not for the benefit of the minors. The decree of 1852 could not apparently be executed for want of means on the part of the defendant Syedun, for I think little credit can be given to the statements of the witnesses examined under the remand order as to the extent of her private means. Then there was other litigation to be gone into, which, if successful, would be for the benefit of the minor. Time was running against the execution of the decree, and it was clearly an object to realize, if possible, some part of the mesne profits awarded under the decree; and if she had not the means of executing it herself, her only method was to have recourse to some one who would advance money on the security or part purchase of that decree, and it cannot, I think, be fairly said that she acted otherwise than in good faith and for the benefit of the minor, though now she tries to repudiate her own acts. It has been found that she did execute the deed through her father who acted under her instructions, and that she received the price agreed on. I concur with the Subordinate Judge in his finding on the first issue.

On the question of price, I differ from the Lower Court. No doubt, the transaction is a speculation on the plaintiff's part. He has the prospect of making a good thing if he can work the decree effectually, but he may be a loser. We have not been shown that anything had been realized under the decree when the purchase was made, or that there is a probability that the amount now estimated as due under the decree is likely to be recovered from the debtor. The sum mentioned in the plaint is merely an estimate of what is due, *viz.* the principal swollen with interest to date. It does not follow that the whole or any part of it will be realized; and when the plaintiff purchased in 1862, there appears to have been little prospect of executing the decree at all. As far as the plaintiff is concerned, he appears to have acted in good faith; and considering the risks he ran of getting nothing, the price he gave does not appear unconscionably small. I do not think that the decision in Grose's case is applicable. I would declare the plaintiff entitled to have his name registered as a co-decree-holder to the extent of the half of the decree of 1852 as prayed for by him, and would dismiss the appeal with costs.

Ainslie, J.—Taking up this case from the point at which it was left by the remand order of the 7th February 1870, I am disposed to concur in the findings of my learned colleague.

The decree of 1852, it is true, was in force in 1862, and it is shown by defendant's own petition of 15th September 1862 that she then valued her interest in it at little less than a lakh of rupees, but this valuation was doubtless, as in all similar claims, to mesne profits left to be calculated in execution of decree an extravagant one. On the other hand, it was uncertain then and for four years after, whether the mesne profits decreed would not have to be taken into account in calculating whether anything was due under the mortgage. The distinction between *wassilat* decreed as damages on eviction and usufruct, which was pointed out in the Full Bench decision* given in the suits brought by Maharanee Wuzeerunissa and Rajah Joy Mungul Singh, cannot be supposed to have been within the contemplation of the parties to the deed of 1862; and although it turned out that no fresh suit on the part of defendant was necessary to enable her to carry out the decree of 1852, the contrary was certainly supposed to be the case at the time. The case cited by the Subordinate Judge from XII Moore, 308 †, has no bearing on this case, or rather I should say that the bearing of it has been inverted by the mode of citation. The Subordinate Judge says, the facts upon which the remarks of their Lordships, quoted by him, are founded are exactly applicable to this suit; but if he had continued his quotation a few lines further, he would have seen that this is not so. As far as he has gone, the facts are parallel, but he stops short at the point at which the divergence occurs. In that case the purchaser retained his money till the risk was over, and so, as remarked by their Lordships, the contract had become incapable of being performed according to the true meaning and intent of the contracting parties. In this case, it has been found that the purchaser at once paid down the entire amount of the consideration agreed upon, and took his share of the risk as he contracted to do.

At this stage of the case, we are, I understand, dealing only with the finding of the Subordinate Judge on the issues laid down by this Court in the order of 7th February 1870, and with the objections of the respondents thereto. Any other points that did or might arise in this case have been disposed of or dropped.

I concur in dismissing this appeal with costs.

The 19th February 1872.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Contract—Want of Privity—Carriers—Two Companies—Loss—Remedy.

Reference to the High Court by the Officiating Judge of the Small Cause Court of the Suburbs of Calcutta, including Howrah, dated the 12th September 1871.

Gujendro Mohun Shaha, *Plaintiff,*

versus

Eastern Bengal Railway Company, *Defendant.*

Baboo Tarinee Kant Bhuttacharjee for Plaintiff.

Messrs. Berners, Sanderson, and Upton for Defendants.

Plaintiff delivered certain jute to the India General Steam Navigation Company at Serajgunge, for delivery at the Eastern Bengal Railway Company's station at Sealdah, and it was arranged by the bill of lading (the contract in the case) that the freight from Serajgunge to Sealdah should be payable to the Eastern Bengal Railway Company at Sealdah, and it was so paid upon the delivery of the goods. A portion of the jute was not delivered, and this suit having been brought against the Eastern Bengal Railway Company for the value thereof, the Small Cause Court Judge was disposed to dismiss the suit without further enquiry, on the ground of want of privity between plaintiff and defendant. HELD that it was premature for the Judge to say that the suit could not lie against defendant without proceeding with the further investigation of the case, and that although plaintiff might have a remedy against the Indian General Steam Navigation Company, it by no means followed that he had none against the defendant Company also.

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* VI W. R., 240.

† XII W. R., (P. C.), 6.

Case.—In this case the plaintiff delivered certain goods to the servants of the India General Steam Navigation Company at Serajgunge, for delivery at the Sealdah Railway station. Some of the goods only came to hand, and were delivered to the plaintiff, and he now sues the Eastern Bengal Railway Company for the value of the remainder. The contract to deliver at Sealdah was not made with the Eastern Bengal Railway Company, and the defendant consequently pleads want of privity, and that the proper party to be sued is the India General Steam Navigation Company. I have dismissed the case contingent on the opinion of the High Court on the question whether the defendant Company or the India General Steam Navigation Company is the proper party to be made defendant. It appears that the India General Steam Navigation Company's steamers ply, or used to ply, from Serajgunge to Kooshtea, and there make over jute and other goods to the Eastern Bengal Railway Company for delivery at Sealdah. The freight for the entire journey from Serajgunge to Sealdah being payable to the Eastern Bengal Railway Company at the latter station, the agreement between the two Companies was that they were to divide the freight equally between them; but in this particular instance at all events, the Railway Company was to get the whole of the freight in part payment of certain outstanding debts due to them by the other Company. In this case, the plaintiff paid the whole of the freight to the Railway Company's servants at Sealdah, and it is contended for the plaintiff that defendants, by accepting this freight, took over the liability upon themselves. The bill of lading contains a direction that the freight should be payable to the Agent Eastern Bengal Railway at Sealdah; the Railway Company would therefore be enabled to sue plaintiff for the freight supposing he had refused or neglected to pay it, and it is argued that this right carries with it a corresponding burthen which prevents defendant from setting up a plea of non-liability, supposing that the goods had been lost while in their custody.

I have not taken evidence on the question as to whether the goods were lost from the custody of the steamer or the Railway Company, as I am of opinion that defendants are not liable in either case, as well on the general grounds of want of privity between them and plaintiff, and also as I observe that the point in question has been decided in England conformably with the view of the case. Addison on Contracts, 5th Edition, page 499. "When a common carrier takes into his care a parcel directed to a particular place, and does not, by positive agreement, limit his responsibility to a part only of the distance, that is, *primâ facie* evidence of an undertaking on his part to carry the parcel to the place to which it is directed, although the place may be beyond the limits within which he ordinarily professes to carry on his trade. His responsibility, therefore, continues to the door of the address to which the goods are destined, and he cannot release himself from such responsibility by transferring the goods to another carrier, or sending them by another conveyance, and it makes no difference whether part of the carriage is by land, and part by water, or whether part of the distance is by railway, part by water, and part by stage coach. If a Railway Company accepts goods for conveyance to a particular destination beyond the limits of its own line of railroad, and the goods are lost whilst in the hands of another Railway Company, to whom they have been delivered to be forwarded on their journey, the first Railway Company is responsible for the loss, as being the party contracting with the consignor or consignee for the conveyance of them, and a proviso in the contract exonerating the Company from all liability in respect of loss of, or damage to, the goods occurring beyond the limits of its own line of Railway, from the negligence of other Companies to whom the goods have been delivered to be forwarded, is repugnant and void."

Inasmuch, however, as the question is one which is not unlikely to arise again in this Court, and I am not sure how far the argument that acceptance of freight involves liability to deliver safely may be valid, I have referred the case for the opinion of the High Court.

The Judgment of the High Court was delivered as follows by—

Markby, J.—The facts of this case, so far as they appear before us at present, are that 242 drums of jute were delivered by the plaintiff to the India General Steam Navigation Company at Serajgunge, to be delivered at the Eastern Bengal Railway Company's station at Calcutta, and by a bill of lading which contains the contract, it was arranged that the freight for the entire journey from Serajgunge to Sealdah should be payable, not to the India

General Steam Navigation Company, but to the Eastern Bengal Railway Company upon delivery of the goods. The freight was accordingly paid to the Eastern Bengal Railway Company, and accepted by them, and it is stated before us that there existed an agreement between the India General Steam Navigation Company and the Eastern Bengal Railway Company, that each Company should be entitled to half the freight; but under some special arrangement the whole freight in this case was appropriated by the Railway Company. Somewhere about 40 drums were not delivered and this suit to recover their value was accordingly brought. So much of the facts as are above stated having been ascertained by the Judge of the Small Cause Courts, he thinks he ought to dismiss the suit, without further enquiry upon the ground that there was no privity of contract between the plaintiff and the Eastern Bengal Railway Company, and that the party liable to the plaintiff, if any one at all, was the India General Steam Navigation Company.

We think the Small Cause Court Judge is wrong in refusing to proceed further in this case upon that ground, because, although it is true that the original contract was made with the India General Steam Navigation Company, we think it quite possible that it may turn out upon further investigation in the case that the Eastern Bengal Railway Company are liable. It was a contract which, in its very nature, could not be performed entirely by the India General Steam Navigation Company, and it must have been in the contemplation of the parties at the time that the contract was made that it should be carried out in part by the Eastern Bengal Railway Company and in part by the India General Steam Navigation Company jointly. It may possibly be that the India General Steam Navigation Company could not compel the Eastern Bengal Railway Company to receive the goods from them and carry them to their destination; but be that as it may, the Eastern Bengal Railway Company chose to do so, and it has been found as a fact that the Eastern Bengal Railway Company accepted the whole of the freight for the conveyance of the goods, not only by the India General Steam Navigation Company, but by themselves, and that they delivered to the plaintiff the major portion of the goods, but not the whole. We therefore think that it was premature for the Small Cause Court Judge to say that the suit could not be against the Eastern Bengal Railway Company on the ground of want of privity. We have thought it better to put our judgment in this guarded manner, because circumstances may arise, and possibly evidence may be given, which may change the apparent liability of the parties. All that we need now say is that the Small Cause Court Judge ought to try the case, and take evidence of both parties on the point of liability.

We may observe that the case from which the proposition of law has been quoted by the Small Cause Court Judge in Addison on Contracts would perhaps go to show that the India General Steam Navigation Company might have been made liable whether the goods had been lost on river or on land. That may well be so, and yet the Eastern Bengal Railway Company may be liable for any loss which may occur to the plaintiff when the goods were in their possession. It does not follow that, because the plaintiff might have a remedy against the India General Steam Navigation Company, that he may not have a remedy in this case against the Eastern Bengal Railway Company.

The case must be sent back to the Small Cause Court Judge to take the evidence which the parties may offer and to determine the case accordingly. The costs will be the costs in the suit to be disposed of by the Small Cause Court Judge when he has taken all the evidence, and decides the suit.

The 20th February 1872.

Present:

The Hon'ble Louis S. Jackson and F. A. Glover, *Judges.*

Moostajiree rights—Possession—Rent—Intervenor.

Case No. 774 of 1871.

Special appeal from a decision passed by the Subordinate Judge of Shahabad, dated the 27th February 1871, reversing a decision of the Moonsiff of that district, dated the 30th July 1870.

Lalla Ishur Dutt (Plaintiff) *Appellant,*

versus

Bhaka Chowdhry and others (Defendant) *Respondents.*

Mr. H. E. Mendies for Appellant.

Mr. C. Gregory for Respondents.

Plaintiff as purchaser of certain *Moostajiree* rights set up a claim to *possession* e. i. he claimed the right to collect rent from the ryots. Defendant sought to intercept that right by setting up a lease from the plaintiff under which he, defendant, was to collect the rents from the ryots and pay a stipulated sum to plaintiff. That lease having been declared to be unproved and in fact fabricated, nothing remained but to declare plaintiff entitled to the right he claimed.

Jackson, J.—It appears to me that the decision of the Lower Appellate Court in this case is erroneous.

The plaintiff purchased certain *moostajiree* rights over the lands specified, which rights formerly belonged to the Rajah of Buxar. After his purchase, he sued the ryot for rent in the Revenue Court. Thereupon the present defendant intervened, and alleged that he, and not the plaintiff or his predecessor, was in the receipt and enjoyment of the rents. That case was decided in favor of the intervenor, and the plaintiff now comes into Court and sues to have it declared that the intervenor's title is invalid, and that he (plaintiff) ought to be allowed to collect the rents of the land.

Both the Courts below have concurrently found that the pottah set up by the defendant was not executed by the previous owner, but was a false and fabricated document. But the Subordinate Judge having found this, went on to observe that the defendant having occupied the land under the previous owner, and also under the plaintiff, for a great many years, had acquired a right of occupancy, and was "entitled to retain possession of the land so long as he paid the usual rent under Section 20, or a fair and equitable rent under Section 5 of the Act as the case may be;" and he therefore reversed the decision of the first Court, and dismissed the plaintiff's suit.

In this case, as in so many others, much discussion has been occasioned by the use of the word "possession." The possession which the plaintiff here claims is simply the right to collect rent from the ryots. The defendant seeks to intercept that right as it were by setting up a lease from the plaintiff under which he, defendant, is to collect the rents from the ryots, and pay a certain stipulated sum to the plaintiff. That lease being declared to be unproved, and in fact fabricated, it appears to me that nothing remains but to declare the plaintiff entitled to that which he asks for.

The respondent requests us to abstain from passing final judgment, and to remit the case to the Lower Appellate Court upon the ground that its decision as to the defendant's pottah has been arrived at on inadequate and improper grounds. But there is no reason for any such contention. Both the Lower Courts have found as a fact that the pottah was not genuine, and that it was fabricated.

The appeal must be decreed, the decision of the Lower Appellate Court must be reversed, and that of the first Court restored and affirmed with all costs.

Glover, J.—I concur.

The 20th February 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble Dwarkanath Mitter, *Judge.*

Appeal—Act XXI of 1863 *s.* 27—*Value.*

Case No. 184 of 1871.

Regular Appeal from a decision passed by the Recorder of Moulmein, dated the 29th May 1871.

Mootoo (Plaintiff) *Appellant,*

versus

Verapah Chetty (Defendant) *Respondent.*

Mr. Ingram for Appellant.

Mr. Fergusson for Respondent.

A party cannot obtain a right of appeal to the High Court under Section 27 Act XXI of 1868 by valuing his appeal at Rs. 3,100 when his own statement shows that the value is only Rs. 1,590 and the difference is made up by damages which he does not claim in the suit.

Couch, C. J.—We think no appeal lies in this case. Under Section 27 Act XXI of 1868, the value of the suit must exceed 3,000 rupees before an appeal can lie. The suit is stated to be a suit to establish the plaintiff's right to a quantity of timber, and at the conclusion of the plaint the plaintiff says that he now brings a regular suit to establish his right to the said property. It was brought under Section 246 Act VIII of 1859. There is no claim for damages, and he says that the timber was valued at 1,590 rupees. That therefore is the amount or value, according to his own statement, of this suit, and he cannot, by valuing it at 3,100 rupees, when his own statement shows that the value is only 1,590 rupees, and the difference is made up by damages which he does not claim in the suit, obtain a right of appeal to this Court. We reject the appeal with costs.

The 21st Feb. 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble A. G. Macpherson, *Judge.*

Contract—Warranty—Part Performance—Acceptance—Price.

Appeal from the judgment of the Hon'ble W. Markby exercising the Ordinary Original Civil Jurisdiction of the High Court.

D. H. Macfarlane and others,

versus

R. Carr and others.

Defendants agreed to purchase from plaintiffs 2,000 maunds of Indigo seed "guaranteed growth of the season 1870-71." Defendant's agent took delivery of 865 maunds after he had full opportunity of examining them. Held that the defendants must be considered to have accepted the 865 maunds as being in accordance with the contract, although they were not really so; and that, though the acceptance was such as to conclude the defendants from objecting that that portion did not comply with the warranty in the contract, yet the plaintiffs, not having delivered the whole quantity contracted for, could not recover for the 865 maunds according to the rate mentioned in the contract, but as upon a new contract according to their value at the time when they were accepted.

This was an appeal from the decision of Mr. Justice Markby, by Messrs. Begg, Dunlop and Co., the defendants in the Court below. The original suit was brought to recover the sum of Rs. 21,418-12, under the following circumstances: On the 17th of November 1870, the defendants, the present appellants, contracted to purchase from the plaintiffs "2,000 maunds of fresh, clean, and good up-country indigo seed, guaranteed growth of the season 1870-71, at Rs. 11 per maund, to be delivered at Hadjeepore in all February then next, payment to be made by an approved draft or cheque at 30 days' date from delivery." In pursuance of this contract the plaintiffs delivered at Hadjeepore, on or about the 4th of February 1871, 865 maunds of indigo seed which they alleged to be of the quality described in the contract. The defendants took delivery of that portion of the seed. The plaintiffs stated that, in further pursuance of the contract, they tendered to the defendants at Hadjeepore, during the same month, the remainder of the indigo seed they had contracted to supply; but the defendants refused to receive the same as not being the quality of seed they had agreed to accept. In consequence of such refusal, the plaintiffs alleged that they suffered a loss, and in this action sought to recover the sum of Rs. 9,515, the contract price of the 865 maunds of seed; the sum of Rs. 11,385, the contract price of the 1,035 maunds of seed, a portion of the seed refused by the defendants; and the sum of Rs. 318-12, being the difference between the contract price and the price realized by the plaintiffs, on re-sale of 100 maunds, the residue of the 2,000 maunds contracted to be sold; and the sum of Rs. 200 being in respect of the charges incurred by the plaintiffs in consequence of the defendants' breach of contract.

The rest of the facts of the case appear from the following judgment, which was delivered in the Court below on the 19th of December 1871 by—

Markby, J.—In this case the plaintiffs sued to recover the price of 865 maunds of indigo seed delivered to the defendants in part performance of a contract for the sale of 2,000 maunds, and also to recover damages for the non-acceptance of 1,135 maunds, the residue of the 2,000. The contract was for 2,000 maunds of fresh, clean, and good up-country indigo seed, guaranteed growth of season 1870-71, at Rs. 11 per maund, to be delivered at Hadjeepore.

The issues were settled as follows:—

1st. Whether the seed which the plaintiffs were ready to deliver was fresh, clean, and good up-country indigo seed of the growth of the season 1870-71, in accordance with the contract?

2nd. Whether the 865 maunds of indigo seed delivered by the plaintiffs to defendants was fresh, clean, and good up-country indigo seed of the growth of the season 1870-71, in accordance with the contract, and if not so, whether the defendants are entitled to any and what reduction in the price thereof?

It was agreed that the second issue should be understood to raise the question of waiver by the defendants of any objection to the seed by reason of delay, and also that the form of the issue as to the damages for non-acceptance should be the subject of further discussion if it should turn out to be necessary. With regard to so much of the suit as seeks for damages for non-acceptance, the plaintiffs must show that they were ready to deliver seed in accordance with the contract. Now quite independently of the question whether the 1135 maunds which were tendered and refused were fresh, clean, and good up-country indigo seed, it must also be shown that it was the growth of season 1870-71.

It has been, I think, sufficiently established by the evidence that seed which shall be wholly of the growth of the last past season is not generally procurable by persons who go to purchase it from the native dealers who supply the market, the seed of the last season being almost invariably mixed to some extent with older seed before it is brought to market by the native dealers. I also think that it is shown to be the practice of indigo planters to accept seed so mixed, if of an average quality, without objection under such contract as the present, which form of contracts, though not universal, is exceedingly common. Looking to this evidence and to the extreme improbability that buyers would seek to purchase, or sellers would undertake to deliver, an article which it was almost impossible to procure, I should be strongly inclined to think that the contract might be read with some such modification of the strict letter of it as was suggested by the Advocate-General, namely, that the plaintiffs guaranteed to deliver seed of the season 1870-71, as far as it was reasonably possible to do so; that would be, as it appears to me, a fair interpretation of this contract. But, then arises the question, have the plaintiffs proved that these 1185 maunds were of the growth of the season 1870-71, as far as it was reasonably possible to procure such seed? I think that, on the face of Mr. Howard's own very candid admission, I am unable to infer this, Mr. Howard having said in cross-examination that his firm had bought the best seed they could get of that which came into the market as the crop of 1870-71, and that they passed seed containing some of the crop of 1869-70, because they could get no better. He said on re-examination that they also had occasionally bought seed of the previous year, and that they did so on one or two occasions in the past year; that they made use of the old seed so bought, but whether any was in this contract he could not tell; that their practice was to make the seed up to a certain good standard sample for the season, using the old seed if in a good state of preservation. This evidence came out, to me at least, somewhat unexpectedly, and I subsequently asked Mr. Howard if he was desirous of offering any explanation of a practice which appeared to me to be in contravention of his contract, and he then said that it happened that the crop of 1869-70 was a very fine quality, whilst the crop of 1870-71, on the contrary, suffered from rain towards the end of the season, and was inferior in quality to the seed of 1869-70; so that it did not follow that a mixture of the previous year's seed, if of a good quality and in good preservation, made the seed bad seed, and that all planters accepted such seed as a good fulfilment of such contracts as this. As I have said, I do not think it possible, in the face of these statements, to infer that the seed which the plaintiffs were ready to deliver was seed of the season 1870-71, as far as it was reasonably possible to procure it. It may have been seed as good or better than the seed of that season, and it may also have been seed which planters generally would be willing to accept; but it is not shown to have been such seed as according to the plaintiffs' own interpretation of the contract they had contracted to deliver, and there is no evidence or even suggestion that under such a contract as this the seller is by custom at liberty to take seeds of two crops and by admixture to bring the sample up to an average quality; nor do I think it would be possible to allow a custom to prevail which is so directly at variance with the express terms of the contract. The result is that I determine the first issue in favor of the defendants, and consequently dismiss so much of the suit as claims damages for non-acceptance.

With regard to the second issue, so far as it raises the question whether the seed delivered was in accordance with the contract, I must also find it in favor of the defendants for the reasons already stated; but I have further to consider whether the defendants are entitled to any reduction in respect of this portion of the seed. Now, as in all such cases, the evidence is conflicting as to the quality of the seed; but I think there is no reason to suppose that the seed in question, though not exactly seed of that kind which the defendants had under this contract a right to demand, was inferior in quality to fair average seed of the season 1870-1871. I accept the evidence produced on the part of the plaintiffs to that effect. From the circumstances under which Mr. Smith gave his opinion upon this seed, it is peculiarly reliable, and from the price which the seed, notwithstanding its rejection, subsequently fetched, that is to say very nearly the full market rate, I think I may fairly infer that it was fair average seed of a value equivalent to that purchasable at the current market rate. A question would, however, arise, whether the plaintiffs having failed to perform their special contract to deliver seed of a particular kind, the defendants are bound to pay for the seed actually delivered and accepted, at the rate current in November upon which the special contract was made, or at the rates current in February when the seed was delivered? But this question is in my opinion settled by the conduct of the defendants in accepting the seed. The 865 maunds of seed were delivered early in February and were accepted about the 21st or 22nd. No objection to this seed was communicated to the plaintiffs until the 13th of March—after the dispute had arisen as to the seed subsequently tendered, and refused. It is said that this portion of the seed was accepted under a mistake; and the defendants in their letter of the 27th of March, assert that the mistake arose from the seed not having been examined. But Mr. Wilson says he took samples of the 865 maunds in February. The defendants' agents at Cawnpore had seen samples of this seed and communicated to the defendants their opinion thereon. The attention, therefore, of the defendants was then called to the quality of the seed, and I think they should have at once objected to it, if they had intended to do so. By accepting the seed, by keeping it in their godowns for nearly three weeks, and by remaining silent as to any objection to this portion of the delivery, they waived the objection that it was not in accordance with the guarantee, and I think, therefore, that the delivery of the 865 maunds was, by the conduct of the parties, *pro tanto* a good delivery under the contract, and must be paid for accordingly.

I have considered the question of costs, and I think the plaintiffs are entitled to them, for, as my decision shows, the defendants' objection to the seed was, in my opinion, a technical rather than a substantial one, and I believe the plaintiffs' conduct throughout to have been perfectly *bonâ fide.* The plaintiffs will therefore have a decree for Rs. 9,515 with costs on scale No. 2.

The defendants appealed against so much of the above judgment as ordered them to pay for 865 maunds of indigo seed at Rs. 11 per maund, and also to pay the plaintiffs their costs of the suit, on the following grounds:—

1. That the learned Judge having found that the plaintiffs had contracted to deliver to the defendants "fresh, clean, and good up-country indigo seed of the growth of the season 1870-71," and that the plaintiffs had delivered 865 maunds of indigo seed which did not correspond with the said description, erroneously held that the defendants were bound to pay for the said 865 maunds at the contract rate of Rs. 11 per maund.

2. That the learned Judge ought to have held that the defendants were not liable to pay more for the said 865 maunds than the market value of the same at the time of delivery which had been tendered by the defendants to the plaintiffs before action brought.

3. That the learned Judge was in error in finding that the said indigo seed, though not corresponding with the description in the contract contained was not substantially of less value than if it had corresponded with the said description.

4. That the learned Judge was in error in holding that the defendants had waived or forfeited their right to object to the said 865 maunds as not corresponding with the contract description.

5. That the learned Judge ought to have found that the defendant had before suit brought tendered to the plaintiffs the full sum that they were entitled to, whereas he did not so find.

6. That the learned Judge ordered the defendants to pay the plaintiffs costs of this suit whereas he ought not so to have ordered.

7. That the learned Judge did not order the plaintiffs to pay the defendants their costs of this suit whereas he ought so to have ordered.

8. That the judgment and decree of the learned Judge in this suit are in other respects erroneous, and the decree ought to be varied and amended.

Mr. Woodroffe and *Mr. Evans* for the Appellants.

The Advocate General and *Mr. Marindin* for the Respondents.

Mr. Woodroffe (after referring to the evidence) contended that, with regard to the question of time and the course of conduct to be pursued by the parties, the law was nowhere more clearly laid down than in *Poulton* v. *Lattimore* (9 B. & C. 259), which was a leading case on this subject. That was a case where, by a contract for the sale of cinqfoin seed, the vendor warranted it to be good, new, growing seed; but soon after the sale, the buyer was told by a competent judge that the seed did not correspond with the warranty, and yet, instead of giving notice to the vendor that it was defective in quality, he proceeded to sow part and to sell the residue. It was then contended that the buyer knew the seed to be bad before it was sown, and that he ought then to have returned the seed, or to have given notice to the seller of its defective quality. But Bayley, J. held that the vendor was not bound to return the seed without using it; that he had not precluded himself either from bringing an action for breach of the warranty, or from insisting on such breach in an action for the price of value of the seed in order to show that the seed was of less value than the seller represented it to be. In the present case we had adopted the third of those expedients. Having regard to the circumstances in which the seed was given and the time at which it was delivered, we made them a fair offer. We might have gone farther and thrown the seed back into their hands. Instead of that, we offered them the market price of good seed of the season at the time when it was delivered to us, more in fact than the market price of such seed actually was, and therefore we were entitled, as Littledale, J. laid down, to prove the breach of the warranty either in diminution of damages as we sought to do, or in answer to the action, if the goods were of no value.

Couch, C.J.—In *Bannerman* v. *White* (31 L. J., C. P. 28) Erle, C. J. is reported to have said (p. 30) with reference to this case of *Poulton* v. *Lattimore*, "I never could understand that case except on the ground that defendant satisfied the jury that the seed was of no value at all."

Mr. Woodroffe thought that the view of the case which he had taken would appear from *Mondel* v. *Steel* (8 M. and W. 858). He would refer to the judgment of Parke, B., at p. 870, where that learned Judge observed:—"Formerly it was the practice, where an action was brought for an agreed price of specific chattel sold with a warranty, or of work which was to be performed according to contract, to allow the plaintiff to recover the stipulated sum leaving the defendant to a cross-action for breach of the warranty or contract; in which action as well the difference between the price contracted for and the real value of the articles or of the work done, as any consequential damage might have been recovered; and this course was simple and consistent." After showing how, by subsequent cases a different practice, attended with much practical convenience, began to prevail and had been since generally followed, according to which the defendant was now permitted to show that the chattel by reason of the non-compliance with the warranty, or the work in consequence of the non-performance of the contract, was diminished in value, Parke, B. went on to say:—"It is not so easy to reconcile these deviations from the ancient practice with principle in those particular cases above-mentioned as it is in those where an executory contract, such as this, is made for a chattel to be manufactured in a particular manner, or goods to be delivered according to sample—*Germaine* v. *Burton* (3 Stark, 32); where the party may refuse to receive, or may return in a reasonable time, if the article is not such as bargained for; for in those cases the acceptance or non-return affords evidence of a new contract on a *quantum valebat*." As to *Bannerman* v. *White*, there was nothing in that case in the nature of an express guarantee by the parties. The distinction between the two cases appeared from the concluding part of Mr. Justice Erle's judgment, which was as follows:—"The intention of the parties governs in the making and in the construction of all contracts. If the parties so intend, the sale may be absolute with a warranty superadded, or the sale may be conditional to be null if the warranty is broken." *Street* v. *Blay* (2 B. and Ad. 456) and *Okell* v. *Smith* (1 Starkie N. P. 107) went on this principle, that the buyer was not to do with an article anything by which the seller would be damnified. The Judges said that the keeping of an article for a length of time raised the presumption that it was according to the quality contracted for. But in this case that presumption did not arise, for the Court below had gone on the principle that the seed was not according to the contract. Now, according to the cases cited, the law on the subject stood clearly thus: If according to the contract, pay for it; if not, either return it at once, or keep it only for such a reasonable time as will enable you to determine whether it is or is not according to the contract; but if you keep it, you must pay for it according to its worth. In the present case we did not go to the full extent of our rights—we kept the goods for (at the very farthest) three weeks after their arrival, and in no case was it laid down that that was not a reasonable time. The learned Judge had in fact found two contradictory things, (1), that the goods were not of the quality contracted for; and (2), he had presumed, on the face of his own finding, that the defendants must be held to have accepted them as according to the quality contracted for. According to the learned Judge, the mere fact of keeping the goods was tantamount to an admission that the goods were according to the warranty. Now it was either a sale with a warranty attached, or a sale with a condition attached; and the principle of law, as raised by Littledale, J., was that the keeping of the article raised a presumption that the article delivered was according to the quality contracted for; but this presumption could be rebutted by showing that the article was not of the quality contracted for. There was no case which decided that a party was estopped by the mere keeping of an article which was not according to the quality agreed upon. Where parties were estopped was when more than a reasonable time had elapsed. Then again the learned Judge had erred in not giving the defendant his costs. Taking the Judge's own finding, he had not exercised a just discretion in the matter of costs. At the very lowest, each party ought to have been made to bear his own costs. In the case of *Greedharee Lal Roy* v. *Goonder Bibee*, 6 W. R., 187, it was held by a Full Bench that an appeal would lie solely on a question of costs.

Mr. Evans (on the same side) contended that it was clearly shown by the finding of the Judges, that the contract was not fulfilled by the plaintiffs in this case. Their plaint was plain and concise, and said,—"The plaintiffs in this action seek to recover the sum of Rs. 9,515, the contract price of the 865 maunds of seed taken delivery of by the defendants." Now the contrary of all this took place. At the time when we refused to take delivery of the 1,135 maunds, we were in a position to sue them for damages in breach of their contract, and it was our good nature only that prevented us from not forcing them to take back the 865 maunds, as we might have done. The cases on this subject are collected in Benjamin on Sales 512, where it was said,—"If the delivery is of a quantity less than that sold, it may be refused by the purchaser; and if the contract be for a specified quantity to be delivered in parcels from time to time, the purchaser may return the parcels first received, if the later deliveries be not made, for the contract is not performed by the vendor's delivery of less than the whole quantity sold. But the buyer is bound to pay for any part that he accepts; and after the time for delivery has elapsed, he must either return or pay for the part received, and cannot insist on retaining it without payment, until the vendor makes delivery of the rest."

We most distinctly pointed out to them that they had broken the whole contract, and that, although it was so, we did not mind keeping the 865 maunds, if they made us a fair allowance, and we actually tendered them Rs. 7,707, being more than the market value. Now, mere receipt was no acceptance, not even within the Statute of Frauds. Then the peculiar circumstances of delivery must be taken into consideration. Delivery was to take place at Hadjeepore, where we had no person, on whose judgment we could rely, to see whether the seed was good or bad; and the only thing against us was that we did not reject the 865 maunds and turn them out of our godowns altogether. In strictness, no doubt, we ought to have done so, but that would obviously have been a most inconvenient course to take, and we practically did the same thing by offering to keep the seed if they made a fair allowance. Then we made a tender of a certain sum, which they declined to accept. If it was conceded to us that, supposing there was a breach of contract to deliver 2,000 maunds at the end of February, we had a right to make them take back the 865 maunds good or bad, have we done anything to estop ourselves from now saying that that seed was not according to contract? The result of the evidence was that in November the price began to fall steadily till it came to Rs. 9 a maund in January, Rs. 8 in February, and 7 Rs. in March; so that we were clearly within the market price. So far therefore from what we did amounting to an estoppel, it could not be denied on the evidence that this seed was not according to contract, and if so, we could not be called upon to pay according to the contract rate. The ordinary principle to apply in such cases was that, where a long time elapsed, it raised a strong presumption. Another was that, where goods were received; there was an implied contract to pay for them according to *quantum valebat*. Then if this was a case of a condition precedent, it made our case still stronger, because, before they could recover upon it, they must show their readiness and willingness to perform their part of the contract. As for the notion of waiver, there really was no acquiescence except the acquiescence of ignorance caused by the delivery of the seed at a great distance from Calcutta.

It was perfectly clear, therefore, that the seed was not according to contract, that it was kept under protest, and that we could have turned it out and recovered damages for breach of contract. As to costs, we were willing to have the question as to the price of the 865 maunds settled by arbitration; but instead of that, we have been driven into Court on the ground that the whole of the seed was contrary to contract.

The Advocate General contended that the acceptance of the 865 maunds was an acceptance in pursuance of the contract. It was said that the price ought to be reduced to 9 Rs. from the contract rate of 11 Rs., because 9 Rs. was the market rate of the time the goods were accepted and taken to the godowns. But the goods had really been accepted by the defendant pursuant to contract and ought to be paid for at the rate provided for in the contract, and there was no ground for urging that the market rate was the rate that ought to be paid. That there was adulteration in the seed, he would not deny. But the evidence showed that there was not an unreasonable excess of foreign matter; and the only question was whether the buyer having taken delivery of part of the goods, was competent to raise the question of inferiority afterwards. He (the Advocate General) denied that there was any inferiority proved, and referred at length to the evidence to show that there had been an admixture of foreign matter to the extent of only 5 per cent., and of no more than under the necessity of the case was unavoidable.

The Chief Justice.—Can you refer us to any case in which it was held that, where a contract was not performed, the seller of the goods could recover according to the contract price?

The Advocate-General.—The point has never been raised.

The Chief Justice.—The fallacy of your argument seems to be this, that the acceptance was according to the contract, whereas the buyer has not accepted according to the contract, because the contract was for 2,000 maunds and has not been performed. Can a seller who has partly performed his contract recover according to the contract? The acceptance does not go to more than the acceptance of so much as part of the contract. As my brother Macpherson says, if you had agreed to deliver the remainder of the 2,000 maunds according to the contract, the defendants might probably by their delay have precluded themselves from objecting that the 865 maunds were not according to the contract. But you have not done that, and that is the difficulty of your position.

The Advocate-General.—The question about the difference between the contract price and the market price was never raised in the Court below.

The Chief Justice.—The learned Judge seems to have overlooked the point that there was no performance of the contract in this case.

Macpherson, J.—If you had sued under the old procedure, you could not have sued for the price of the 865 maunds according to the contract price. You could only have sued for them as for goods sold and delivered.

Mr. Marindin (following the Advocate-General) said that the first point was, whether the 865 maunds and the other goods which were afterwards tendered were in accordance with the contract. As to that he would cite the case of ***Wieler* v. *Schillizzi*** (17 C. B., 619), which was an action for an alleged breach of a contract for the sale of certain parcels of linseed described as Calcutta linseed, and there it was held that upon a sale (not by sample and without warranty) of merchandise which the buyer had no opportunity of inspecting, it was an implied condition that the article should fairly and reasonably answer the description in the contract. The learned Judges in giving judgment on the case, explained that what they meant by *fairly and reasonably answering the description in the contract* was, that the article should be Calcutta linseed with a reasonable amount of adulteration only, and, as Willes, J. observed, "the purchaser had a right to expect, not a *perfect* article, but an article which would be saleable in the market as Calcutta linseed." In the same way here, although it would be vain to contend that the article was absolutely pure and unadulterated indigo seed of the season 1870-71, yet upon the evidence it had been shown to answer such description in a commercial sense, there having been only such adulteration as might reasonably have been expected to be in the contemplation of the parties who had entered into the contract. There was a distinction between the delivery of seed in bulk and of separable articles such as gunny bags for instance. In the former case, the Court had to put a construction upon the contract by deciding whether in the commercial sense of the word the article answered the description in the contract. In the latter case where the article is sold by a description which applies to each bag, the contract can be only satisfied by each bag answering to that description, and the purchasers would have a right to refuse any single one which did not come within that description, and it was the vendor's duty to assort the bags and see that they were of the proper quality and size before delivery. This had been so ruled by this Court in the case of ***Miller* v. *The Gourespore Company, Limited***, reported in the ***Englishman*** newspaper of the 27th and 28th of June 1871. In that case the defendants entered into a contract with the agents of the plaintiffs to purchase a certain quantity of gunny bags described as "No. 6 gunny bags, 40 by 28 inches." The terms were cash on delivery, which was to be given and taken in all August, and the defendants were to have the option of taking bags of shorter or longer length at a proportionate price on giving a fortnight's notice. The defendants accepted a portion of the bags contracted for, but refused to receive the remainder, as they did not answer to the description of bag stipulated for in the contract, and called on the plaintiffs to re-sort the bags. It was held in appeal, reversing the judgment of the lower Court, that in this case the description applied to each individual bag, and in that respect it differed from such descriptions in contracts of sale as purport to describe the quality of the article in bulk, so that that case did not fall into the class of cases in which are comprehended the ordinary contracts of sale of cotton, grain, oils, and so on; because, whenever the article is sold by description of quality, the quality could only be ascertained by a survey of the whole bulk: the defendants in that case were therefore entitled to refuse to receive any single bag which did not correspond to the description in the contract, and they were also entitled to call upon the plaintiffs to re-sort the bags before they were bound to take them. He would therefore, submit that in the present case the bulk of the seed was to be looked to, and that there had been a compliance with the description of the quality stipulated for in the contract. Not only had the 865 maunds been accepted substantially in compliance with the contract, but the remainder of the 2,000 maunds had also been tendered substantially in compliance with the contract. Even supposing that it was not so, and taking the case to be, as found by the learned Judge, that the 865 maunds delivered were not fully equal to the contract quality, and that the rest of the seed tendered did not fully answer the description in the contract, the Judge had found in favor of the respondents, and, as was completely justified by the evidence, that the 865 maunds were accepted by the defendants as being a delivery under the contract, and further that there was no real difference in value between the seed so taken delivery of, and the seed described in the contract. With reference to the objection taken by his Lordship the Chief Justice, as to the quantity delivered, namely, that the contract had not been complied with, because it was originally a contract for 2,000 maunds, and only 865 maunds had been delivered, and that as the whole had not been delivered, we could not sue upon the contract, but only upon a *quantum valebat*, he (Mr. Marindin) would ask what would have been the effect of the acceptance by the defendants, if the seed had been found to correspond with the description in the contract? On this point he would cite the case of *Morgan* v. *Gath* (3 Hurl. and Colt. 748). In that case, the suit was brought for goods sold and delivered. The facts appeared to be that the plaintiff had delivered a less quantity than they were bound to deliver, the quantity which was not delivered not having been equal in quality. There was a special clause in the agreement as to allowance being made for damaged goods, and Martin, B. observed, "If only a reasonable quantity is damaged and cannot be made merchantable, the bulk is not to be rejected but accepted subject to a reduction of the price."

Then upon principle he thought that, when a contract was entered into to deliver certain goods it could make no difference whether the failure to comply with that contract was with regard to the quantity or quality. In either way, there was no doubt that, if the goods were not according to the contract (he was taking now the case of goods sold by description and not specific goods), the vendee had a right to refuse to take delivery, or after taking delivery, to say whether he would give receipt of the goods or not. Here there had been a complete acceptance as far as any objection to quality went. But so far as regards quantity, according to the cases referred to in Benjamin, there could be no doubt that it was open to the defendants to say up to the end of February, "as you cannot give us the 2,000 maunds, we will not keep the 865 maunds." Instead of that they kept those 865 maunds after they knew they could not get the whole.

The Chief Justice.—Does not the correspondence show that, as soon as the defendants knew that the remainder did not answer the description in the contract, they wrote to say that they would return the whole?

Mr. Marindin.—No, there was a letter which took objection to the quality of the 865 maunds and simply contained an allegation that the seed was of inferior quality. But there was no letter in which the defendants offered to return the 865 maunds. But suppose we did not sue upon the contract, but for the 865 maunds, as bargained and sold, upon the authority of *Morgan* v. *Gath*, the question would be as to the rate agreed upon by the parties, and that rate he would submit was the rate agreed upon at the time of the contract, *The Chief Justice.*—But then you will be going upon the contract, which you cannot do if you sue upon a bargain and sale When do you say the bargain and sale was complete?

Mr. Marindin.—At the time the 865 maunds were taken delivery of.

The Chief Justice.—Could there have been a bargain and sale at the time of the contract? In the case to which you refer there was a bargain and sale at the time the parties assented to take the cotton at the invoice price.

Mr. Marindin.—Then I should say that the bargain and sale took effect when the seed was set apart.

The Chief Justice.—To constitute bargain and sale, it is not sufficient that one party sets apart the article bargained and sold, but the assent of the purchaser in some way is necessary.

Mr. Marindin.—There is a case in which there was an order for crockery and the vendee sued the vendor for some damage done to the property.

The Chief Justice.—There the purchaser gave the order and did assent. But you are contending that, as soon as you set aside the 865 maunds or the defendants do anything to accept it, there is a complete bargain and sale.

Mr. Marindin.—I do not mean to say that there would have been an acceptance by the defendants preventing their rejection of the goods afterwards.

The Chief Justice.—How do you constitute the bargain and sale?

Mr. Marindin.—I must say then that the bargain and sale took place at the time the defendants elected to keep the 865 maunds. Their attorney's letter of 27th March 1871 showed that all that they were entitled to claim and did claim was the damages they had suffered by reason of inferiority, and that had been found by the Judge to be *nil*, in other words, that there was really no difference between the seed delivered and the contract seed. Suppose the quality had been the same and the quantity delivered was only 865 maunds, at what price would plaintiffs have recovered? At the contract rate, he thought. As he understood the law to be, the defendants who had accepted could not say that they had not accepted under the contract; but they might sue for the loss or use the difference in value in reduction of damages. That they had accepted the goods was clear from their having kept them and from their attempt to resell them. *Chapman* vs. *Morton* (11 M. and W. 534) was a case in point. There the plaintiffs, merchants Dieppe, sold to the defendant, a merchant at Wisbeach, a quantity of oil-cake, which was delivered to him there in December 1841. The defendant conceiving that the cargo did not answer the sample, landed a portion of it for the purpose of examination, and subsequently landed the whole, stored it in a public warehouse, and wrote to the plaintiffs informing them that it lay there at their risk and cost, and requiring them to take it back, which they refused to do. After some correspondence the defendant in May 1842 gave the plaintiffs notice that the cargo was lying at the warehouse at their disposal, and that if no directions were given by them it would be sold and the proceeds applied in part payment of the defendant's damages. The plaintiffs answered that they considered the transaction at an end and demanded payment of the price. The defendant thereupon offered for sale in his own name, and in July sold it in his own name to a third party; and it was held that these facts sufficiently showed an acceptance of the goods by the defendant, after which he could not treat the contract as rescinded.

The Chief Justice.—You need not argue that point. After the defendants in this case had the samples and had an opportunity of examining the samples, we think that there was a sufficient acceptance of the goods according to the contract.

Mr. Marindin.—But there was something more than that, namely, that subsequently to the time when the defendants had rejected the rest of the goods, there was a further acceptance, and that further acceptance was evidenced by the fact that they had endeavoured to re-sell the goods. *In Parker* v. *Palmer* (4 B. and Ald., 387) wherein an action for rice bargained and sold per sample, it appeared that the rice did not correspond with the sample; but the defendant, after seeing fresh samples inferior in quality to the original purchase sample, put it up for sale at a limited price, and no bidding taking place to that extent, he bought it in; and it was held that he could not afterwards repudiate the contract. In the present case the goods had been taken under a contract, could the law imply a different price from the contract price? *Morgan* v. *Gath* was the case in point as regards quantity, and as regards quality the rule was in *Street* v. *Blay*. The breach of warranty can only be set off in reduction of the price. But then what was the damage caused by the breach of warranty? The oss caused by the breach of warranty was the difference of value between the one set of goods which would not answer the description and goods which would answer the description. *Street* v. *Blay* was certainly different from the present case inasmuch as it was for the sale of a specific property. There could be no doubt that the property in the 865 maunds had passed to the defendants.

Mr. Evans, on rising to reply, having been asked by the Court what he had to say with reference to the case of *Morgan* v. *Gath*, went into the facts as found by Martin B. *viz.*, that in April the plaintiff had agreed to sell to the defendant 500 piculs of China Cotton, June or July delivery, guaranteed fair; that the contract contained a stipulation that in case of dispute the matter should be referred to two respectable brokers for settlement; that in June the plaintiff purchased 420 maunds from Messrs. Whittaker and Co., from whom he received a delivery order; that the plaintiff procured a sampling order from Messrs. Whittaker & Co., and forwarded it to the defendant; that when the process of weighing went on some objection was made to the quantity of cotton, whereupon the defendant gave notice to refer the matter, as provided for in the contract, to two brokers for settlement as to quantity and the allowance; and that two brokers accordingly met, and decided that a certain allowance should be made. That was the state of things on which the jury found that there was evidence of the defendant having agreed to accept the smaller quantity, and as Martin, B. observed, "If a man agrees to sell 100 quarters of wheat, and defendant find that he possesses only 80, which the buyer consents to accept, that is not a new contract, but a waiver of the delivery of the remainder; and no action could be maintained by the vendee against the vendor for not delivering the whole quantity of 100 quarters." That was the principle of that case, viz., that there was clear evidence of acceptance of a part, and a waiver of the delivery of the rest, and if so, the vendee could maintain no action. Now there was nothing of the sort here, and the question as to whether the contract price was a proper price could not really arise here.

He then referred to Chitty on Contracts, 8th edition, p. 426, in which all the cases (including those of *Chapman* v. *Morton* and *Parker* v. *Palmer* cited by Mr. Marindin) had been summarised and quoted, and the compiler treated the matter thus:—"If the vendee do not return the goods within a reasonable time; or if, before objecting to their quality, he exercises any act of ownership over them, *e. g.* by attempting to re-sell them, he cannot afterwards repudiate the contract, so as wholly to defeat the vendor's claim for the price," quoting *Harnor* v. *Groves* (15 C. B. 667), *Chapman* v. *Morton* and *Parker* v. *Palmer*. The compiler went on to say: "And there are some decisions which appear to favor the opinion, that the omission by the vendee, within a reasonable time, to return the goods, or to offer to do so, or to complain of the breach of warranty, was a ground for reducing the price, even in cases where an early objection to or return of the goods would have given him this right." "But these cases" (he added, citing *Mondel* v. *Steel* and 2 Smith L.C. 16,17) "may now be considered to be overruled, and the true principle would seem to be that, where a party may refuse to receive the goods, or may return them if they be not such as he bargained for, the acceptance or non-return thereof merely affords evidence of a new contract on a *quantum valebat*."

With regard to the facts of the case, it was sufficient for him to say that on the 18th March we declined to pay for these goods. We said that they were not according to the contract. If that was not a distinct repudiation of the contract, he did not know what was one. Afterwards seeing that an agent, Mr. Wilson, had taken delivery of 865 maunds, we from good nature offered to take them at a reduction of 2 Rs. They, however, declined to accept our offer, and insisting that they had fully performed the contract, elected to sue upon the whole contract. Having done so, it was too late for them now to say that we were bound by our offer to pay them more than they were entitled to. As they had preferred to bring us into Court and to have their legal rights tried, they must abide by the consequences.

Mr. Marindin said there had been no payment into Court.

Mr. Evans replied that there was no rule to that effect under the Procedure Code, but that the money had been tendered.

The Chief Justice.—There is no provision in the Procedure Code for payment into Court, and there is, in point of fact, no one to receive the money.

The judgment of the Appellate Bench was delivered as follows by—

Couch, C.J.—Upon the question which was raised by Mr. Marindin at the commencement of his argument, and which was also argued to some extent by the learned Advocate General, whether the seed was such as was contracted for, I think we cannot disturb the finding of the learned Judge who evidently had a disposition (I do not say any improper disposition) to allow the plaintiff to recover. The learned Judge says in his judgment, "I do not think it possible in the face of "these statements to infer that the seed which "the plaintiffs were ready to deliver was seed "of the season 1870-71, as far as it was "reasonably possible to procure it. It may "have been seed as good or better than the "seed of that season, and it may also have "been seed which planters generally would "be willing to accept, but it is not shown "to have been such seed as, according to the "plaintiffs' own interpretation of the con- "tract, they had contracted to deliver." That certainly appears to me to be borne out by the evidence in the case, and the distinction between the case which Mr. Marindin quoted to us, the Calcutta Linseed Case (*Wieler* v. *Schilizzi*, 17 C. B., 619), and the present, is that in that case there was no warranty but a mere description, whereas in the present case there is a guarantee that the seed should be of the growth of the year 1870-71. The argument in the Calcutta Linseed Case of Mr. Justice Montague Smith, who was Counsel for the defendant, was founded on the fact that there was no warranty. That case does not apply to the present. Then taking it to be proved (and I think it is) that the seed which was sent by the plaintiffs was not such as answered to the warranty in the contract, we have to consider whether the plaintiffs are entitled to recover for the 865 maunds which the defendants retained according to the price contracted for, which the learned Judge has awarded to them.

I think, upon the evidence of Mr. Wilson, that the defendants must be considered to have accepted the 865 maunds as being in accordance with the contract, although they were not really so, because his evidence shows that after this seed had arrived, and whilst it was in the boats, samples were taken. Those samples were in the hands of Mr. Wilson as agent for the defendants, and he must be taken to have had their authority to accept the goods on their behalf. He did, in fact, act under the authority and accepted the seed. He had full opportunity of ascertaining whether the 865 maunds answered to the contract. Having had that, he, as he says, gave directions to Peter, who was authorized to act under him, to take delivery of that quantity of seed and to remove it to the godowns of the defendants, and it was removed. Mr. Wilson, indeed, from his own expressions felt that he was accepting the seed, but he said he accepted it under a mistake. I think although he says he did not accept it under the contract, there was such an acceptance after he had an opportunity of examining the seed as concludes the defendants from saying that that portion did not comply with the warranty. Now what was the effect of that acceptance? They accepted it, at the utmost, as a portion of the seed which the plaintiffs contracted to deliver. The contract is a contract for the delivery of the entire quantity of 2,000 maunds. It is for "2,000 "maunds of fresh, clean, and good up-coun- "try Indigo seed guaranteed growth of "season 1870-71 at rupees 11 per maund "to be delivered at Hadjeepore in "all February then next, payment to be "made by an approved draft or cheque at 30 "days' date from delivery." It is clearly, as I have said, a contract for the entire quantity of the seed, *viz.* 2,000 maunds. Now the law upon that is perfectly well understood. I will only refer to the way in which it is stated in Mr. Leake's book on Contracts, p. 33. I select this as giving a very good summary of the decisions bearing upon the point. He says—"Similarly, upon a contract with an "executory consideration, if the promisee after "part performance of the consideration refuses "to complete it, the promiser may in general "treat the contract as rescinded; but in such "case, by retaining the part performed con- "sideration, he may render himself liable "upon a new contract arising from such exe- "cuted consideration. Thus in contracts of "sale of a certain quantity of any article, if "part only is delivered and the seller fails to "deliver the rest, the purchaser may return "the part delivered; but if he elects to keep "it after the seller has failed in performing "his contract, he is taken to consent to pay "the value," and he quotes amongst other authorities for that the case of *Shipton* v. *Casson* (5 B. & C., 378). In that case, Mr. Justice Bayley in his judgment said, "Where an entire contract for "goods is performed in part, and the whole "may be completed, no action will lie in "respect of that which has been done, "until after the expiration of the time "fixed for the completion of the whole. But "where some of the goods have been deliver- "ed, and the vendee does not return them "upon the failure of the vendor to perform "his part of the contract, the latter may "bring an action for the value (not the "stipulated price) of those goods, although "he is liable to a cross-action for the breach "of his contract." Mr. Leake continues—"So "under a contract of sale of goods by de-"scription, if the goods delivered are not "according to the description, they may be "returned; but if they are kept, the seller "may claim their value, because, as explained "by Parke J., from the circumstances a new "contract may be implied." That agrees with the passage from Chitty on Contracts which Mr. Evans referred to.

In this case, although the defendants, by the acceptance of the 865 maunds, might have been precluded, and I think, would have been precluded, from objecting that that quantity did not correspond with the contract if the plaintiffs had delivered the remainder of the 2000 maunds, yet the plaintiffs, not having delivered what they contracted to deliver, can only recover for the 865 maunds as on a new contract, a new contract arising at the time when the goods were accepted, and a contract to pay for the goods according to their value and not according to the rate stipulated for the 2000 maunds. The plaintiffs can have no right to recover in accordance with the price in the contract if they have not performed it. To hold they can oblige the defendants to pay for the 865 maunds at the price mentioned in the contract, would be making the defendants' conduct in accepting a portion of the goods amount to the entering into a new contract with the plaintiffs to take 865 maunds and pay for that quantity at the rate of 11 rupees a maund, which certainly was not the intention of the parties at the time the goods were taken out of the boats and put in the godown of the defendants.

This view of the case was apparently not present to the mind of the learned Judge when he made the decree for payment according to the rate mentioned in the contract. The price the defendants ought to pay is certainly not more than what they tendered, looking at the evidence of the falling price in January and February. There must be a decree for 7,785 rupees, and inasmuch as the result shows that the plaintiffs were entirely in the wrong, and ought to have taken that sum they must pay the entire costs of this suit on scale No. 2.

Macpherson, J.—I am of the same opinion.

The 21st February 1872.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Attachment—Annuity—Act VIII of 1859 *Ss.* 205.

Case No. 357 of 1871.

Miscellaneous Appeal from an order passed by the Judge of East Burdwan, dated the 28th September 1871.

Maharajah Dheraj Mahtab Chand Bahadoor (Decree-holder) *Appellant,*

versus

Sreemuttee Dhun Coomaree Bibee and others (Judgment-debtors) *Respondents.*

Baboos Chunder Madhub Ghose, Romesh Chunder Mitter, and *Hem Chunder Banerjee* for Appellant.

Baboo Ashootosh Dhur for Respondents.

An annuity, the payment of which is a charge upon an estate, is property which can be attached under the provisions of Section 205 Act VIII of 1859, at the instance of the person who has inherited the estate from the grantor of the annuity, and by whom the annuity is payable.

Kemp, J.—It appears that the late Maharanee of Burdwan made a charge upon her estate, Pergunnah Havelee, to the extent of 400 rupees per mensem as allowance or maintenance to her brother, Baboo Sham Chand. On the death of the Maharanee, the Rajah of Burdwan inherited this Pergunnah and therefore took the estate burthened with the payment of this annuity to the brother of the Ranee. Sham Chand, it appears, is indebted to the Rajah and to other people; and the Rajah now seeks to execute a decree which he holds against Sham Chand by selling a portion of the annuity payable by him to his judgment-debtor, Baboo Sham Chand. The Judge of East Burdwan has held that, under Section 205 of the Code of Civil Procedure, this property cannot be attached and sold. He also quotes two decisions of this Court—one dated the 5th of February 1863, and the other a later decision which is to be found in Volume XI, Weekly Reporter, page 138. The Judge observes that he need not go beyond the decision of the former date, inasmuch as that decision is a ruling upon the very point before him and which he is bound to respect. He, therefore, declines to be guided by the later decision to be found in Volume XI, page 138.

The Rajah appeals on the ground that the Lower Appellate Court is wrong in holding that the right to receive an annuity of this description cannot be attached and sold under Section 205, and that the Judge ought to have followed the ruling in Weekly Reporter, Volume XI.

We are of opinion that the decision of the 5th of February 1863 is not a ruling on the same point which is now before the Judge. The Rajah was not a party to that case; a third party Futeek Chand Baboo brought a suit to obtain a declaration of his right to sell a portion of this pension. Now, it is very clear that, in respect to a third party, there might be good and valid objections to his being allowed to proceed in execution as against any portion of this pension. As this pension is payable by the Maharajah and is a charge upon the estate which he has inherited from the Ranee, he might very well object to have this pension split up and the payment of it made compulsory upon him to several pensioners instead of one. But the case before the Court now is the case of the Rajah himself, the party who has to pay the pension, and therefore he will pay as hitherto the pension to Sham Chand and his heirs, *minus* any portion of that pension which may be represented by the sum which the Rajah (for we think there is no doubt that the Rajah will purchase the annuity) pays for that portion of the annuity; that sum going towards the satisfaction of the Rajah's decree. In the decision to be found in Volume XI of the Weekly Reporter (present Justices Kemp and Glover), we held that the estate of the grantor in that case being chargeable with the payment of salary, and as in the event of non-payment of that salary the grantee or his representatives could recover the salary due from the estate which is charged with the payment of that salary, it came within the purview of Section 205, and can be attached and sold under that Section. In this case also the Pergunnah of Havelee is charged with the payment of an annuity; and if the annuity is not paid, the Pergunnah is liable to sale for its payment.

We, therefore, think that under the ruling already quoted from Volume XI, the Rajah is at liberty to execute his decree as against this property.

We reverse the decision of the Judge and decree this appeal, but without costs.

The 18th January 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Suit for Possession—Lease—Evidence (Rejection of)—Error in Law.

Case No. 845 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Pubna in Rajshahye, dated the 28th April 1871, *reversing a decision of the Moonsiff of that district, dated the 15th February* 1870.

Huro Chunder Chowdhry (one of the Plaintiffs) *Appellant,*

versus

Gobind Chunder Moitree and others (Defendants) *Respondents.*

Baboo Radhika Churn Mitter for Appellant.

Baboos Issur Chunder Chuckerbutty and *Kalee Mohun Doss* for Respondents.

In a suit for possession by a lessee, where evidence was erroneously rejected by reason of a total misconception of the position of plaintiff's lessor, and such rejection affected the decision of the case on its merits, the error was held to be an error in law.

Mitter, J.—This suit was instituted by the plaintiff, now special appellant before us, for possession of a piece of land, under a *mowrosee* pottah alleged to have been granted to him by one Haran Chunder Chowdhry, on the 29th Joist 1273. He was opposed by the defendants, Gobind Chunder Moitree, Rumzan Shaikh, Kuromuddee Lushker, and Nukee Gazee. The first defendant, Gobind Chunder Moitree, claims the property in dispute under a *kobalah* alleged to have been executed in his favor by the said Haran Chunder Chowdhry, but the date of this *kabalah* is not mentioned in his written statement The other defendants, Rumzan Shaikh, Kuromuddee Lushker, and Nukee Gazee, claim to hold the land in question under a lease granted to them by one Kristo Soonduree Debia, the daughter of the defendant Gobind Chunder, but on what date such lease was granted it is not stated in their written statement, nor is there any mention in it of the date when the alleged *mowrosee* pottah in favor of Kristo Soonduree was granted by Haran Chunder. The Moonsiff who heard this case in the first instance, gave a decree to the plaintiff upon the ground that he, the plaintiff, had proved the genuineness of his *mowrosee* pottah by the testimony of three credible witnesses, and that the allegations put forward by the defendants, Gobind Chunder, Rumzan, Kuromuddee, and Nukee Gazee, were without any foundation in truth, neither of those parties having produced their title-deeds nor given any explanation whatever to account for their non-production.

On appeal, the Subordinate Judge of Rajshahye reversed the decision of the Moonsiff upon the bare ground that the plaintiff had failed to prove that he was dispossessed by the defendants on the particular day mentioned in his plaint. In special appeal, the case came before us, and we remanded it to the Lower Appellate Court for the determination of certain issues which were specifically laid down in our order of remand, as it appeared to us that the Subordinate Judge was wrong in dismissing the plaintiff's suit upon the narrow ground above referred to. The Subordinate Judge has now determined those issues against the plaintiff, and hence the present special appeal.

We are of opinion that the decision of the Subordinate Judge cannot be supported. It is clear from the very first sentence of his judgment that he has altogether misunderstood the position of the parties in this case and the nature of the rights respectively claimed by them. It is admitted on all sides that Haran Chunder was the original owner of this land. The plaintiff claims, as we have already observed, under a *mowrosee* lease from Haran Chunder bearing date 29th Joist 1273, and the titles set up by the defendants, Gobind Chunder, Rumzan, Kuromuddee, and Nukee Gazee, depend upon a bill of sale in favor of Gobind Chunder, and a *mowrosee* lease in favor of his daughter Kristo Soonduree Debia, both of which documents are alleged to have been granted by the said Haran Chunder. The Subordinate Judge, in dealing with the evidence in this case, pays no attention whatever to the way in which the defendants have conducted their defence or to the grounds on which the Moonsiff's judgment is based.

In dealing with the evidence of the plaintiff's witnesses, the Subordinate Judge makes the following remarks: "The plaintiff's witness No. 1, Chunder Nath Chowdhry, has "stated that the plaintiff's lessor (party "granting the pottah to the plaintiff) Haran "Chowdhry held possession up to the year "1278, B. S., *i. e.*, the time when the pottah, "&c., were granted. But he has failed to "state from what time the said Haran Chunder first began to hold possession."

Now, in the first place, it is quite clear from the facts above stated that the date on which Haran Chunder acquired his possession was not important. Nevertheless, because a witness of the plaintiff did not mention anything about that date in the course of his examination, and because, as the Subordinate Judge says in another part of his judgment, he is a relative of the plaintiff, therefore his evidence must be rejected as a matter of course.

We think that this a very incorrect way of dealing with the evidence of witnesses; and we are also of opinion that the error is an error in law, it being an error based upon a total misconception of the position of Haran Chunder and substantially affecting the decision of the case on the merits.

We, therefore, reverse the decision of the Subordinate Judge, and as a matter of form remand the case to him, and then remove it from his file to that of our own to be tried as a regular appeal.

Having heard the Regular Appeal No. 21 of 1872, we feel no hesitation in saying that the plaintiff has made out his case most satisfactorily. The *mowrosee* lease, under which he claims, is a registered document, and it has been proved, as the Moonsiff observes, by the testimony of three credible witnesses. The evidence of the witness Chunder Nath Chowdhry appears to us, so far from being weak as the Subordinate Judge characterizes it, to be as satisfactory as it could be. On the other hand, the defendants have not made the slightest attempt to prove any of their allegations. They have not produced their original title-deeds nor, as we have already observed, given any explanation for their non-production. The defendants Rumzan Shaikh, Kuromuddee Lushker, and Nukee Gazee, allege that they have been in possession of the disputed land for a period of twenty-five years under a lease granted to them by Haran Chunder Chowdhry, which lease was subsequently confirmed by Kristo Sunduree, the daughter of the defendant Gobind Chunder. No *dakhilas* have been produced by these defendants to prove that they ever paid rent to Haran Chunder or to Kristo Sunduree for any part of the land in question; and although they have produced two witnesses who state in their depositions that they have seen them paying rent to Kristo Soonduree for the last fifteen or sixteen years, the evidence of those witnesses is in our opinion unworthy of belief. Indeed, from what we have seen of the facts of this case, the defence set up in it appears to us only a concoction of the defendant Gobind Chunder in order to deprive the plaintiff of his rights under the lease granted to him by the admitted owner Haran Chunder Chowdhry under the color of a bill of sale alleged to have been executed in his own favor and a *mowrosee* pottah alleged to have been granted to his daughter Kristo Soonduree Debia, neither of which documents have been produced.

Considering, therefore, that the Moonsiff's decision is perfectly right, we affirm that decision with all costs.

The 19th January 1872.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Mesne Profits (Mode of calculating)—Dispossession—Landlord Wrong-doer.

Regular Appeals from a decison passed by the Officiating Judge of Backergunge, dated the 24th February 1871.

Case No. 112 of 1871.

Bhyrub Chunder Mojoomdar and others (Defendants) *Appellants.*

versus

Huro Prosunno Bhuttacharjee Chowdhry (Plaintiff) *Respondent.*

Baboos Romesh Chunder Mitter and *Doorga Mohun Doss* for Appellants.

Baboo Kalee Mohun Doss for Respondent.

Case No. 124 of 1871,

Huro Prosunno Bhuttacharjee Chowdhry (Plaintiff) *Appellant,*

versus

Bhyrub Chunder Mojoomdar (Defendant) *Respondent.*

Baboo Kalee Mohun Doss for Appellant.

Baboo Doorga Mohun Doss for Respondent.

HELD that the mode of estimating the amount of mesne profits in respect of a *talook* held by plaintiff under defendant was to ascertain the amount of profits which plaintiff could have realized from the *talook* if he had not been dispossessed therefrom by the wrongful act of defendant; and that as there was no necessary relation between those profits and the amount of revenue payable by the latter on account of the inferior holding, such revenue cannot be treated as an element in the calculation; but that the amount of rent payable by plaintiff to defendant ought to be deducted from the gross calculations of the *talook*. HELD also that there seemed no reason why the same rule should not be adopted in this case merely because the wrong-doer was the landlord.

Mitter, J.—THIS was a suit for mesne profits in respect of a *talook* held by the plaintiff under the defendant, and the period for which the mesne profits are claimed extends from the 27th of Kartick 1271 to the 5th of Srabun 1276. The Lower Court has passed a decree in modification of the claims, and hence these two appeals have been preferred to us, one by the plaintiff, the other by the defendant. The contention in plaintiff's appeal (No. 124 of 1871) is substantially reducible to a single point, namely, whether the Lower Court is right in deducting a sum of 1,416 rupees from the annual *hustobood* or collections of the *talook*, that sum being the amount of Government revenue payable by the defendant on account of the estate within which the *talook* is situated. We are of opinion that this portion of the Lower Court's decree requires some slight modification. In order to estimate the amount of mesne profits due to the plaintiff, all that we have to do is to ascertain the amount of profits which he could have realized from his *talook*, if he had not been dispossessed therefrom by the wrongful act of the defendant; and as there is no necessary relation between those profits and the amount of revenue payable by the latter on account of the superior holding, such revenue cannot be treated as an element in the calculation. The amount of rent payable by the plaintiff to the defendant ought, however, to be deducted from the gross collections of the *talook*, and as this amount has been determined by us in special appeal No. 583 of 1871, to be 1,322 rupees 11 annas and 10 gundahs, this sum and not the sum of 1,416 rupees should be deducted from the gross rental of each of the years for which the mesne profits are claimed.

It has been argued that as this is a suit for mesne profits against a wrong-doer, the Court has no power to allow any set-off on account of any rent payable to him, particularly when his cause of action in respect of such rent is barred by limitation as in the present case. But this argument is entirely founded upon a misapprehension, for the deduction is made not by way of set-off at all. The mesne profits are claimed in respect of an under-tenure for which rent was actually payable to the defendant, and in a case of this description the net and not the gross profits of the *talook* ought to be taken as the true measure of the damages, for mesne profits are, after all, nothing but damages. If the rent had been payable to a third party and the defendant had actually paid it, there can be no doubt whatever that the Court would have, in assessing the mesne profits, deducted the rent so paid from the gross proceeds of the *talook*, and we see no reason in justice or equity why the same rule should not be adopted in this case merely because the wrong-doer happens to be the landlord also. We cannot allow the plaintiff to recover anything more than what is sufficient to indemnify him for the loss he has sustained by the wrongful act of the defendant; and under the circumstances stated above we are clearly of opinion that the amount of that loss is correctly measured by the *net* profit which he could have realized from his *talook*, if the wrongful act had not been committed at all.

The appeal of the defendant (No. 112 of 1871) can be disposed of in a few words. The first item objected to by the defendant is one of 319 rupees 10 annas and 11 gundahs. This sum, the Judge has found, ought to have been collected by him from a ryot named Mofeezooddeen, but he failed to do so in consequence of his having allowed the prescribed period of limitation to expire, whilst he was carrying on an unsuccessful suit against the said Mofeezooddeen for enhancement of rent. We see no reason whatever for interfering with the Judge's decision on this point. The defendant was clearly guilty of negligence in not collecting this amount, and he must therefore bear the consequence.

The next item is one of 52 rupees 15 annas and 6 pie. This item relates to a sum of money collected by the defendant from the ryots of the *talook* on account of what is called "estate improvement." Whether this amount was realized in consideration of any expenses actually incurred by the defendant for the improvement of the property or as a mere *abwab*, it does not appear from the record. But in either case it is clear that it forms no part of the profits which the plaintiff could have realized if he had not been dispossessed by the defendant. The ryots who paid it might possibly be in a position to recover it from the defendant, but the plaintiff has no right to treat it as an item of the loss for which he is entitled to be indemnified in this case. This decree of the Lower Court ought therefore to be modified to this extent.

The last objection relates to a sum of 400 rupees which has been found by the Lower Court to have been actually collected by the defendant, but which is not supported by any *dakhilahs* produced by the ryots by whom it is alleged to have been paid. We are of opinion that this objection is futile. There is ample evidence on the record to show that the amount in question was actually collected by the defendant, and we see no reason whatever for rejecting that evidence merely because no *dakhilahs* are forthcoming.

The result of our decision is that a decree should be entered for the plaintiff for a sum of Rs. 1,991, 8 annas, and 10 gundahs, with interest at 6 per cent. from the date of the Judge's decision to that of realization. Each party is liable to the other for the costs of this Court and for those of the Lower Court in proportion to the amounts decreed and disallowed, together with interest thereupon at the above rate from the dates of the decisions of this Court and of the Lower Court respectively.

Glover, J.—I concur in this decision.

The 19th January 1872.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Suit for Rent—Plea of Ejectment—Evidence (of Area under Cultivation)—Government Measurement—Notice—Act X of 1859 *s.* 13—*Express Agreement.*

Case No. 583 of 1871.

Special Appeal from a decision passed by the Officiating Judge of Backergunge, dated the 24th February 1871, *reversing a decision of the Subordinate Judge of that District, dated the 24th January* 1871.

Bhyrub Chunder Mojoomdar (Plaintiff) *Appellant,*

versus

Huro Prosunno Bhuttacharjee (Defendant) *Respondent.*

Baboo Doorga Mohun Doss for Appellant.

Baboo Kalee Mohun Doss for Respondent.

An allegation of wrongful ejectment of defendant by plaintiff is no answer to a suit for rent during the period of dispossession.

A measurement made by Government from whom plaintiff derives his title was, in the absence of any evidence to the contrary, held as admissible in evidence of the area actually found under cultivation.

Section 13 Act X of 1859 (requiring previous service of notice) has no application to a case in which there is an express written engagement between the parties providing for the payment of rent at a specified rate from a specified point of time.

Mitter, J.—There was a suit for arrears of rent for the year 1276, and the property in respect of which the arrears are claimed is a talook held by the defendant under the plaintiff. It appears that the plaintiff had dispossessed the defendant in the year 1271, and it was not till Srabun 1276 that the latter was restored to possession in execution of a decree passed by a Court of competent jurisdiction.

The Lower Court has dismissed the plaintiff's claim on the ground that he had wrongfully ejected the defendent. But this is by no means a satisfactory answer to the suit for the rent sued for in this case does relate to the period of dispossession.

The question, therefore, is what is the amount of rent for which the defendant is liable. The talook is held by the defendant under a pottah, and it was on the strength of this pottah that the suit for possession was decreed in his favour. This document, however, contains a distinct stipulation by which the defendant's predecessor bound himself and his representatives to pay rent at a specified rate from the year 1263, upon the area actually found under cultivation by a measurement made in that year. This measurement was made by the Government from whom the plaintiff's title is derived, and in the absence of any evidence to the contrary we see no reason whatever for impugning the correctness of its result. Applying therefore the rates specified in the pottah to the quantity of cultivated land thus ascertained, we find the jumma of the talook to be 1,322 rupees 11 annas and 10 gundahs per annum, and the plaintiff is justly entitled, in our opinion, to a decree for that amount.

It has been argued that a suit like the present cannot be maintained without the previous service of a notice under Section 13 Act X of 1859. But this objection is futile, inasmuch as it is beyond all dispute that Section 13 has no application to a case in which there is an express written engagement between the parties, providing for the payment of rent at a specified point of time. We wish to add that the measurement above referred to was made in the presence of the defendant.

Let a decree be entered for the plaintiff for the sum of 1,322 Rupees 11 annas and 10 gundahs with interest thereupon at the rate of 6 per cent. per annum; from the date of the decision passed by the Court of first instance to that of realization. The parties must pay costs in all the Courts in proportion to the amounts decreed and disallowed, and interest upon those costs at the above rate from the dates of the several decisions passed by the Court of first instance, by the Lower Appellate Court, and by this Court.

The 20th January 1872.

Present:

Sir James W. Colvile, Sir Montague Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Purchase of Immoveable Property—Resulting Trust—Suit to set aside Purchase after 11 *years and after Death of all Parties who knew the transaction.*

*On Appeal from the High Court at Calcutta.**

Mussumat Ameeroonnissa Khanum and others,

versus

Mussumat Ashruffoominssa.

Suit brought to recover possession of a *talook* upon the alleged ground that the monies with which the purchase was made were not the monies of the person in whose name the property was bought, but of a lady with whom he was living as her husband, and that there was a resulting trust in her favor. The PRIVY COUNCIL considered that the very principle of a resulting trust was that the property had been purchased with money belonging to another, with an implied trust that it should belong to that other person to whom the money also belonged, but that if it was the intention of the person to whom the money belonged that there should be no such trust, no such implied trust could arise by implication, and the presumption would then be met by the facts. Considering also that the suit was brought to set aside a purchase which had been made 11 years before and had remained unimpeached from the time when it was first made until the institution of this suit, and that the suit was brought after the death of all the parties who knew the transaction and could have explained it, their Lordships were of opinion that every Court would be bound to look with very great jealousy at the evidence which was brought forward to support such a case.

THIS is an appeal from a judgment and decree of a Division Bench of the High Court of Calcutta which affirmed the decree of the Principal Sudder Ameen of Bhaugulpore, dismissing the suit of the appellants. The suit was brought to recover possession of the *talook* Nisf Ambey, which had been purchased by Velayet Hossein in his own name as long ago as the year 1848. The suit was not commenced till the 16th February 1849, which is nearly 11 years after the purchase.

The suit is brought upon the alleged ground that the moneys with which the purchase was made were not the moneys of Velayet Hossein himself, but of a lady with whom he was living as her husband, Belkissoonnissa Begum. It was admitted by Sir Roundell Palmer that it was not a *benamee* transaction, that Belkissoonnissa Begum had not desired that the estate should be bought in her name, and that there was no intention on her part to purchase an estate at all for herself; But Sir Roundell Palmer put the case on the ground that the money was her money, that it belonged to an *Imambarah*, of which she was the owner, as a sort of lay owner, and that there was a resulting trust in favor of the Begum, in consequence of the money with which the estate was purchased having been so provided.

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* From the judgment of Steer and L. S. Jackson, JJ., dated 3rd October 1868. Sevestre's Rep. for 1868, p. 521.

Now it is plain that if the money did not come from the source indicated, or if the purchase was made in the name of Velayet Hossein, with the consent of the Begum that it should be so purchased for him, there is then no resulting trust. The very principle of a resulting trust is, that the property has been purchased with money belonging to another, with an implied trust that it should belong to that other person to whom the money also belonged. But if it was the intention of the person to whom the money belonged that there should be no such trust, then, of course, no such implied trust could arise, because it is only a trust by implication, and the presumption would then be met by the facts.

The facts of the case are extremely simple. It seems that Belkissoonnissa Begum was a lady of good family and considerable fortune, and that one of the properties which she had was the *Imambarah*. She was, when young, betrothed to her cousin Ali Reza, but it seems either that she never cohabited with him, or that at all events she lived in his house but for a short time, and then they separated. The cause of the separation appears to have been that Ali Reza refused to pay her dower, and the mother of Belkissoonnissa then withdrew her from his house. That being her position, in the year 1842 she formed relations with Velayet Hossein, and it appears that she lived with him as her husband until her death in January 1849. It is plain that during the period of seven years which elapsed whilst they were so living together, Velayet Hossein, although he might not have been possessed of property at the time when these relations commenced, had probably during that period gifts from her, or he may have been allowed to receive the income of her property and to appropriate a part of it to his own use. It appears that in the year 1848 the lady was in failing health, and in that year this purchase was made. It appears to have been a purchase made at a revenue sale, and the purchase was made in the name of Velayet Hossein. All the instruments of title were made out in his name, and he was registered as the owner of the estate. This happened ten months before the death of the Begum.

Now an instrument has been put in and relied on by both sides, a *mooktearnamah*, dated the 15th April 1848, in which Velayet Hossein appoints four persons as his mooktears to purchase and pay for his estate, and one of those persons is Mudun Gopal who was the dewan of the Begum with whom he was living.

It is said that there is evidence that the earnest money and the consideration money were provided by the proceeds of jewels and other valuables which belonged to the *Imambarah*, and their Lordships cannot fail to see that the case, as originally put, was that Velayet Hossein was the Shajada of the *Imambarah*, and that he had used the money which he held as Shajada, in trust for the *Imambarah*, to make this purchase. The first two issues were framed to raise those questions, but the Principal Sudder Ameen has found, and he seems in that to have been well grounded upon the evidence, that there was no existing *Imambarah* in the sense of any place of worship which might be said to have its property belonging to it as distinct from the ownership of the Begum; that it was a sort of lay *Imambarah*, and that, although he may have called himself Shajada, as he does in this document, it really was more a title of honour which he had assumed, or a nominal appointment of Shajada, than any real *status* which he had or anything which put him in the position of a trustee for an *Imambarah* as distinguished from any property which his wife had. The property of the *Imambarah* belonged to the Begum, as her other property would do, and, as was admitted by the learned Counsel for the Appellant, she might have disposed of it as she thought fit.

Now, first of all, did the High Court come to a wrong conclusion in saying that it was not proved to their satisfaction that the money which paid for this estate was the proceeds of the property of the Begum? There is a good deal in the evidence to show that the jewels belonging to the Begum were brought to bankers and others and sold, but a great deal of the evidence is hearsay, and the Court may have come to this conclusion, "although there is some evidence which if "entirely believed would establish that the "money did come from that source, yet, "taking all the circumstances of the case into "consideration, we cannot act upon it; we "cannot say with sufficient certainty that "that evidence is true." One circumstance upon which they strongly rely is that this suit was brought after the deaths of all the parties who knew the transaction and who could have explained it. The Begum was dead; Velayet was dead; the Dewan was dead. Those three persons knew exactly what the transaction was; and, certainly, when the suit is brought to set aside a purchase which was made 11 years before, which has remained unimpeached from the time when it was made until the institution of this suit, every Court would be bound to look with very great jealousy at the evidence which is brought forward in order to support such a case.

But assuming that the High Court are not well founded in the conclusion to which they came, that no part of the money was proved to have come from the proceeds of the sale of the jewels belonging to the Begum, still their Lordships think that there was evidence to support the conclusion of fact at which the Principal Sudder Ameen arrived, and therefore that it is unnecessary to decide the question which the High Court took upon themselves to determine. What the Principal Sudder Ameen thought of the case was this, that some of the money might have come from the Begum, but he said, in effect, "Assume that it did so come; there is to my "mind very strong evidence from the facts of "the case that that was a gift on the part of "the Begum, and that she intended to do "something for the benefit of the man who "had been living with her for seven years." Her husband, Ali Reza, had in fact been the cause of her separation from him by his refusal to pay her dower. She had formed relation with Velayet Hossein as a second husband, although it was not a marriage which was warranted by law; still he lived with her as her husband, and apparently upon very good terms. It was therefore extremely natural, if she found that she was in bad health, that she should have been desirous to make some provision for his benefit. It is also, their Lordships think, extremely probable that he had money of his own, for several of the witnesses speak to his having had money of his own at various periods after his marriage, though he may not have been a man in good circumstances before. The evidence upon which the conclusion is founded that she gave him some of the money, and that he bought this estate in his own name with her consent, is found in her acquiescence during her lifetime, and their Lordships also think it is founded in the acquiescence of Ali Reza after her death. Ali Reza was certainly not sleeping upon his rights. He was living near these parties. He instituted a suit to set aside a deed of gift which was set up by Velayet Hossein, but he took no steps during his life-time to impeach the purchase; there is the strongest inference to be drawn from his acquiescence in it. What could have been the ground of his acquiescence? The ground of his acquiescence must have been that he knew that the purchase which was made by Velayet Hossein was not made for his wife, but was made, with her consent, for Velayet Hossein himself. One witness for the appellant, named Enayet Hossein, gives evidence which fortifies the view taken by the Principal Sudder Ameen. He says of Velayet Hossein, "he had not means former-"ly, but when he got married at Karagolah "he became rich," and then he says, the "possession of Sha Walayet Hossein since his "purchase continued without opposition, and "after the sale the Bebee of the Sha died at "Bhaugulpore. I cannot say after how long "she died. She used to live with her hus-"band, and she did not claim the talook." There is thus strong evidence of her acquiescence, as well as of all the persons most interested in the transaction. The purchase was made by her own agent, who was appointed for that purpose by Velayet Hossein, and she appears to have been perfectly satisfied afterwards. It seems, also, to their Lordships that the whole history of the parties, and the probabilities of the case, strongly confirm the view originally taken by the Principal Sudder Ameen.

It was contended that this view of the case was not raised by the issues.

Their Lordships would be disposed to decide the appeal upon the substantial merits, unless they had reason to suppose the parties had been misled by the form of the proceedings; and although it may be true that the above view is not expressly stated, they think it in effect involved in the first two issues, which were founded on the hypothesis of the misappropriation of the property of the *Imambarah* by Velayet Hossein as Shajada, and the same view is open upon the general question raised in the third issue.

On these grounds, therefore, their Lordships will humbly recommend Her Majesty to affirm the decree of the High Court of Judicature, and to dismiss this appeal with costs.

The 22nd January 1872.

Present:

Sir James W. Colvile, Sir Montague Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Mortgage—Agreement—Construction—Interest—Regulation XV. 1793 s. 7.

On Appeal from the High Court at Calcutta.[*]

Radhabenode Misser

versus

Kripa Moyee Debia.

This case turned upon the construction of an agreement by which (according to appellant's contention) the mortgagee was entitled to the payment of the principal and interest on the debt, but that the payments of interest carried no interest themselves. The PRIVY COUNCIL, according to their construction of the agreement, were of opinion that the parties intended that the interest might be set off from time to time against the rents and profits, and that the mortgagee was only to account to the mortgagor for any rents and profits and interest on the same which he might have received over and above the interest due to him upon the debt; and held that Section 7 Regulation XV of 1793 did not apply to transactions of this kind.

IN this case the question admits of being very shortly stated. It was this, whether the ordinary rules applicable to mortgages expressed in the passage in Mr. Macpherson's book on mortgages, referred to by the High Court, do or do not apply to the present case? It was contended that they did not apply to the present case because their application is expressly excluded by an agreement between the parties; and if their Lordships had come to this conclusion, they would undoubtedly have given effect to that agreement.

The construction of the agreement which is contended for on the part of the appellant is this, that the mortgagee on his part is entitled to the payment of the principal and of the interest on the debt, but that the payments of interest which properly would accrue, at all events annually, carry no interest themselves, which no doubt is the ordinary rule. On the other hand it is said that the mortgagor is entitled to call the mortgagee to account for the whole of the annual proceeds of the property less a few expenses of collection, and that each of the annual payments of the proceeds of the property is chargeable with interest; so that while on the one hand the mortgagor can charge the mortgagee with all the annual proceeds of the estate, those annual proceeds carrying interest, the mortgagee on the other hand can only charge the mortgagor with the debt and the interest, the latter not carrying interest, the result of which is certainly somewhat extraordinary—that whereas in this case it appears very clear that the mortgaged property was an insufficient security, and that the proceeds of it fall short by some Rs. 400 a year of the interest, nevertheless, after a long period of time, the mortgagor, not having paid a farthing of the principal or interest, is entitled to a large balance on the part of the mortgagee. Of course the parties might have so agreed if they pleased, but their Lordships would be loth to put such a construction upon the agreement unless they were compelled to do so by very plain words.

On looking at this agreement, more especially at the 6th and 10th paragraphs which have been often referred to, and to the precise terms of which it is not necessary to refer again, their Lordships on the whole think that these paragraphs and the agreement generally, which is drawn by no means clearly, are not inconsistent with the supposition that the parties intended that the interest might be set off from time to time against the rents and profits, and that the mortgagee was only to account to the mortgagor for any rents and profits and interest on the same which he may have received over and above the interest due to him upon the debt.

Their Lordships being of opinion that that interpretation is not inconsistent with the contract according to the best construction they can give to it, it follows that the rule stated by Macpherson in general terms is not excluded by the terms of this contract.

Their Lordships think it right also to say that even assuming the construction which has been contended for on the part of the appellant, certainly an unusual one in documents of this kind, their Lordships are not prepared to say that the High Court was wrong in determining that such a construction was applicable only to the first ten years, and that if the mortgagor chose at the expiration of that period to avail himself of the Regulations which permit the redemption of mortgages after the expiration of the term stipulated for, he must come in under the general terms of those Regulations which prescribe the equitable conditions required to be satisfied.

Their Lordships are also of opinion that Regulation XV of 1793, Section 7, does not apply to transactions of this kind.

Under these circumstances their Lordships will humbly advise Her Majesty that the decision of the Court below ought to be affirmed, and this appeal dismissed with costs.

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[*] From the Judgment of Bayley and Roberts, J.J., dated 6th October 1868. Sevestre's Rep. for 1868, p., 545.

The 2nd February 1872.

Present :

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Mortgage—Ticoa Lease—Assignment—Sale.

Case No. 946 of 1871.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 30th May 1871, *affirming a decision of the Subordinate Judge of that district, dated the 23rd February* 1871.

Junessur Doss and another (Defendants) *Appellants,*

versus

Lalla Ramdhunee Lall (Plaintiff) *Respondent.*

Baboos Romesh Chunder Mitter and *Mohesh Chunder Chowdhry* for Appellants.

Baboos Kalee Kishen Sein and *Chunder Madhub Ghose* for Respondent.

A mortgagor granted a *ticca* lease of the mortgaged lands for ten years to B R, and under an assignment executed by the mortgagor it was arranged between him and the mortgagee that the latter should pay himself off from the *ticca* rents at a certain rate annually until the realization of the mortgage-debt with principal and interest. HELD that, until mortgagee could prove that something had happened to disturb the arrangement made between him and mortgagor under the terms of the deed of assignment, he could not either according to law or the terms of the contract call upon the mortgagor or his representatives to pay the balance of the mortgage-debt or to have that balance realized from the sale of the mortgaged property.

Mitter, J.—THE plaintiff in this case advanced a certain sum of money to one Reet Bhunjun Singh, and as a security for the loan took a mortgage of 219 beegahs and odd cottahs of land belonging to the said Reet Bhunjun Singh. Simultaneously with these transactions, Reet Bhunjun Singh granted a *ticca* lease of the mortgaged lands to one Bhurosee Raoot for a period of 10 years ; and under an assignment executed by the said Reet Bhunjun Singh on the same date, it was arranged between him and the plaintiff that the latter should pay himself off from the *ticca* rent at the rate of Rs. 801 per annum until the realization of the mortgage debt with principal and interest in the year 1276 F. S.

The plaintiff has now brought this action to recover the balance of the amount due under the mortgage by the sale of the mortgaged property against Reet Bhunjun Singh the original mortgagor, also against the present special appellant, the purchaser of the right, title, and interest of Reet Bhunjun Singh at a sale in execution of decree, and against Bhurosee Raoot the *ticcadar* above referred to. The plaintiff alleges in his plaint that under the terms of his mortgage bond he is entitled to bring this suit, the *ticcadar* Bhurosee Raoot having refused from the year 1274 to pay him the Rs. 801 mentioned in the deed of assignment above alluded to.

In order to maintain this action it is indispensably necessary for the plaintiff to prove that something has happened to disturb the arrangement made between him and the mortgagor under the terms of the deed of assignment ; and unless he can prove this fact, it is quite clear that he would not be entitled, either according to law or according to the terms of the contract, to call upon the mortgagor or his representative to pay the balance of the mortgage-debt, or to have that balance realized from the sale of the mortgaged property.

Both the Lower Courts have concurrently found against the contention of the plaintiff, that Bhurosee Raoot was nothing but a mere *benameedar* of the plaintiff himself, and it is clear upon this finding that the allegation put forward by the plaintiff regarding the refusal of Bhurosee Raoot to pay him the *ticca* rent since the year 1274 is altogether destitute of any foundation in truth. It is, therefore, clear that, before the plaintiff can recover in this case, he should make out clearly and distinctly that his possession as *ticcadar* has been interfered with against his consent either by the defendant or by such third parties as are contemplated in the deed of mortgage. Taking the findings which both the Lower Courts have arrived at on this point, there seems to be no doubt whatever that, up to the date of the institution of this suit, there was no interference with the possession of the plaintiff as such *ticcadar*. The Lower Appellate Court, however, says—"The plaintiff, even supposing " him to be still at this moment in possession, " has every right under the terms of the " mortgage to sell the right and interests of " Reet Bhunjun. However, it is proved to " the satisfaction of this Court that he was " in possession up to 1276 F. S. only." The first remark appears to us to be clearly untenable. If the plaintiff is still in possession of the mortgaged lands, it seems to be beyond all question that he is not at liberty to institute this suit to recover the balance of the mortgage-debt by the sale of those lands. There is nothing whatever in the terms of the mortgage-bond to create such a right in his favor, and it appears neither just nor equitable that he should be allowed to sue for the recovery of the balance due under the mortgage, at the very time when he is paying himself off from the usufruct of the mortgaged property. The last remark, however, disposes of the pretended case of dispossession in 1274, which the plaintiff attempted to make out by his witnesses. It is certainly not very clear whether the Judge means to say that the possession of the plaintiff continued up to the end of 1276, or, as is contended by the pleader for the plaintiff, up to the month of Falgoon of that year only. But assuming that the evidence on which the Judge has come to this conclusion, goes to show that the plaintiff was in possession of the mortgaged land up to Falgoon 1276, there is no other evidence on the record to prove that any dispossession against his consent took place between that time and the 12th July 1869, corresponding with Joist 1276, when this suit was instituted.

In the absence of such evidence, therefore, we may safely conclude that the plaintiff continued in possession of the mortgaged property down to the institution of this suit, and the result of this conclusion is that the present suit must be dismissed as one not supported by any cause of action whatever.

It has been contended under the provisions of Section 348 Act VIII of 1859, that the point of dispossession was never raised by the parties, nor was it included in the order of remand previously passed by this Court, nor was any issue raised on that point either by the first Court or by the Appellate Court. We are of opinion that this objection is of no force whatever. The defendant stated most distinctly in his written statement that the plaintiff was in possession of the mortgaged land up to the time when that written statement was filed, and there was an issue raised by the first Court to the effect as to whether there was any cause of action at all. As for the order of remand, it appears to us clear that that order merely disposed of a preliminary point which had been raised by the Lower Courts, and the very terms in which the order was couched go to show that the issue of dispossession was substantially involved in it. Those terms are as follow:—"The case must go back to the Court of first instance for the determination of the question, whether the mortgage-debt had been satisfied from the usufruct of the property before the plaintiff was dispossessed by the respondent or to what extent."

Now, in order to answer this question, it was absolutely necessary for the Lower Courts to determine on what date the plaintiff was dispossessed of the mortgaged lands leased to him in *ticca*; and as the plaintiff has failed to prove that there was any dispossession at all, the conclusion seems to be inevitable that this suit, as brought, must fail.

It is further argued that the plaintiff had no opportunity to produce evidence in order to prove that he was dispossessed by the defendant; but there does not seem to be any force in this argument. He produced witnesses to prove that his dispossession arose from the refusal of Bhurosee Raoot to pay rent to him, an allegation which substantially comes to this that he as the *ticcadar* refused to pay rent to himself as the mortgagee. Having tried to support this manifestly false case, the plaintiff is not entitled in our opinion to have another opportunity to mend that case by producing evidence to show that the dispossession took place at some period between Falgoon 1276 and the date of the present suit.

It is further argued that the defendant admitted before the first Court that Bhurosee Raoot was not in possession of the *ticca* lands. There is nothing, however, in this so called admission to militate against the written statement of the defendant. His contention has been throughout that Bhurosee Raoot was a mere *benameedar* for the plaintiff, and it is therefore clear that the statement made by him to the effect that Bhurosee Raoot was not in possession is by no means inconsistent with the case on which he relies.

In this view of the case, it becomes unnecessary for us to enter into the question of accounts.

We reverse the decisions of the Lower Courts and dismiss the plaintiff's suit with all costs.

The 15th February 1872.

Present :

The Hon'ble A. G. Macpherson and F. A. Glover, *Judges.*

Pre-emption — Mahomedan Law — Compliance with Requirements—Among Hindoos in Behar.

Case No. 792 of 1871.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the

3rd May 1871, *reversing a decision of the Subordinate Judge of that district, dated the* 8*th June* 1870.

Ram Doolar Misser and another (Plaintiffs) *Appellants,*

versus

Jhumuck Lall Misser and another (Defendants) *Respondents.*

Baboo Chunder Madhub Ghose for Appellants.

Baboos Romesh Chunder Mitter and *Taruck Nath Dutt* for Respondents.

A claimant of the right of pre-emption who made a demand three times, said that he bought the property, offered the money to the vendor and vendee, and demanded back the *kobala*, and upon the refusal of the vendor and vendee to receive the money, or to give back the *kobala*, called the attention of the parties present to these facts and constituted them his witnesses, was held to have sufficiently complied with the requirements of the Mahomedan law; the use of the precise words given in the *Hedaya*, or in any other Mahomedan law books, not being imperative.

It must be considered to be settled law that the right of pre-emption exists amongst Hindoos in Behar.

Macpherson, J.—In this appeal, the only question is whether the Judge was wrong in law in holding that, on the facts found by him, the plaintiff had not complied with the provisions of the Mahomedan law as to the ceremonies which ought to attend the *tulub-e-ishteshaad* by the person who claims to enforce the right of pre-emption. The parties to the suit are Hindoos, and the object of the plaintiff is to enforce a right of pre-emption.

The Judge is of opinion that the plaintiff failed to prove that he had complied with the requirements of the Mahomedan law. The Judge says:—"I proceed to give the *verbatim* "words used by the plaintiff and his only "witness on the point in question, one Doormil. Plaintiff says he took money with him, "and accompanied by Doormil (only witness "examined) and Mobibut Roy and Dhurinee "Chowdhry (not examined), went to a certain "place where he met the vendor and vendee "of the property claimed. He there said "three times 'I have bought,' and added "'I have brought the money, take it, and "give back the *kobala*. Both the vendor "and vendee refused. Having heard this "I made all the persons who came with me "witnesses.'" The Judge goes on to say:—"The Mahomedan law is clear as to what the "ceremony ought to be. When his money was "refused, plaintiff ought to have used words "to the effect following:—'I have claimed the "right of pre-emption of such and such pro- "perty, and it has been rejected. Bear ye wit- "ness.' I do not think that there is anything "in the evidence detailed above in any way "showing that any such ceremony was gone "through, and there is no other evidence "to show that it was."

Being of this opinion, the Judge reversed the decision of the Subordinate Judge, and dismissed the plaintiff's suit.

I think that the Judge was wrong in law, and that the plaintiff did substantially comply with the requirements of the Mahomedan law. Having made the demand three times, and having said that he had bought the property, and having offered the money to the vendor and vendee, he demanded back the *kobala*. After that he made the persons who were with him, and who had been present during the time when all this took place, witnesses. The words he used are "*gawah rukha*," which means that he made them witnesses, or called on them to bear witness. This was in my opinion a substantial compliance with the requirements of the Mahomedan law; for I am not aware that it is imperative that the precise words which are given in the *Hedaya* or in any other of the Mahomedan law books should be used. In so holding I in no way depart from the rules laid down either in the case reported in the Weekly Reporter, 1864, page 331, or in that reported in XIII Weekly Reporter, page 177.

In the first of these cases no witnesses had been called at all, that is to say, no witnesses were referred to and formally told to bear witness, or, so to say, were constituted witnesses by the claimant of the right.

So, in the case in XIII Weekly Reporter, the parties did not go through the same formalities as the plaintiff did in the present case. In the present case, we have the demand made of the vendor and vendee before witnesses; we have the money tendered before witnesses, and we have the refusal before the same witnesses to receive the money, or to give back the *kobala*; and with reference to what passed, the plaintiff called the attention of the persons present to these facts, and constituted them his witnesses. Having done so, it appears to me that he is entitled to succeed, as having substantially done all that the Mahomedan law required him to do.

For the respondent a question is raised that the parties being Hindoos and residents of Bhaugulpore, which is in Behar, the plaintiff cannot succeed in the absence of proof that the right of pre-emption does exist by custom amongst Hindoos in Behar.

The Court of first instance held that the custom did prevail, and had been recognised by the Courts. So far back as 1868, in the case of Fakir Rawut *vs.* Shaikh Emam Buksh, reported in the Special No. of the Weekly Reporter (Full Bench Rulings), 148, it was held that a right of pre-emption does exist by custom among Hindoos in Behar; and in the judgment in which this declaration is made, many older cases are referred to in which the custom had been recognised and acted on by the Courts. There are also several cases of later date in which the same thing has been held. There can be no doubt that for years it has always been considered to be settled law that the right of pre-emption exists amongst Hindoos in Behar; and therefore it is not now open to the respondent to raise any objection upon this point.

I would reverse the decision of the Lower Appellate Court and restore and affirm that of the Court of first instance with all costs.

Glover, J.—I concur.

The 15th February 1872.

Present:

The Hon'ble G. Loch and W. Ainslie,
Judges.

Limitation—Act XIV of 1859 *s.* 14—
" *Or other cause.*"

Case No. 197 of 1871.

Regular Appeal from a decision passed by the Officiating Subordinate Judge of Sarun, dated the 15*th May* 1871.

Luchmun Pershad (Plaintiff) *Appellant,*

versus

Nimhoo Pershad and others (Defendants) *Respondents.*

Mr. R. E. Twidale and *Baboo Unnoda Pershad Banerjee* for Appellant.

Mr. R. T. Allan and *Baboo Mohesh Chunder Chowdhry* for Respondents.

The words "or other cause" in Section 14 Act XIV of 1859, apply to cases where the action of the Court is prevented by causes not arising from laches on the part of plaintiff, in other words by accidental circumstances beyond his control.

Loch, J.—The plaintiff sues to recover possession of an eight anna share of Mouzah Gundur, as being part of the ancestral property belonging to a joint Hindoo family, and to set aside the alienation made by his father under a deed of conditional sale of 21st January 1848, and all the subsequent proceedings of foreclosure and delivery of possession to the principal defendant No. 1. The plaintiff urges that the alienation was made during his minority, and as the family is governed by the Mitacksbara law, his father had no authority to make it, there being no legal necessity to warrant such alienation. The suit is admittedly out of time, but the plaintiff seeks to avoid the effect of the law of limitation by pleading the provisions of Section 14 Act XIV of 1859, to the effect that up to 11th December 1869 he was engaged in the *boná fide* prosecution of a suit for the same cause of action which suit was instituted within time, and was dismissed by way of nonsuit for defect of parties by the High Court on the above date.

From the appellant's pleader we gather the following dates: The purchaser got possession on 19th December 1854, the plaintiff instituted his former suit on 5th October 1863, and obtained a decree on 31st May 1865. An appeal was preferred to the High Court on 22nd August 1865, in which limitation was pleaded as barring the plaintiff's suit. This plea was overruled by a Full Bench on 7th June 1867. The appeal was heard on the merits by a Division Bench, and the judgment given on 11th December 1869. Application for review was put in on 10th March 1870 which was rejected on 6th April 1870, and the present suit was instituted on 12th December 1870, the plaintiff making all the members of the joint family parties to it as declared to be necessary by the judgment of this Court, when a suit is instituted to recover joint family property.

The pleader for the appellant quotes the words of Section 14 Act XIV of 1859, "which from want of jurisdiction or other cause shall have been unable to decide the suit," and urges that the words "other cause" are sufficiently wide to allow of the admission of this suit after time; that the words "other cause" have not the restricted meaning put upon them by the majority of the Full Bench in the case of Bissessuree Dabia, VI Weekly Reporter, page 184, *viz.*, that these words must be taken to mean "other cause of a like nature with defect of jurisdiction," but that when, from defect of parties or other cause except want of jurisdiction, a Court is unable to decide a suit before it, then the provisions of this Section are applicable, and the plaintiff can come in and avoid the effect of limitation under the words. "other cause;" that in the present instance there was in reality no defect of parties in the former suit as the other members of the family had been brought before the Court being represented by their father Oodit Narain, who had also joined in the conditional sale; that as the former suit was for the same subject matter and against the same parties as the present and was prosecuted with due diligence and in good faith, all the conditions required by the law have been complied with, and the plaintiff is entitled to have the present suit admitted.

It was also said that the Chief Justice had, in a subsequent case, IX Weekly Reporter, page 402, modified the opinion he had expressed as to the meaning of the "other cause." I certainly do not find any indication of his having done so, and in the judgment referred to he was not called upon to express any opinion on those words.

The Court dismissed the plaintiff's suit on two grounds (XII Weekly Reporter, page 478), first, that all the proper parties were not before the Court as the plaintiff had failed to make the other members of the joint family parties to the suit; and, secondly, because the plaintiff had mistaken his cause of action, for, as no partition had taken place, the plaintiff could not sue for any share, but, as a member of a joint family, could sue only to restore the whole of the alienated property to the family and not merely to recover his share, for, under the theory of Hindoo law, so long as a family remained joint, no one could say what was his particular share. On application for review the Court declined to revive the case, though it was pointed out that there had not been a defect of parties, for the other objection to the suit still remained.

The plaintiff has again brought his suit for an eight anna share, alleging that he has done so because the other members of the family, the sons of Oodit Singh, have brought a separate suit for their share of the property. That suit, as admitted by plaintiff, has been dismissed, and it is quite clear from the ruling come to in the judgment of this Court of 11th December 1869, that the present suit is defective, inasmuch as the plaintiff sues to recover only a part of the property alienated, and not to restore the whole to the joint family. This the plaintiff should have done, whether the other members of the family brought a separate suit or not, and therefore this suit cannot be entertained.

With regard to the words "other cause" of which we are pressed to give a construction, we think they apply to cases where the action of the Court is prevented by some cause not arising from laches on the part of the plaintiff. A case is quoted from the IV Madras Reports, page 1, where it was held that the provisions of the Section would apply to a case where a plaintiff had been unable after due diligence to procure due service of summons on the defendant; but where there is a defect of parties, or where the subject-matter of the suit is incorrectly set forth, that is a defect caused by the negligence of the plaintiff which prevents the Court from disposing of the suit, and where this happens, a plaintiff cannot be allowed to take advantage of the provisions of this Section of Act XIV of 1859.

We think, therefore, that the judgment of the Court below should be affirmed, and this appeal dismissed with costs.

Ainslie, J.—The question of limitation turns on the construction of the words "other cause" in Section 14 Act XIV of 1859.

In the Full Bench case, VI Weekly Reporter, 184, the late Chief Justice, Sir Barnes Peacock, said "I am of opinion that the words 'or other cause,' must mean a "cause of a like nature as defect of juris-"diction. Now a defect of jurisdiction "would be a cause that would not include "any neglect on the part of the plaintiff "either in stating his case or in other "respects." Mr. Justice Trevor concurred in the judgment of the Chief Justice. Mr. Justice Louis S. Jackson who concurred, uses these words: "It appears to me that the "inability of the Court must be either some "unavoidable circumstance over which no "one has any control, or something incidental "to the Court itself and unconnected with "the acts of the parties."

It has been urged that the late Chief Justice's views were subsequently modified, and his judgment in the Full Bench case, IX Weekly Reporter, 402, is quoted in proof of this. But that judgment had no reference whatever to the proper interpretation of the words "or other cause." The question before the Court was whether certain proceedings come within that part of Section 14 Act XIV of 1859 which provides that, when a previous suit prosecuted *bonâ fide* and with due diligence has been dismissed for want of jurisdiction, the time occupied shall be excluded from the computation of the time allowed for instituting a suit.

This Court in dealing with a case in appeal had used these words :—“As the “ *Court below has in this matter acted* “ *altogether without jurisdiction*, we quash “ the order and decree the appeal with costs.” The Chief Justice held that these words distinctly brought the case within the Section. He says (page 408) “ It is impossible, in my “ opinion, to say that the decision of the “ Principal Sudder Ameen was not reversed “ on the ground that from defect of jurisdic- “ tion or other cause, he was unable to decide “ upon the plaintiff's claim.” And again— “ The decision of the Principal Sudder Ameen “ was reversed, not upon the ground that the “ plaintiff was not entitled to mesne profits, “ but upon the ground that the Principal “ Sudder Ameen was not the proper Court “ to decide as to her right to mesne profits, “ and that he ought to have referred her to “ the Sudder Court, or to a new action.”

And further (page 409) :—“ If the decision “ of the Principal Sudder Ameen was re- “ versed, because he had not the power to “ award the mesne profits to the plaintiff, a “ power which, it was admitted, the Sudder “ Court, or a Court in which a new suit “ might be instituted, would have had, it “ must have been because he had not the “ power to determine whether the plaintiff “ ought to have them or not, or in other “ words, because he had not the power, for “ want of jurisdiction or from some other “ cause, to decide the plaintiff's claim. I “ know of no difference between not hav- “ ing power by law to determine or to de- “ cide upon a question, and being unable for “ want of jurisdiction to determine or decide “ upon it.”

And again (page 409) :—“ If they had an- “ nulled it upon the ground that the plaintiff “ was not entitled to the mesne profits of “ which she had been deprived by the de- “ fendant under the erroneous decree, that “ would have been a different thing. But “ they did not do so ; they annulled the “ decision expressly upon the ground that “ the Principal Sudder Ameen acted without “ jurisdiction.”

At page 410, the following passage occurs :—“ The judgment of the Principal “ Sudder Ameen was in fact reversed upon “ the ground that he acted without jurisdic- “ tion : and the plaintiff has acted upon the “ faith of what the Judges said; and she “ brought a new suit according to the sugges- “ tion of the Court. How could she or her “ advisers have possibly imagined that, when “ she should seek to have the time deducted, “ which she had spent fruitlessly in a Court “ whose decision had been expressly reversed, “ because it had acted altogether without “ jurisdiction, she would be told that that “ was not the ground of reversal. In my “ opinion a reversal of the decision of the “ Principal Sudder Ameen, expressed to be “ on the ground of want of jurisdiction, was “ a reversal within the meaning of Section “ 14 of the Limitation Act, whether the Prin- “ cipal Sudder Ameen had jurisdiction or “ not. Even if it can be said that the deci- “ sion was not reversed upon the ground of “ want of jurisdiction, it was clearly annulled “ upon the ground that the Principal Sudder “ Ameen for some other cause was unable to “ decide upon the plaintiff's claim.” It is on these last few lines that the appellants rely ; but it is clear that the learned Chief Justice in no part of the judgment entered into any examination of what “ other causes” would operate to save the case from the operation of the Limitation Act. He merely threw this in at the end of his judgment as an indication that, if the majority of the Court was right on the question of the want of jurisdiction, still the plaintiff had a case for consideration. He did not himself say that she had any other ground to rely on except the want of jurisdiction in the Principal Sudder Ameen, or that he would grant her deduction of time on any other cause than that want of jurisdiction. He could not enquire whether the cause was a cause falling within the meaning of the term “ cause other than want of jurisdiction,” for his whole contention was that the cause was want or supposed want of jurisdiction ; and that whether the first judgment of the Court was right or not, it could not recede from it.

He left it to those who differed from him to show that the cause was not only some thing different from want of jurisdiction, but that it was one that did not come within the Section of the Act. This view of the case was never considered, and no opinion as to the meaning of the words “ or other cause” was expressed by any of the Judges, and it cannot be said that the Chief Justice deliberately put forward, or even hinted at any modification of the opinion on the subject of the meaning of those words which he expressed in the judgment in VI Weekly Reporter, and which he illustrated by examples.

The Madras case cited is also in agreement with the Full Bench decision of 1st September 1866 (in the VI Weekly Reporter).

I think Section 14 Act XIV of 1859 refers to suits in which the Court is unable to make a decree for want of jurisdiction over the subject of suit and to suits in which the Court has jurisdiction in respect to the subject of litigation, but in which, from some accidental circumstance beyond the plaintiff's control, it never arrives at that stage of the proceedings at which a decree can be properly recorded.

In this case there was jurisdiction in the Court before which the former suit was brought to try the plaintiff's claim, and the Court found that the claim laid before it was bad in law, and dismissed it; it did not declare that it was unable, from defect of jurisdiction or other cause, to decide upon it. It merely said that the plaintiff had misconceived his right of action, and so dismissed the claim as laid. The present claim is not the same, for, though the thing to which the right claimed by the plaintiff attaches is the same, the right which he seeks to establish (if indeed he has even now properly framed his suit) is different. If this suit is on the same cause of action as the former suit, plaintiff's claim has already been dismissed as bad; if it is on another cause of action, Section 14 does not apply. Moreover, if the two claims could be said to be on the same cause of action, it would still on other grounds not help the plaintiff, as that which prevented his getting his proper claim adjudicated on before was his own error, and not something beyond his control which stopped the procedure of the Court before it arrived at that stage in which a decree could be made.

I concur in dismissing the appeal with costs. The fees chargeable under the Court Fees' Act, 1870, are to be calculated as required by Section 309 Act VIII of 1859, and are to be recoverable from the plaintiff.

The 16th February 1872.

Present:

The Hon'ble G. Loch and W. Ainslie,
Judges.

Act XI of 1858—*Withdrawal of Certificate as Manager—"Sufficient Cause" (within meaning of s. 21)—Resignation of Manager—Appointment of Successor—Notice—Sections* 6 *&* 12—*New Manager and Guardian.*

Case Nos. 823 and 324 of 1871.

Miscellaneous Appeals from an order passed by the Judge of Patna, dated the 28th August 1871.

Musst. Jugodumba Koer, *Appellant,*

versus

Musst. Mircha Koer and another,
Respondents.

Mr. C. Gregory, Moonshee Mahomed Yusuf, and *Baboo Boodh Sein Singh*
for Appellant.

Mr. R. E. Twidale for Respondents.

The marriage of a minor is not a sufficient cause, within the meaning of Section 21 Act XL of 1858, for withdrawing a certificate as manager granted under that Act; there must be some neglect in the performance of duty or some cause of a similar kind rendering it improper to continue the manager in the appointment.

One manager cannot shift off the responsibility from himself and resign the appointment, and another one take up the appointment, without the provisions of Section 6 (requiring issue of a notice of such application or the fixing of a day for the hearing of the application) being duly carried out.

Where two parties were fighting to get hold of the property, and the probability was that the minor would suffer if the property remained in the hands of either, the Court could not say that either person was a fit person to be appointed manager, and therefore under Section 12 ordered the property to be made over to the charge of the Collector with direction to appoint a manager of the property and a guardian of the person of the minor.

Loch, J.—The property which is referred to in this case belonged to one Jankee Surun, who died leaving two daughters Subodra and Shyam Peary, minors. At his death Juttah Singh, the maternal grand-father of the minors, was appointed manager of the estate under Act XL of 1858, after a contest with one Jugodumba who claimed to be appointed manager, and at the same time Mircha, the maternal grand-mother of the minors, was appointed guardian of their persons.

Juttah Singh retained his appointment as manager of the property till the 26th April 1871, when he resigned in favor of the said Jugodumba.

On the 31st May 1871, Joy Mungul Chowdhry presented an application to the Court, praying that Jugodumba's service as manager might be dispensed with and the certificate granted to her be withdrawn, as his son had married the minor Sobodra, and that he as father-in-law was entitled to manage the estate.

Jugodumba disputed the fact of the marriage.

The Judge after going into the evidence considered that the marriage was proved, and on that ground held that the certificate granted to Jugodumba must be withdrawn, and that Joy Mungul Chowdhry as the father-in-law of the girl must be appointed to manage the estate.

By Section 21 Act XL of 1858, the Civil Court may for any sufficient cause recall any certificate granted under this Act. We do not think that any marriage, if such marriage did take place, between Joy Mungul's son and Subodra, can be considered a sufficient cause within the meaning of the Act, for withdrawing the certificate. The sufficient cause referred to in that Section is probably some neglect in the performance of duty, or cause of similar kind, which will render it improper to continue the manager in the appointment. Therefore, whether the girl be married or not, it would not necessarily follow that the certificate should be withdrawn from Jugodumba merely because she is married. It was wholly unnecessary for the Judge to go into the question of marriage at all; and we decline to pronounce any opinion as to the validity or otherwise of the marriage. But we find that there is a defect in the appointment of Jugodumba as manager. Juttah Singh resigned the appointment on the 26th April 1871 in favor of Jugodumba, and Jugodumba was then and there appointed to succeed him, without any notice of such application having been issued or any day fixed for the hearing of the application as required by the provisions of Section 6 Act XL of 1858. We do not think that the law allows one manager to shift off the responsibility from himself and to resign the appointment, and another one to take up the appointment, without the provisions of this Section of the law being duly carried out. We must, therefore, hold that Jugodumba has not been legally appointed manager in the place of Juttah Singh.

It is clear to us that both parties are fighting to get hold of this property, and the probability is that the minor will suffer if the property remains in the hand of either. Under such circumstances, we cannot say that either person is a fit person to be appointed manager of the property, and we, therefore, under the provisions of Section 12 of the Act, direct that the property be made over to the charge of the Collector, who of course under the powers vested in him by that Section, will appoint a manager of the property, and will also appoint a guardian of the person of the minor.

The certificate held by Mircha as guardian will remain in force until some other person be appointed by the Collector or till she be confirmed in the appointment by the Collector.

Miscellaneous Appeal No. 324 of 1871 will be decreed, and the parties pay their own costs.

Miscellaneous Appeal
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The 16th Febru

Present

The Hon'ble Sir Richard
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Mitter, *Judge*.

Partition Proceeding—Rep
VIII of 1859 *s.* 180—*Ev*

Case No. 298

Miscellaneous Appeal fr
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Papers—Nugdee Lands—
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ground that papers of this kind cannot be legally received in proof of the amount of land and rent, because, he says, according to law the zemindars should give *pottahs* in exchange for *kubooleuts* to their ryots; and because the document has not been duly registered. He further objects to the document, because he does not understand how, when the *nugdee* lands of the village remained in possession of the ryots, the quantity of the *nugdee* lands varies from year to year, becoming, as he thinks, larger each year.

We think that the Subordinate Judge must first determine whether this document has been properly executed; and if it has been so, then, as the amount of the rent therein agreed to be paid, including what the Subordinate Judge calls cesses, is under Rs. 100 and as the term is only for one year, the document would not require registration, and may be admitted as evidence; and if proved, it would be binding upon the defendant.

As to the difficulty which the Subordinate Judge suggests with regard to the *nugdee* land increasing year by year, he will find that this arises merely from the fact that the ryots engage for a larger quantity of land as *nugdee*, and for a less quantity as *bhowlee* year by year, while there is no alteration in the actual area.

With regard to the *bhowlee* land, the Subordinate Judge has found that the plaintiff's statement as to the quantity of produce is contradicted by his own *putwaree;* whereas the plaintiff says that the produce is 711 maunds, the *putwaree* says it is only 611 maunds. The special appellant has pointed out to us that the Subordinate Judge has misread the figures used by the *putwaree;* and in support of that, he points out that, if 611 maunds be read, then under no circumstances could the amount of 220 maunds be arrived at which the *putwaree* himself says is the share of the plaintiff.

Further objection is taken to the admission of the evidence of the *putwaree* of the other 8 annas share as being that of an independent witness, for it is shown that the defendant in this case is also a shareholder in that 8 annas; therefore, the evidence of that witness cannot be relied on as being that of an entirely independent witness.

We think that the case must go back to the Subordinate Judge, who will dispose of it afresh with reference to the above remarks.

Costs will follow the ultimate result of the suit.

The 22nd February 1872.

Present:

The Hon'ble G. Loch and W. Ainslie, *Judges.*

Right of Occupancy—Act X of 1859 *s.* 6—*Cultivator and Ticca Lessee—Merger.*

Cases Nos. 790 and 791 of 1871.

Special Appeals from a decision passed by the Judge of Bhaugulpore, dated the 10*th April* 1871, *reversing a decision of the Subordinate Judge of that district, dated the* 12*th March* 1870.

Mokoondy Lall Doobey and others (Plaintiffs) *Appellants,*

versus

L. G. Crowdy and others (Defendants) *Respondents.*

Baboos Mohesh Chunder Chowdhry and *Romesh Chunder Mitter* for Appellants.

Mr. R. E. Twidale and *Baboos Rajendro Nath Bose* and *Omer Nath Bose* for Respondents.

Where a person held ryottee lands alternately as cultivator and ticca lessee or farmer continuously for a period of about 50 years, HELD that his cultivation of the lands for broken periods would not deprive him of his right of occupancy under Section 6 Act X of 1859, and that the doctrine of merger did not apply to such cases.

Loch, J.—THE plaintiff in this case sues to recover possession of certain lands held by the defendant, who claims to have acquired a right of occupancy therein, alleging that he has cultivated these lands from the year 1231.

The lands in dispute are not the zemindar's *khas* lands, and from 1231 to 1239 the defendant held these lands as a cultivator; from that year to 1246 he obtained a lease of the village in which these lands are situated; from 1246 to 1250 he continued to hold these lands as cultivators; from that time to 1269 he again obtained a lease of the village, still however retaining these lands in his own cultivation, and from 1269 to the present time, he has continued to cultivate the lands. So that it appears that he actually held these lands in his own cultivation for a period of about 50 years.

The Lower Appellate Court has found that the defendant has proved a right of occupancy and therefore the plaintiff is not entitled to eject him.

In special appeal, it has been urged before
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On the other points, I entirely concur, and I hold that there is evidence to show that Akbur Hossein has attained his majority, and that there is no sufficent evidence to show that he is not a person fit to be appointed as a guardian.

The 23rd February 1872.

Present:

The Hon'ble G. Loch and W. Ainslie, *Judges.*

Limitation—Act XIV of 1859 *s.* 1 *Clauses* 2 *&* 16*—Damages—Value of Crop.*

Case No. 817 of 1871.

Special Appeal from a decision passed by the Additional Judge of Tirhoot, dated the 18*th April* 1871, *modifying a decision of the Subordinate Judge of that district, dated the* 14*th December* 1870.

Musst. Dhunputty Kooer (Plaintiff) *Appellant,*

versus

Mr. Lloyd (Defendant) *Respondent.*

Baboo Debendro Narain Bose for Appellant.

Baboos Bhowanee Churn Dutt and *Umbika Churn Ghose* for Respondent.

A suit against defendant for entering into plaintiff's land, cutting his crop, and carrying it away, though the plaint may use the word "damages," is clearly for the value of the crop, and is governed by the limitation prescribed by Clause 16 and not Clause 2 Section 1 Act XIV of 1859.

Loch, J.—The pleader for the respondent admits that he cannot support the judgment of the lower Court on the point of limitation as regards the years 1274 and 1275. But he urges that with regard to 1273, as the plaintiff sues for damages and not for the value of the crop, the suit for that year is barred by limitation under the provisions of Clause 2 Section 1 Act XIV of 1859. But this case appears to come under the ruling of the Full Bench of the 26th August 1868, reported in the Special No. of the Weekly Reporter, pages 126-27. That was a case in which the tenant brought his action against the defendant for having entered into his land, cut his crop and carried it away. The suit in the present instance is of the same nature; and though the plaintiff in his plaint may have used the word "damages," yet it is clear that it is for the value of his crop that he brings his present action. We think, therefore, that the limitation which would apply to this case is that of Clause 16 Section 1 and not of Clause 2 Section 1 of Act XIV of 1859. The case is remanded for disposal on the merits.

Costs of remand will follow the result.

The 23rd February 1872.

Present:

The Hon'ble A. G. Macpherson and Dwarkanath Mitter, *Judges.*

Certificate under Act XXVII of 1860*—Claim under Will—Procedure.*

Case No. 341 of 1871.

Miscellaneous Appeal from an order passed by the Judge of Tipperah, dated the 22*nd July* 1871.

Juggut Chunder Roy, *Appellant,*

versus

Chunder Monee Shaha, *Respondent.*

Baboo Nullit Chunder Sein for Appellant.

Baboo Kashee Kant Sein for Respondent.

When a party claims a certificate under Act XXVII of 1860 by reason of a will said to have been executed by the deceased, the Judge should decide upon the issue raised by him and say whether under the will he has a preferable right, instead of granting a certificate to the widow of the deceased upon her giving security to satisfy any claims which may be brought, should the will be proved to be a genuine document in a Civil Court.

Macpherson, J.—In this case, Juggut Chunder applied to the Court for a certificate under Act XXVII of 1860. He claimed under a will said to have been executed by the deceased. The Judge has not decided whether the will was executed or not, but has given a certificate to Chunder Monee, the widow of the deceased, upon her giving security to satisfy any claims which may be brought, should the will be proved to be a genuine document in a Civil Court.

It appears to us that this is not the proper way of disposing of the matter, and that as Juggut Chunder claimed a certificate by reason of the will, he was entitled to have the Judge's decision upon the issue raised by him, and that the Judge must say whether under the will he has a preferable right. The case is remanded in order that the Judge may decide this point. We leave it to the Judge to say whether the parties may adduce fresh evidence. He will allow them to do so if it is necessary for the ends of justice.

The 23rd February 1872.

Present :

The Hon'ble A. G. Macpherson and Dwarkanath Mitter, *Judges.*

Sales in Execution—Irregularity—Postponement—Time fixed in Proclamation.

Case No. 339 of 1871.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Tipperah, dated the 16th August 1871.

Sreemutty Asmutoonnissa Bibee and another (Judgment-debtors) *Appellants,*

versus

Sreemutty Khudemoonnissa Bibee and another (Decree-holders) *Respondents.*

Baboo Romanath Bose for Appellants.

Baboo Doorga Mohun Doss for Respondents.

HELD that the appellant could not complain of the order of the Subordinate Judge postponing a sale in execution of decree from the 25th to the 26th, unless he could show that he had suffered substantially by the postponement. But the attention of the Courts was called to the importance of abiding by the dates fixed in the proclamations of sale as far as possible, and not postponing sales without good reason.

Macpherson, J.—IT appears to us that this appeal ought to be dismissed, as there is nothing to show that the judgment-debtor suffered any substantial damage by reason of any irregularity in making the sale. The sale was fixed to take place upon the 25th May; but on the 23rd May the Subordinate Judge learnt that the Court was to be closed upon the 25th, and that that day was to be kept as a holiday. He thereupon drew up a proceeding on the 23rd May, reciting that the Court was to be closed on the 25th, and fixing the 26th for the sale. The sale did take place on the 26th, but the appellant now contends that because the day on which the sale took place was the 26th instead of the 25th, it is an irregularity which has caused him injury and vitiates the sale.

It is sufficient to say that the appellant cannot complain of the order of postponement from the 25th to the 26th unless he can prove that, by reason of that postponement, persons who would have come to bid were prevented from coming, and unless he can show that he has suffered substantially by the postponement. There is nothing whatever in the circumstances of this case to lead to the conclusion that he did suffer in any way by the postponement: and we think that the appeal ought to be dismissed.

We wish to observe, with reference to the latter part of the judgment of the Subordinate Judge, that he does not seem to be sufficiently aware of the necessity of holding sales which have been advertised upon the day fixed for the sale by the proclamation, when it is possible to do so. It stands to reason that the chances of bidders appearing is very much greater when the date duly notified by the proclamation is adhered to, and that if the sale is postponed from day to day to suit the convenience of the Judge, the parties cannot have such full and sufficient notice as when the proclamations are attended to. The Subordinate Judge refers to a case where a sale which was fixed for the 14th did not take place till the 15th, and the reason was that on the 14th, the day on which the sale ought to have taken place, the Subordinate Judge was assisting the Collector in holding certain examinations. It may be quite proper that the Subordinate Judge should assist the Collector on such an occasion; but his being so engaged clearly was no good reason for postponing a sale which had been long previously fixed to take place on the 14th. Certainly a postponement is not justifiable for such a cause, unless the fullest notice is given to all parties concerned. In these matters of sale, it is all important that due notice should be given, and it is the duty of the Courts to abide by the dates given in the proclamation as far as possible, and it is not right that they should postpone sales without good reason.

The respondents are entitled to their costs, and we allow as vakeel's fees 16 rupees.

The 23rd February 1872.

Present:

The Hon'ble H. V. Bayley and F. A. Glover, *Judges.*

Act X of 1859 s. 17—Notice of Enhancement—Object of.

Case No. 1060 of 1871.

Special Appeal from a decision passed by the Judge of Purneah, dated the 22nd June 1871, affirming a decision of the Moonsiff of Arrariah, dated the 3rd April 1871.

Tirth Nund Thakoor (Plaintiff) *Appellant,*

versus

Mohur Mundul (Defendant) *Respondent.*

Baboos Taruck Nath Sein and *Taruck Nath Dutt* for Appellant.

Baboo Kishen Dyal Roy for Respondent.

The object of the notice of enhancement is that the defendant may know what are the grounds on which the plaintiff seeks to enhance his rent, so that he may have an opportunity of coming forward to contest any of those grounds; and as the defendant's own answer in this case showed that he was fully aware of and came forward to contest the main ground on which the plaintiff sought to enhance his rent, the notice issued by plaintiff was held to be sufficient to meet the requirements of Section 17 Act X of 1859.

Bayley, J.—We think this special appeal should be allowed.

The only point in the case is whether the notice of enhancement issued by plaintiff, special appellant, was sufficient to meet the requirements of Section 17 Act X of 1859. The Judge below on the authority of a decision reported at page 330, Volume VIII Weekly Reporter, considers that it is not. He says, "the notice has only to be read, and "it will be seen how utterly impossible it is "for the ryot to know what points he has to "contest; the three grounds of Section 18 are "lumped into one unintelligible mass, it is "impossible for him to know what increase is "claimed on account of the difference between "his rates, and the surrounding rates; what "increase on account of the fertilizing "powers of the river; what increase on "account of his acreage as found by measurement."

The notice specifies *four* grounds of enhancement. The *first* is that the productive powers of the land had increased owing to the deposit of silt, &c., caused by the inundation of the river. Further that the value of produce had increased. It is true, the notice does not say that the increase of productiveness of the soil had been caused otherwise than by the agency and at the expense of the defendant; but as ryots cannot control the course of rivers, the point of the agency of the ryot need not have been specifically referred to. The specific mention that the land was enriched by the inundation and deposits of the river was sufficient to show that it was without any expense on the part of the ryots.

The *second* ground is that the rate paid by the defendant was below the rate paid by tenants of the adjoining lands. No doubt the notice omits to mention that the rate was lower than the *prevailing rate* paid by the *same class* of ryots for lands of a *similar description* and with *similar advantages*, but the answer of the defendant very distinctly refers to lands similar in character and advantages, and shows that he fully understood as to what the ground of the plaintiff's demand was.

The *third* and the *fourth* grounds relate to the area and the jumma, and both are distinctly met by the defendant referring to long established area and jumma of himself, and the neighbours as belonging to the Durbundee of that portion of the country.

The only point on which no specific answer is given by the defendant is as to the increase of the selling price. But under all the circumstances, we think, it would be too technical to reject the plaintiff's case on the grounds stated by the Lower Appellate Court. The object of the notice is that the defendant may know what the grounds are on which the plaintiff seeks to enhance his rent, so that he may have an opportunity of coming forward and contesting any of those grounds, and nothing is clearer than the defendant's own answer in this case showing that he was fully aware of and came forward to contest the main ground on which the plaintiff sought to enhance his rent.

We reverse the judgment of the Lower Appellate Court, and remand the case to that Court in order to be remitted to the first Court to be tried on the merits on all the points raised by the pleadings in this case. The costs will follow the result.

The 23rd February 1872.

Present:

The Hon'ble H. V. Bayley and F. A. Glover, *Judges.*

Evidence—Document 100 years old—Special Appeal.

Case No. 1061 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Sarun, dated the 6th June 1871, *affirming a decision of the Moonsiff of Pursa, dated the 7th September* 1870.

Shah Buddiooddeen *alias* Buddoo and others (Plaintiffs) *Appellants,*

versus

Golam Peer and thers (Defendants) *Respondents.*

Baboo Taruck Nath Sein for Appellants.

Baboo Boodh Sein Singh for Respondents.

Per Bayley, J.—The omission in the first Court to enquire or specify in the judgment as to whether a pottah which is admittedly 100 years old and which is actually supported by the evidence of old witnesses, comes from proper custody or not, is not a sufficient reason to invalidate the finding that the pottah is proved; nor is it a defect in the invetsigation affecting the merits of the case which would justify the interference of the High Court in special appeal.

Per Glover, J.—The question as to proper custody is not in issue, the Judge having found the pottah proved by the evidence of witnesses.

Bayley, J.—In this case, the plaintiff sued to set aside a ***mokurruree pottah*** alleged to have been 100 years old. It has been held by both the Lower Courts that the ***mokurruree pottah*** has been proved, and that the plaintiff's claim for ejectment must fail.

In special appeal, two grounds have been taken. The ***first*** is that, although the deed is 100 years old, no proof of proper custody has been given. Now, the rule of law is that a document 30 years old ordinarily proves itself when it is shewn that it comes from proper custody; but I do not think that the omission in the first Court to enquire or specify in the judgment as to whether a deed which is admittedly 100 years old and which is actually supported by the evidence of old witnesses, comes from proper custody or not, is a sufficient reason to invalidate the finding that the deed is proved or that such omission is a defect in the investigation affecting the merits of the case which would justify our interference in special appeal.

The ***second*** objection taken is that the Lower Appellate Court has failed to find whether the lands alleged to have been covered by the ***mokurruree pottah*** did lie within the ***puttee*** of Mobaruck Hossein, the alleged grantor of the pottah. It is true that a question similar to it is in the grounds of appeal before the Judge below, but it is not shown that that same question was really urged during the trial of the case. The ordinary inference would be the other way, because the Lower Appellate Court says that from the grounds of appeal the issue fixed is as to whether the pottah was valid or not. It was quite open to the special appellant, if he really intended to raise the question now taken before us, to ask that an issue should be specifically framed on it and evidence taken, and a decision given on ***the*** point. But be that as it may, we think, on reading the judgment of the Lower Appellate Court affirming that of the first Court, that in finding on the validity of the pottah on evidence which the Court considers reliable, the Lower Appellate Court has also found as a fact that Mobaruck Hossein granted some of his lands as ***mokurruree*** to the defendant's ancestor. The finding as one of fact may be right or otherwise, but it does not constitute an error in law for which we should be justified to interfere in this special appeal.

The special appeal is therefore dismissed with costs.

Glover, J.—I also think that the appeal should be dismissed. There is no question as to proper custody in issue, inasmuch as the Judge finds the pottah proved by the evidence of witnesses. The objection that the pottah does not cover the land in dispute was clearly never pressed in the Courts below, and should not be allowed any weight now.

The 23rd February 1872.

Present:

The Hon'ble H. V. Bayley and F. A. Glover,
Judges.

Damages for Abuse and Assault—Plaintiff's Position.

Case No. 1145 of 1871.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 23rd May 1871, modifying a decision of the Subordinate Judge of that district, dated the 22nd February 1871.

Joypal Roy and another (Plaintiffs)
Appellants,

versus

Mukoond Roy and others (Defendants)
Respondents.

Baboo Kalee Kishen Sein for Appellants.

Baboos Romesh Chunder Mitter and *Taruck Nath Paleet* for Respondents.

In a suit for damages occasioned by abuse and assault, the plaintiff's position should be considered for the purpose of seeing how far the compensation awarded is commensurate with the injury inflicted, but not for giving a decree against the defendant beyond any possibility of his ever satisfying it, simply because the plaintiff is a man of a somewhat high position in life.

Bayley, J.—We are of opinion that this special appeal must be dismissed with costs.

The suit was for damages estimated at Rs. 2,000 alleged to have accrued to plaintiff from abuse and assault by the defendant, and from his minor son being bitten by a dog at the defendants' instigation.

The first Court gave the plaintiff a decree for Rs. 700 estimated to be the full income of defendant for one year, or up to the defendants' means of livelihood for that period.

The Lower Appellate Court on appeal reduced the amount of damages to Rs. 200.

The contention put before us in special appeal against this reduction is that, in assessing the amount of damages, the Lower Appellate Court has wrongly excluded from its consideration certain elements which, if considered, might have had the effect of inducing him not to reduce the damage awarded by the first Court, *viz.*, the position and *status* in life of the plaintiff, and the abusive language used by the defendant which was actionable.

Now, it is true that the Lower Appellate Court somewhat wrongly, though not so as to affect its decision on the merits of the case, says that it gives no damages for the abusive language used, but the Court finds as a fact that "the plaintiffs have not proved in any shape that they suffered any personal damage to character or position by such abuse, and moreover that there is no proof whatever detailing the abusive language used." By the words "no proof," it is quite clear, the Court meant "no sufficient proof;" and looking to the defendant's means of life, which is an element which ought to be considered, the Lower Appellate Court thinks that a fine of about one-third of the defendant's whole year's income would be a sufficient punishment to him, as also a sufficient compensation for the injury that may have been inflicted on the plaintiff. It has been somewhat too strongly pressed that the plaintiff's position also should have been considered. No doubt that ought to have been so, but only for the purpose of seeing how far the compensation awarded is commensurate with the injury inflicted, but not for giving a decree against the defendant beyond any possibility of his ever satisfying it simply, because the plaintiff is a man of a somewhat high position in life. On the whole, we think the Lower Appellate Court has in this case awarded a fair sum as compensation for the injury inflicted on the plaintiff, and we therefore see no ground for interference in special appeal.

A cross-objection was attempted to be taken by the pleader for the respondent as to the amount awarded by the Lower Appellate Court; but on the suggestion of the Court that a cross-special appeal so made lays open again the whole case, and that in the present case it would be then in the discretion of the Court, either further to enhance or further lessen the amount of the damages awarded, the pleader discreetly, as it appears to us, gave up the cross-appeal.

The special appeal is dismissed with costs.

Glover, J.—I concur in dismissing this appeal with costs.

The 23rd February 1872.

Present :

The Hon'ble H. V. Bayley and F. A. Glover, *Judges.*

Declaratory Decree—Erection of Drain-pipe—Magistrate's Order under Criminal Procedure Code, s. 321—*Limitation—Burden of Proof.*

Case No. 1062 of 1871.

Special Appeal from a decision passed by the Judge of Gya, dated the 30th June 1871, *affirming a decision of the Subordinate Judge of that district, dated the 18th February* 1871.

Meghraj Singh and others (Defendants) *Appellants,*

versus

Rashdharee Singh and others (Plaintiffs) *Respondents.*

Mr. R. E. Twidale and *Baboo Nil Madhub Sein* for Appellants.

Baboos Mohesh Chunder Chowdhry and *Gopal Lall Mitter* for Respondents.

Plaintiff's right to a declaratory decree as to the erroneousness of the Magistrate's order passed under Section 321 Code of Criminal Procedure permitting defendant to erect a drain-pipe to take water from plaintiff's reservoir, was held to be not affected by the fact that the Magistrate's order had not been put into force.

The period of limitation applicable to such a suit is twelve years and not three years.

The defendant having claimed an easement over plaintiff's water, the burden of proof was on him to show that he acquired it by grant or user.

Glover, J.—THE plaintiff in this case sued to remove a *Dougah* or drain-pipe alleged to have been fixed by the defendant in the north side of a reservoir belonging to plaintiff and to have it declared that the defendant had no right to take water from the reservoir through such drain-pipe. He also sued to have it declared that the order of the Magistrate passed under Section 321 of the Criminal Procedure Code confirming the defendant in possession of that right was erroneous. The plaintiff's case is that there had been a masonry aqueduct on the north end of the tank through which the surplus water flowed and this water the defendant used for the irrigation of his land; that there was no other exit for the water; and that the defendant had no right to fix a drain-pipe where he had done.

The defendant's answer was that the *Dougah* or drain-pipe had always been where it was, that the Magistrate found that point in his favor, and that from that period up to the present the water had always been brought to his fields through that drain-pipe.

Both the Courts below have given a decree in the plaintiff's favor.

The *first* point taken in special appeal is that the plaintiff's claim ought to have been dismissed, it being found by the Judge that the *Dougah* which is sought to be removed is not in existence. Also that the plaintiff had no right to a declaratory decree inasmuch as it is an admitted fact that the order of the Magistrate under Section 321 of the Criminal Procedure Code had never been enforced.

The *first* part of the objection we consider to be good. As found by the Judge below, the defendant never availed himself of the order passed by the Magistrate permitting him to erect the *Dougah*. So far, therefore, the plaintiff's suit to have the *Dougah* removed is based on no sufficient grounds.

On the *second* point, we think the plaintiff had a sufficient cause of action. Notwithstanding that the order of the Magistrate was not at once made use of but was allowed to remain a dead letter for four years, it does not follow that the order is even now non-existent. On the contrary, the Magistrate's order will remain in force until the matter is disposed of by a Civil Court. Therefore, so long as time remains for the plaintiff to bring an action in the Civil Court to have the order passed by the Magistrate set aside, so long the existence of that order would be a cause of action to the plaintiff.

Another objection taken is that supposing the present suit to be one to have the Magistrate's order cancelled, it is out of time, not having been instituted within three years of that order. This supposes that awards under Chapter 22 of the Criminal Procedure Code are to be treated *quoad* limitation in the same way as awards under Act IV of 1840. No doubt a suit to contest certain awards must be brought within three years, but the limitation Act makes no mention of cases coming under Chapter 22 of the Criminal Procedure Code. On the contrary, it has been held by a Division Bench in the case of Undhoob Narain and others, Weekly Reporter, Volume IX, page 480, that a suit for right of possession against an order passed by the Magistrate under this Chapter of the Criminal Procedure Code is not barred by the lapse of three years, but that the plaintiff would have twelve years within which to bring his action.

The last objection taken is that the Judge has wrongly placed the burthen of proof on the defendant; that it was for the plaintiff to start his case and to show that there was no other means for the exit of surplus water of his tank except by the masonry aqueduct. This contention is worth nothing. The tank admittedly belongs to the plaintiff, and it was for the defendant who claimed an easement over it to show distinctly that he had acquired that special right. The mere fact that the plaintiff alleged the existence of an aqueduct does nothing to shift the burthen of proof on to him. It was for the defendant who claimed the special privilege of easement as to plaintiff's water to show that he acquired it by grant on user.

Seeng no error in law in the judgment of the Lower Appellate Court, we dismiss this special appeal with costs.

The 28th February 1872.

Present :

The Hon'ble A. G. Macpherson and Dwarkanath Mitter, *Judges.*

Local Investigations by Ameens— When to be ordered—Evidence.

Case No 1052 of 1871.

Special Appeal from a decision passed by the Officiating Judge of Nuddea, dated the 1st June 1871, reversing a decision of the Subordinate Judge of that district, dated the 11th July 1870.

Bindabun Chunder Sirkar Chowdhry and others (Plaintiffs) *Appellants,*

versus

Nobin Chunder Biswas and others (Defendants) *Respondents.*

Baboo Gopal Lall Mitter for Appellants,

Baboo Sreenath Doss and *Bipro Doss Mookerjee* for Respondents.

An Ameen should be appointed to hold a local investigation only when it is necessary to inspect the land which is the subject of dispute, to make maps of localities to obtain information with regard to the physical features of the place, to identify the land in maps with parcels which are the subject of the suit, and to identify the maps with one another with the aid of objects to be

found in the land; and for these and similar purposes, an Ameen may examine witnesses when the evidence which they have to give is of such a nature that it ought to be taken by him on the spot. Where, however, any fact can be proved by evidence taken otherwise than on the spot, that evidence ought to be taken by the Court itself in a regular manner and not by an Ameen.

***Quære.*—Whether, where an Ameen has in fact been, though improperly, deputed and has examined witnesses, that evidence ought to be totally rejected.**

Macpherson, J.—In this case, the objection taken to the judgment of the Lower Appellate Court is that, whereas the Subordinate Judge directed a local investigation, and the Ameen in the course of that investigation took the evidence of certain witnesses, the Judge was of opinion that the Subordinate Judge acted illegally in appointing an Ameen at all, and held that the evidence taken by the Ameen must be excluded from the record.

The Lower Appellate Court was quite right in holding that the case was not one in which the Subordinate Judge was justified in appointing an Ameen and directing a local investigation. In fact, the matter which the Subordinate Judge referred to the Ameen was really the substantial issue which had to be tried in the case, *viz.*, whether the disputed *julkur* was part of or connected with a certain other *julkur*, and therefore belonging to the plaintiffs or not. That was an issue which might or ought to have been tried by the Subordinate Judge himself, sitting in his own Court, and dealing with the case upon the evidence brought before him by the parties; and it was not a matter which he should have referred to an Ameen. An Ameen is properly appointed when it is necessary to inspect the land which is the subject of dispute, and when it is necessary to make maps of localities, and to obtain information with regard to the physical features of the place in dispute, and to identify the land in maps with parcels which are the subject of the suit, and identify the maps with one another with the aid of objects to be found in the land; and for these and similar purposes, an Ameen may examine witnesses when the evidence which they have to give is of such a nature that it ought to be taken by him on the spot. Where, however, any fact can be proved by evidence taken otherwise than on the spot, that evidence ought to be taken by the Court itself in a regular manner, and not by an Ameen.

In the present instance, that which was referred to the Ameen was a matter which could much better have been disposed of by the Subordinate Judge sitting in his Court: and the Subordinate Judge was quite wrong in appointing an Ameen. But the Ameen having been in fact deputed, and having examined witnesses, we have some doubt as to how far the Judge was right in totally rejecting that evidence and saying that it was evidence which he ought not to look at. It is not necessary, however, to go into that question; because, although the Judge says that he thinks it must be rejected entirely as being illegally taken, he, in fact, has considered it and has expressed his opinion upon it. He expressly says that the evidence given before the Ameen is merely a second and improved edition of that already given before the Subordinate Judge, and he says—"I do not "apprehend any practical injustice to either "party from excluding evidence which must, "even if admitted, be viewed with distrust." The Judge further says—"The fact that "the Ameen has acted upon evidence which "the Subordinate Judge found to be legally "inadmissible, shows how far beyond his "proper sphere the Ameen was going." With that expression of the Judge's opinion, and with the fact that the Ameen admitted and acted upon evidence which the Subordinate Judge declared to be inadmissible, it appears to us to be unnecessary to interfere with the judgment of the Lower Appellate Court. The Judge has, in fact, considered and decided upon the merits of the evidence considering it unreliable and bad.

On the whole, we think, the appeal ought to be dismissed with costs.

The 25th January 1872.

Present:

Sir James W. Colvile, Sir Montague Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Defamation of Character—Malicious Prosecution—Onus Probandi—Evidence—Reasonable and Probable Cause.

*On Appeal from the High Court at Calcutta.**

Baboo Gunnesh Dutt Singh

versus

Mugneeram Chowdry and others.

Although a suit cannot be maintained for damages for defamation of character when it is substantially a suit for damages against witnesses in respect of evidence given by them upon oath in a judicial proceeding, yet it may be supported when, though called a suit for defamation of character, it is substantially a suit for a

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* From the Judgment of Bayley and S. N. Pundit, JJ dated 7th March 1866. 5 W. R., Civil Rulings, 184.

malicious prosecution. In the latter case the burden is on the plaintiff to prove (1) that the defendants were the prosecutors of the criminal proceeding against him, (2) that they were actuated by malice, and (3) that their proceeding was without any reasonable or probable cause; and the PRIVY COUNCIL agreed with the High Court in thinking that there was no evidence on the part of the plaintiff of want of reasonable and proper cause for the institution of this prosecution.

THE material facts in this case may be very shortly stated.

It would appear that an affray took place between the partisans of the Chowdrys who were the defendants in the suit below, and of Baboo Gunnesh Dutt Singh who was the plaintiff in the suit below. The cause of the affray and the circumstances attending it are involved in some obscurity, but their Lordships think it sufficiently appears that it originated in some attempt on the part of the partisans of the Chowdrys to assert some real or pretended right which was resisted by the partisans of Baboo Gunnesh Dutt Singh, and that in the course of that affray one of the Chowdrys was killed and some were wounded. It would appear that some of the Chowdrys who were defendants in the suit below preferred a charge against Gunnesh Dutt Singh of having been accessory to this murder by inciting his partisans to violence, and Gunnesh Dutt Singh was brought before the Magistrate, who, however, upon hearing the case, dismissed it as against him for want of proof, and declined to commit him for trial. Thereupon Gunnesh Dutt Singh brought the present action.

This action has been called a suit to recover damages for defamation of character. Their Lordships are of opinion with the High Court that, if it had been strictly speaking such an action, it could not have been maintained, for they agree with that Court that witnesses cannot be sued in a Civil Court for damages in respect of evidence given by them upon oath in a judicial proceeding. Their Lordships hold this maxim, which certainly has been recognized by all the Courts of this country to be one based upon principles of public policy. The ground of it is this,—that it concerns the public and the administration of justice that witnesses giving their evidence on oath in a Court of Justice should not have before their eyes the fear of being harassed by suits for damages; but that the only penalty which they should incur if they give evidence falsely should be an indictment for perjury. But it appears to their Lordships that the suit of the plaintiff in the Court below, although called a suit for defamation of character, may be substantially supported (the question is one of substance rather than of form) as an action for a malicious prosecution; and that being so, if we apply the principles of English law to the case, the burden of proof lying upon the plaintiff would be this,—he would have to prove in the first place that the defendants were the prosecutors of the criminal proceeding against him: next that they were actuated by malice; and, further, that their proceeding was without any reasonable or probable cause.

It appears to their Lordships that the issues of fact as stated do in substance raise the same questions which would be raised in an action for malicious prosecution in this country. We find the first issue of fact to be stated thus: "Is there any proof of the "existence of any enmity between the liti- "gant parties previous to the commencement "of the criminal prosecution? If it be in the "affirmative, then whether or not the charge "of complicity in the wilful murder of Kirtee "Chowdry, deceased, preferred against plain- "tiff by the defendants of the first party, "simply originated from motives of humilia- "ting the plaintiff, and was therefore entirely "groundless." The other issues of fact appear to their Lordships to substantially state the same questions which would come before a Judge and Jury in an action for malicious prosecution in this country.

With respect to the proof of those issues, it appears to their Lordships that the plaintiff did substantially prove that the defendants, or at all events two of them, were the prosecutors on this occasion, although some little doubt is expressed upon that subject by the High Court. It appears to their Lordships also that some evidence was given by the plaintiff of malice on the part of the defendants. That evidence was not of a very clear or conclusive kind, but their Lordships are disposed to say that the case of the plaintiff on this issue was on the whole sufficiently made out.

We now come to the third issue, namely, whether or not the plaintiff has given any proof of the want of reasonable and probable cause, or, as it is put in the statement of the points in the Court below, that the proceeding was altogether groundless. Their Lordships are of opinion that it rested upon the plaintiff to prove this, or at the least to give *primâ facie* evidence of it calling for an answer.

Their Lordships agree with this statement which they find in the judgment of the High Court: "We find on the record of the case "that the plaintiff has given no other proof "of his innocence and of the falsehood of the "statements of these four appellants except a "copy of the order of the Magistrate by which "that officer released the plaintiff for want of "proof." The plaintiff, it is true, gave in evidence certain depositions of the defendants; but those depositions taken by themselves were evidence of his guilt, not of his innocence.

Then what evidence does he give to rebut them? He puts in the decision of the Magistrate, which was neither more nor less than this (although it is a good deal amplified by the Sudder Ameen in the Court below), that the case is not proved against him in the opinion of the Magistrate.

Their Lordships are of opinion that this decision was no evidence whatever against the defendants of the groundlessness of the prosecution. To hold that every person whom a Magistrate refuses to commit for trial is entitled to maintain an action for malicious prosecution, on the bare proof (without more) of the dismissal of the charge might very injuriously affect the administration of the criminal law. It was in the power of the plaintiff himself to go into the witness box and give evidence of his own innocence. He might have proved where he was and what he did at the time of the affray. He might have stated all the circumstances within his knowledge. But he declines to give evidence.

Undoubtedly in this country, where a man sues for defamation of character, whether in the form of an action for a malicious prosecution or of libel or slander, it is expected that he who of all men is best able to give evidence of his own innocence should be put into the witness box; and it is very rarely indeed that a plaintiff in any such suit obtains substantial damages, if he does not give evidence or a good reason for not giving it.

Not only does the plaintiff not give evidence himself, but although he calls witnesses for the purpose of showing malice on the part of the defendants, he calls none for the purpose of establishing his own innocence, or of disproving the charge against him.

Under the circumstances their Lordships concur with the judgment of the High Court, which appears to be substantially based upon the ground that in their opinion no proof had been given—not even *primâ facie* proof, certainly not such as the plaintiff if he had been an entirely innocent man would have had it in his power to give—of the groundlessness of the charges preferred against him; in other words, that there was no evidence on the part of the plaintiff of want of reasonable and proper cause for the institution of this prosecution.

Their Lordships do not think it necessary to follow the High Court in some observations which they have made as to the effect of the evidence upon the plaintiff's character; a subject on which they give no opinion; but on the ground already stated, namely, that they substantially agree with the finding of the High Court that no sufficient evidence was given on the part of the plaintiff of this being a malicious and a groundless prosecution, their Lordships will humbly advise Her Majesty that the decision of the High Court should be affirmed, and this appeal dismissed.

The 26th January 1872.

Present:

Sir James W. Colvile, Sir Montague Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Practice — Boundary questions — Evidence — Copies—Reports of Deputy Collectors—Local Investigations.

On Appeal from the High Court at Calcutta.[*]

Ram Gopal Roy and others,

versus

Gordon Stuart and Company and others.

The PRIVY COUNCIL will never interfere with the finding of an Indian Court upon a question of boundary, unless they are clearly satisfied that there has been some plain miscarriage in the conduct or decision of the case upon which they can put their hands and make it the ground for an order reversing or varying the decree.

Although the admissibility in India of copies in evidence must not be dealt with by the strict rules prevailing at a *nisi prius* trial in England, yet THEIR LORDSHIPS were of opinion that, when a copy has been in any way received and it becomes the function of the Judge to consider what weight and value should be given to it, it is the duty of the Judge, in order to test its authenticity, to satisfy himself that there is some reason for producing a copy instead of the original, that there should be some account given in ordinary cases of the original, and some sufficient reason assigned why the original is not produced, and the parties rely upon the copy. In all cases the whole of the circumstances should be looked at in order that the Judge may come to a definite conclusion as to the genuineness of the document in question, and the weight and value which he will attach to it. There is a considerable difference between cases where documents come in as mere links or as part only of the evidence in the case, and those in which the suit is actually brought upon the instrument of which a copy is tendered and the whole cause of action depends on the proof of the original instrument; strict proof may properly be required in the latter case.

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[*] From the judgment of Steer and Levinge, JJ., dated 26th August 1868. Sevestre's Rep. for 1868, p. 104.

Dealing with the present document, THEIR LORDSHIPS were not prepared to say that the High Court had miscarried in concluding it to be genuine; but the High Court did not rest upon that document wholly but proceeded upon the whole of the evidence in the case, which appeared to THEIR LORDSHIPS amply sufficient to support the finding of the Court.

Unless there be very good grounds for dissenting and differing from the reports made by Deputy Collectors upon local investigations, the Courts even in India, and *a fortiori* the Courts in England, in dealing with boundary questions, ought to give great weight to them and to be guided by them.

THE property in question in this suit is a large tract of jungle land lying to the north of the Great Trunk Road in Zillah Beerbhoom. There have been several claimants to portions of this land, besides the present appellants and the present respondents, and some of them were originally parties to this suit. Therefore, in order to see how the appellants and respondents stand to each other, it may be desirable shortly to consider the proceedings which led to the suit.

There was a dispute as early as 1828 between the Chatterjees, whose title is now vested in the principal respondents the Bengal Coal Company, and one Ram Narain Mitter, through whom the appellants derive their title concerning the right to this land, but at that time the dispute appears to have been limited to some 1,600 beegahs of land. The Government authorities attached this land, and their possession seems afterwards to have extended itself in some way or another to the whole of that which was claimed in this suit, being 5,600 beegahs. When the trunk road was made in 1841 there was another dispute between the parties as to who were entitled to compensation for the small portion of jungle which was taken on each side of the road; and, so far as any recognition of title went, the appellants seem to have been preferred on that occasion. They received some small sum which was awarded for compensation under an *ikrar* binding them, in case the opposite party or any other party should prove a title to it and come against the Government for it, to repay it.

Then came the proceedings which immediately led to this litigation, proceedings which were connected with the Government survey in 1857. There was then the ordinary dispute between the Chatterjees or the Bengal Coal Company as then representing the Chatterjees on the one side, and the Roys, the appellants, on the other, and the several other parties who claimed parts of the forest as annexed to their undisputed mouzahs, and also the Government claiming to hold, by some title or another, or by virtue of that occupation which had begun in 1828, a large portion of the land. Mr. Deputy Collector Ross appears then to have gone upon the land, to have made local enquiries, and on the 18th June 1857 to have made an award giving the land or the greater portion of the land to the Bengal Coal Company as representing the Chatterjees. The opposite party appealed to the Collector, who, acting upon his view that the principal document produced by the Chatterjees or the Bengal Coal Company was spurious, and that it did not correspond with an earlier document which was admitted to be the foundation of the Chatterjees' title, set aside that decision of Mr. Ross. There was an appeal from his decision to the Commissioner, and an appeal from the Commissioner to the Sudder Board of Revenue, but the result was that those authorities upheld the Collector's order. Another Deputy Collector was directed to make a further apportionment and award of the land among the parties, and the result was that this last officer, on the 16th July 1858, awarded 625 beegahs of the waste land in dispute to the appellants, and the remaining 4,975 beegahs to the Government.

The result of these Revenue proceedings was to put the parties to whom those lands were awarded actually or constructively in possession, but to leave to the opposite party the power of impeaching the Revenue awards, and of recovering possession of the lands by a regular sui if instituted within three years of the date of the award, and accordingly this suit was so brought for that purpose.

The Government appear to have now dropped out of the litigation. The Zillah Judge, who was the Judge of first instance, dismissed the respondent's suit wholly on the ground that they had failed to prove their title, and he also held that the suit as against the Government would have been barred by the Statute of Limitation, inasmuch as they had been in possession of this land since the time they took possession of it in 1828, certainly for more than 12 years. There was an appeal from that decision to the High Court, and on that occasion it seems to have been almost admitted before the High Court that the Government had not really any title to the land. The High Court, moreover, held that the decision as to the Statute of Limitation was erroneous, inasmuch as the possession of Government had been founded on the attachment of 1828, which was in the nature of taking possession in trust and for the benefit of the party who should succeed in establishing a title to the land. Government appears to have acquiesced in that view, and certainly has not appealed from the decree which gave the land which had been awarded to them by the Revenue authorities to the Bengal Coal Company, the plaintiffs in this suit, and the respondents on this appeal. The other parties who were also made parties to the suit, and who claimed portions of the land which were the subject of the award of the Revenue authorities, seem also now to have abandoned their respective claims, and the litigation is therefore reduced to a question between the appellants and the respondents the Bengal Coal Company. Nor can the appellants, if they were to succeed on this appeal, do more than obtain the dismissal of the respondents' suit, and thus obtain an affirmance of their right to hold the 625 beeghas of land. They cannot in this suit assert a title to the larger portion of the land, which the respondents have recovered from Government.

It is obvious from what I have already stated that the question is simply one of boundary. The appellants claim title under Government, which held *khas* a large portion of forest land situate in this district and apparently never included in the decennial settlement. Out of this land, no doubt, that estate which is admittedly in the possession of and belongs to the appellants has been carved. On the other hand, the Chatterjees derive title from a *mokururee* grant from the Rajah of Burdwan, and it must be held that the land so granted to them was part of the settled estate of the Rajah of Burdwan. It has appeared to their Lordships, in the course of this discussion, that a more easy, at least a more satisfactory, mode of deciding this dispute might have been found in the ascertainment (if that be possible) of the real boundaries between the settled mehals of the Rajah of Burdwan, and the forest lands which remain after the perpetual settlement in the hands of the Government, because it is clear that, on the one hand, the Chatterjees claim nothing except what they got from the Rajah of Burdwan, and, on the other hand, that the appellants claim nothing except what they derived from the Government. That, however, has not been the course which the parties have thought fit to take. They have, however, adduced a good deal of the evidence generally given in boundary cases; the issue being — what are the boundaries of the estate of Gopeenathpore, which is the *mokururee* of the Chatterjees, and has now passed to the Bengal Coal Company, and what the true boundary of the estate of Gopeenathpore, which is in the undoubted possession of the appellants?

It has frequently been said at this board, that of all the questions which are brought here from India, there is no question of fact which is so improper to be brought for final decision by this tribunal as a question of boundary, since the decision of that question, particularly where the boundary line is to be run through a forest or tract of waste land, must depend so much upon local investigation and local enquiry, and on that sort of knowledge which only officers in India, who are conversant with such disputes, can acquire. Accordingly their Lordships will never interfere with the finding of an Indian Court upon a question of boundary unless they are clearly satisfied that there has been some plain miscarriage in the conduct or decision of the case upon which they can put their hands and make the grounds for an order reversing or varying the decree. This case, no doubt, has been argued very much on that assumption. The long argument of Mr. Leith has turned mainly upon the miscarriage, or rather the alleged miscarriage, of the High Court in dealing with a particular document, viz., the copy of the confirmatory *sunnud*, which has been so much impeached.

I will at once go to the consideration of that document. With reference to the general question of the admissibility of copies, and the mode in which the Courts in India deal with them, their Lordships are desirous that I should make some observations. It has been repeatedly ruled here that these questions are not to be dealt with by the strict rules that would prevail at a *nisi prius* trial in England, where the question is whether the document ought to be submitted at all to the jury. The way in which evidence is brought in in India almost precludes that. On the other hand, their Lordships are undoubtedly of opinion that when a copy has been in any way received, and it becomes the function of the Judge to consider what weight and value should be given to it, it is the duty of the Judge, in order to test its authenticity, to satisfy himself that there is some reason for producing a copy instead of the original, that there should be some account given in ordinary cases of the original, and some sufficient reason assigned why the original is not produced, and the parties rely upon the copy. In all cases the whole of the circumstances should be looked at in order that the Judge may come to a definite conclusion as to the genuineness of the document in question and the weight and value which he will attach to it. There is, no doubt, a considerable difference between cases where documents come in as mere links or as part only of the evidence in the case, and those in which the suit, as in the case cited by Mr. Leith from 3rd Moore's Indian Appeals, is actually brought upon the instrument of which a copy is tendered, and the whole cause of action depends on the proof of the original instrument. In the latter case strict proof may properly be required.

Dealing with the present document, their Lordships are not prepared to say that the High Court has miscarried, in so far as it has come to a conclusion that this document is genuine. It is a very ancient document. It cannot for one moment be contended in the High Court that it was fabricated for the purpose of this suit. No doubt what we have actually on the record is a copy of a copy, but it is a certified copy of a document which is shown, though a copy, to have been produced in the earlier suits. The degree of credit which it has acquired in those suits, and the effect which has been given to it in those suits, may be more open to question, and there is no doubt great weight in many of the observations of Mr. Leith, that those decisions did not positively affirm the genuineness of the document or proceed wholly on the document so as in effect to involve the decision of its genuineness. On the other hand, it is to be observed that it was produced in one of those suits against the Rajah of Burdwan, that it was not impeached then as other than a genuine document, and it is impossible to say that it did not, by being then produced, acquire some degree of credit.

The effect of the document against Mr. Leith's clients is of course another question. If the document is treated as a genuine instrument, it does not at all follow that of itself it would prove the title of the respondents against the appellants, because it is a mere statement by the Rajah of Burdwan that those are the boundaries of what he professes to grant, and one can conceive cases in which, if there had been a conflict between the Rajah of Burdwan and the Government as to the boundaries of his zemindary, this assertion of a right to grant all the land comprised within the boundaries specified would be no evidence against the Government that his zemindary extended so far; it is at most a proof of an early assertion on the part of the Rajah of Burdwan that the land which he purported to grant in *mokururee* to the Chatterjees did extend so far. Their Lordships conceive that the reason why this has been treated as the turning point of the case is that the supposed spuriousness of the document and its assumed inconsistency with the earlier documents were the grounds upon which Mr. Lawford, the Collector, reversed the finding of Mr. Ross, the Deputy Collector, a decision which led to the final adjudication of the Revenue authorities, which is impeached by this suit. In their Lordships' opinion this decision of Mr. Lawford cannot be supported. For the reasons already given their Lordships think that the document is not spurious. Nor can it be properly said to be inconsistent with the earlier document. It contains something which the earlier document did not contain, but it contains nothing which is inconsistent with the earlier document. It gives boundaries which the other did not give, but it does not give boundaries which differ in any degree from any which the earlier document gave either expressly or by implication.

It is, however, to be observed that the decision of the High Court does not rest upon that document wholly, or indeed further than this, that if the document be genuine, it gets rid of that reversal of Mr. Ross's order, and throws the parties back into the position in which Mr. Ross's award would have left them. The judgment of the High Court proceeds upon the whole of the evidence in the cause, which appears to their Lordships to be amply sufficient to support the finding of the Court. There is, first, Mr. Ross's own finding, the result of his local investigation on the spot. It is confirmed to a certain degree by the other local investigation which takes place by the Ameen, and their Lordships cannot but remark that, unless there be very good grounds for dissenting and differing from those reports made upon local investigations, the Courts even in India, and *à fortiori* the Courts in England, in dealing with boundary questions, ought to give great weight to them and to be guided by them. Supposing then that the *onus* of proof in this case was much heavier on the plaintiff than it really was, there was ample ground for saying that he had proved enough to throw the defendants upon proof of their title; and looking at the petition which limits the amount of their holding to the 1,800 odd beegahs and to the other circumstances remarked upon by the High Court, their Lordships find it impossible to come to the conclusion that the High Court was not amply warranted in the finding to which it came and in reversing the decision of the Zillah Judge, which appears to their Lordships to rest upon very unsatisfactory grounds, and to treat the case as if the whole question turned upon the *sunnud.*

Their Lordships, therefore, must humbly advise Her Majesty that the judgment of the High Court be affirmed, and this appeal dismissed, with costs.

The 3rd February 1872.

Present:

Sir James W. Colvile, Sir Montague Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Manager of Lunatic's Estate—Security by—Sale in Execution of Decree—Code of Criminal Procedure—Attachment without Sale—Lands situate in several Zillahs—Concurrent Execution—Onus Probandi—Non-transmission of Decree—Omnia præsumuntur rite esse acta.

*On Appeal from the High Court at Calcutta.**

Saroda Prosad Mullick (Manager of the person and estate of Sreenath Sannyal a Lunatic),

versus

Luchmeeput Sing Doogur and others.

Appellant, a lunatic's wife, as manager of his estate obtained a decree in execution of which certain lands belonging to the judgment-debtor were sold and purchased by the manager; but before allowing actual possession to be given to her, she was required to give security for the proceeds of the sale. Sometime elapsed before she found the security, and meanwhile the lands were attached and sold in execution of the respondent's decree, and purchased by him, and possession given to him. HELD that the appellant's omission to give security (which was a proceeding not affecting the judgment-debtor and entirely collateral to the suit between the judgment-creditor and him, could not in any way affect her title by the previous sale, and that the Judge was in error in granting the order for a second sale under the respondent's attachment and, confirming the purchase by him when the sale of the same lands had already taken place under the appellant's attachment, and the purchase by her under that sale had been confirmed and had not been set aside.

Under the Code of Civil Procedure, property may be attached without view to immediate sale. The process of attachment and the order for sale may be distinct and separate, and there may be a complete execution of a decree under an attachment without any order for sale.

Where lands are situate in other zillahs, the Code contemplates the issuing of separate orders, subsequent to the attachment, for the sale or other disposition of them. The Code, instead of preventing the transmission of a decree with certificate to several Courts concurrently for execution, allows of it and of its being done most beneficially for the creditor, and without injustice to the debtor. At the same time the PRIVY COUNCIL considered that in any case it would be a right exercise of the discretion of the Court not to act on the power and to refuse to send a decree for concurrent execution into several places, or at least to impose terms on decree-holders that they should not proceed to sale under all the attachments at once.

Assuming that, if no copy of the decree was sent, the attachment made in this case would be invalid, and without determining that point, the PRIVY COUNCIL held that the *onus* lay on the respondent to prove non-transmission; and as the Judge had acted on the certificate by the attachment and sale of the lands, the maxim *omnia præsumuntur rite esse acta* must prevail until the contrary were shown.

IN this case Mooktakashee Dabee, the manager of the estate of her husband—a lunatic—(of which the appellant is now manager) obtained a decree in the Zillah Court of East Burdwan against Jodoonath Sannyal, for upwards of 2 lacs of rupees.

A small sum only having been realized in that zillah, proceedings were taken to obtain execution of the decree on properties of the defendant Jodoonath Sannyal within the jurisdiction of the Zillah Courts of Moorshedabad, Hooghly, and Dinagepore. It is with reference to what was done in Dinagepore that the question arise.

In March 1864 a certificate and other papers were sent by the Judge of East Burdwan to the Judge of Dinagepore, the terms of which will be hereafter adverted to. Sometime afterwards, but the precise date is not given, the Judge of Dinagepore attached the lands of the defendant in his zillah, which form the subject of the suit. On 24th June 1865, another certificate was sent from the Judge of Burdwan, and on the 4th September the lands of the defendant were sold under the decree to Mooktakashee Dabee, the decree-holder, and by an order of the Judge of Dinagepore, of the 4th December 1865, the sale was confirmed, and a writ of possession directed.

It appears that the Judge of Dinagepore, in pursuance of the order of the Judge of Burdwan, required Mooktakashee Dabee to give security for the proceeds of the sale before he would allow actual possession to be given to her. Several months elapsed before she found the security, and meanwhile the present defendants, by orders of the Zillah Judge of Dinagepore, obtained attachment and sale of the same lands under a judgment obtained by them against the same debtor, Jodoonath Sannyal; and on the 6th January 1866, the lands were sold in execution of the decree, and purchased by themselves, and possession afterwards given to them.

Mooktakashee then brought this suit against the present defendants (the respondents), asserting her title under the first judgment sale. It is conceded that her title must prevail, unless the sale under her execution can be invalidated.

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* From the judgment of Kemp and E. Jackson, JJ., dated 26th March 1868, 9 W. R., 388.

The ground on which the Zillah Judge directed the giving of possession under the second sale to the respondents was that, Mooktakashee having failed to give security, the sale to her became null. It is plain that this ground is utterly untenable. The security was ordered for the protection of the lunatic plaintiff against misappropriation by his manager. It was not a proceeding affecting the judgment-debtor, and was entirely collateral to the course of the suit between the judgment-creditor and judgment-debtor. The omission to give this security could not in any way affect the title which had vested in the plaintiff by the previous sale. This decision of the Zillah Judge had the effect of causing the omission by the lunatic's manager to do an act intended to secure the fruits of his judgment to him, to operate so as to deprive him altogether of them, and hand them over to the second judgment-creditor. It is much to be lamented that such a misconception should have taken place.

Their Lordships also consider that the Zillah Judge was in error in granting the order for the second sale under the respondent's attachment, and confirming the purchase by him, when the sale of the same lands had already taken place under Mooktakashee's attachment, and the purchase by her under that sale had been confirmed and had not been set aside. Their Lordships cannot find that this course was in accordance with the Code of Procedure. The title had vested in Mooktakashee by the sale under her attachment, and until it was set aside there was nothing upon which the second sale could operate. This course inevitably created a conflict between the two decree-holders who became purchasers at the judicial sales under their respective attachments, and led to the erroneous order of the 19th June 1866 which ordered the possession to be given to the respondent. Such a course also is in any case clearly contrary to the interests of debtors as well as creditors, as it is obvious that when property is offered at a second sale, with the cloud cast on the title by the subsisting first sale, it would be likely to go for an inadequate price.

In the present appeal, however, it was contended at their Lordship's Bar, by Sir Roundell Palmer, that the proceedings in the Court of Dinagepore, which resulted in the sale of the plaintiff, were without jurisdiction and that the sale under them was invalid on the ground of "a radical vice" in the proceedings when the matter was first transmitted by the East Burdwan Judge to Dinagepore in this—that the lands of the judgment-debtor were ordered to be attached, not as the first step in an execution which might terminate in a sale, but by way of sequestration or injunction only, and therefore that the proceedings were not an execution or a step in it within the meaning of the Civil Procedure Code.

It is plain, however, on reference to the Code, that property may be attached without view to immediate sale. The group of Clauses, Sections 232 to 245, under the heading "Of the execution of decrees for money by attachment of property," prescribe the manner of attaching the various kinds of property and dealing with them when attached. Section 243 shows how debts and immoveable property are dealt with, and provides modes of satisfying the decree by them, without sale. Another group of Sections 248 to 272, "Of sales in execution of decrees," provide the procedure in case it becomes necessary to sell.

It is obvious from these Sections that, in the case of lands, the process of attachment and the order for sale may be distinct and separate, and that there may be a complete execution of a decree under an attachment without any order for sale.

Then procedure is provided for the execution of decrees out of the jurisdiction of the Court in which they are made. Section 284 and following clauses empower the Judge on application, "unless there be any sufficient reason to the contrary," to transmit a copy of the decree with a certificate that satisfaction of it has not been obtained in his jurisdiction, and a copy of any order for execution of such decree that may have been passed, "to any Court to which the applicant may wish the decree to be executed." The Court to which they are sent is to file them, and Section 287 enacts that the copy of any decree, or of any order of execution, when filed in the Court to which it has been transmitted for execution, shall for such purpose have the same effect as a decree or order for execution made by such Court.

The certificate or order of the Judge of Burdwan, of 19th March 1864, sent to the Judge of Dinagepore, contains, in substance, a recital or statement of the decree of the East Burdwan Court, the amount recovered by execution, the balance due, and that the decree-holder had given a list of properties in Zillahs Moorshedabad, Hooghly, and Dinagepore, and then declares that "a certificate, &c., are sent" to Moorshedabad, under Sections 284 and 285, requesting that properties in that district may be attached and brought to sale, and that certificates, &c., be sent under Section 285 for attachment, with a view to prevent alienations of properties, in Zillahs Hooghly, and Dinagepore. It ends thus "afterwards, when proceedings for attachment and sale of the properties in Moorshedabad shall have been completed, the proper order will be passed on the decree-holder's application."

The objection was, in effect, that this order treated the attachment directed to be made in Dinagepore as an injunction or sequestration only. Their Lordships, however, think that this was not so, but that it was meant that the attachment should be a proceeding in execution of the decree. The proceeding was, on the face of it, declared to be a direction to attach under Section 285; and that Section only authorises the attachment as a step in execution. No doubt, every attachment involves an injunction, which is indeed one of its necessary effects. But when an act of a Court can be so construed as to have an operation consistently with law, it would be contrary to ordinary rules of construction to attach to it another signification which would altogether destroy its effect. Their Lordships, therefore, consider that what the Court intended to do was to transmit the proceedings to the three Zillahs for execution, with a direction that the first process of execution, *viz*., by attachment, should take place in all, but that further proceedings under the attachments should not be taken in Hooghly and Dinagepore until the result of the completed execution in Moorshebabad was known.

It has been already pointed out that the procedure of the Code contemplates, in the case of lands, the issuing of separate orders, subsequent to the attachment, for the sale or other disposition of them.

A more important point involved in the case is whether the transmission could be made to the three Zillah Courts concurrently, for the purpose of execution. On consideration of the Code their Lordships can find nothing to prevent this being done. On the contrary, the procedure is well adapted to allow of it, and of its being done most beneficially for the creditor, and without injustice to the debtor. If it were not so, the debtor might be able to get rid of his property before it could be attached. On the other hand, there is provision for the protection of the debtor, for the issuing of the execution in more Zillahs than one is made subject to the control of the Judge, who may refuse to do so, "where he saw there was any sufficient reason to the contrary" (Section 286). Again, after the attachments have been granted, if there should be any ground of complaint the debtor and any parties interested may apply, under the provisions of the Code, to remove or stay proceedings under them.

It would, no doubt, in many cases, be a right exercise of the discretion of the Court not to act on the power, and to refuse to send a decree for concurrent execution into several places; and when it did act on it, it would be in many cases proper to impose terms on decree-holders, that they should not proceed to sale under all the attachments at once.

This is really what was meant to be done here, although it was not done in a very good and satisfactory form.

The case is thus reduced to the objection, that a copy of the decree was not transmitted to Dinagepore.

The High Court rest their first judgment on the ground that no copy of the decree or of the certificate, that satisfaction had not been obtained, was sent. The latter document clearly was sent. In the judgment on review, Mr. Justice Jackson came to the conclusion that both were transmitted; Mr. Justice Kemp alone retained his former view.

Assuming that, if no copy of the decree was sent, the attachment made at Dinagepore would be without valid authority, which their Lordships do not find it necessary to determine, it lies on the defendant to prove that it was not transmitted. The Judge at Dinagepore acted on the certificate by attaching the lands, and afterwards sold under that attachment. The maxim, therefore, *Omnia præsumuntur rite esse acta*, must prevail until the contrary is shown. It certainly is not shown by the document of 19th March 1864, for it is there stated that "certificates, &c.," were sent; nor by the Memorandum of the attachment which refers to the *roobakaree* "and other papers" having arrived. On the contrary, it may be presumed from them that all necessary documents were transmitted. It is said that it must be inferred from the order which preceded the document of the 19th March, that it was not intended to send the copy of the decree to Dinagepore. This, perhaps, may be inferred from that document taken alone; but it would not be safe to act on such an inference to annul the attachment and sale, especially when it is consistent with the language of the subsequent documents, that the copy was sent with the other papers on the 19th of March; or, at all events, before the attachment was made.

On the whole, their Lordships consider that the appeal should be allowed; and will humbly advise Her Majesty that the decree of the High Court should be reversed, that the decree of the Principal Sudder Ameen should be executed, and that the appellant should have the costs of the litigation in India and of this appeal.

The 3rd February 1872.

Present:

Sir James W. Colvile, Sir Montague Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Limitation—Act XIV of 1859—High Courts when not Courts established by Royal Charter within meaning of that Act—Sections 19 & 20—Decrees of High Court on Appeal—Execution—Final Decree—Decrees of Privy Council—Appeal to England—Proceeding to keep Decree Alive.

*On Appeal from the High Court at Calcutta.**

Kristo Kinker Ghose Roy and another,

versus

Burrodakant Singh Roy and another.

Considering the date and history of the Limitation Act XIV of 1859, the PRIVY COUNCIL were of opinion that the High Court in their decision (16 W. R., Full Bench, p. 1) were warranted in holding that the High Courts, though unquestionably "Courts established by Royal Charter" in the broad and general sense of the term, were not, when exercising their appellate jurisdiction from the Mofussil Courts, such Courts within the meaning of that Act.

THEIR LORDSHIPS also agreed in the same Full Bench ruling that the execution of decrees of the High Court made on appeal from the District Courts was subject to the three years' limitation prescribed by Section 20.

The consideration of the question as to the date from which the three years should be calculated was not necessary for the determination of this appeal; but the PRIVY COUNCIL inclined to the view that the execution ought to proceed on a decree of which the mandatory part expressly declared the right sought to be enforced; and as the question was not one of practical importance, THEIR LORDSHIPS would not express dissent from the Full Bench ruling above referred to—in which it was held that, when the decree of the Lower Court was reversed, modified, or affirmed, the decree passed by the Appellate Court was the final decree in the suit—farther than by saying that there might be cases in which the Appellate Court, particularly on special appeal, might see good reasons to limit its decision to a simple dismissal of the appeal without confirming a decree erroneous or questionable, yet not open to examination on special appeal; and THEIR LORDSHIPS suggested the expediency in all cases expressly to embody in a decree of affirmance so much of the decree below as it is necessary to affirm.

Quære—Whether the so-called "*decrees* of the Privy Council" are not subject to any law of limitation; or where they are not merely Orders of H. M. in Council made on the recommendation of a Committee of the Privy Council, and do no more than prescribe what shall be the final decree in the cause, leaving them to be executed by the ordinary process of the Courts in India.

The presentation of a petition of appeal to England, which is a proceeding taken to destroy the decree appealed from, cannot of itself be treated as a proceeding to keep it in force; though if the appeal to England be allowed, the respondent to it supporting the decree appealed from is entitled to sue out execution at any time within three years after the final dismissal of the appeal.

THIS was an appeal from a decision of the High Court of Calcutta confirming a decision of the Judge of Moorshedabad.

The facts of the case appear in the judgment.

For the Appellants: *Mr. Bell* and *Mr. John Cutler.*

For the Respondents *Sir R. Palmer* and *Mr. Doyne.*

Mr. Bell, after stating the facts, contended that the decree in the suit became, on being affirmed, the decree of a Court established by Royal Charter (Chowdry Wahid Ali *v.* Mullick Enayet Ali, 14 W. R., 288; Bipro Doss Gossain *v.* Chunder Seekur Bhuttacharjee, 7 W. R., 521; and Bapura Krishna *v.* Madhariah Ramrav, 5 Bom. H. C. R., 215); and therefore, the twelve years' rule applied. If, however, the three years' rule applied, then, there had been a proceeding to keep the decree in force within the meaning of Section 20 of the Limitation Act, (Rajah of Burdwan *v.* Bulram Singh, 14 W. R., Privy Council, 21; and Ramruttun Bannerjee *v.* Maharajah Ameeroolmolk, 6 W. R., 95).

Mr. John Cutler, after stating that there was no dispute as to the material facts, contended that, if the case fell within the three years' rule, either the petition of 8th April 1865, or the order of the High Court of the 4th August 1865, or the striking off the appeal on the 9th May 1866, was "a proceeding to keep the decree in force" (Bipro Doss Gossain *v.* Chunder Seekur Bhuttacharjee, 7 W. R., 521), or that the net effect of the proceedings in the suit between the 8th of April 1865 and the 9th of May 1866, was to keep the decree in force until the latter date, so that the time ran from that date. He argued that "a proceeding to keep the decree in force" should be construed "a proceeding having the quality of keeping the decree in force"; and that when an appeal was preferred, then during every day of the time and every hour of the day that the appeal was pending, there was a proceeding to keep the decree in force' (Rajah of Burdwan *v* Bulram Singh, 14 W. R., Privy Council, 21), and that this was so whatever might be the result of the appeal (*per* Holloway, J., in Arunachella Haidayan *v.* Veludayan, 5 Mad. H. C. R., 215). But he contended that the decree was the decree of the High Court, and therefore that of a Court established by Royal Charter to which the twelve years' rule applies. Where a decree is passed by an Appellate Court, that decree is the final decree in the suit, be it one affirming, modifying, or revising the decree of the Court below. There cannot be two final decrees in the same suit (Chowdry Wahid Ali *v.* Mullick Enayet Ali, 14 W. R., 288; Bipro Dass Gossain *v.* Chunder Seekur Bhuttacharjee, 7 W. R., 521; Bapurah Krishna *v.* Madhariah Ramrar, 5 Bom. H. C. R., 215).

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* From the judgment of L. S. Jackson and C. P. Hobhouse, JJ., dated 27th November 1867. 8 W. R., 470.

Sir R. Palmer contended that there were two distinct decrees, the one that of the High Court for costs, the other that of the Zillah Court, and that the High Court by affirming the decree of the Zillah Court did not incorporate it into its own; that the decrees of the High Court on the Appellate side were not decrees of Courts established by Royal Charter within the meaning of Section 19, because that Section only applies to existing Courts established by Royal Charter, and the High Court was not at that time in existence. He then contended that, if the three years' limitation applied, there had not been "a proceeding to keep the decree in force." He commented upon the cases cited on behalf of the appellant and cited Arunachella Hadayan *v* Veludayan, 5 Mad. H. C. R., 215, as being directly contrary to Bipro Doss Gossain *v.* Chunder Seekur Bhuttacharjee, 7 W. R., 521. In the present case there was no *litis contestatio* between the parties after the decree of the High Court, no judicial proceeding and no act by the decreeholder.

Mr. Doyne contended that there had been no "proceeding to keep the decree in force" and that the 20th Section applied to decrees passed by the High Courts on appeal from the mofussil.

Mr. Bell replied.

Sir James Colvile delivered the following judgment:—

This appeal, though the facts of it lie in an extremely narrow compass, has raised several questions of general importance and considerable difficulty.

The appellants, on the 25th of March 1862, obtained a judgment against the respondents for the sums of 9,500 rupees with interest from the date of the plaint, and costs of suit on a claim founded on an agreement to pay to the appellant Kristokinker an allowance of 900 rupees per annum by way of maintenance.

The respondent, Rajah Burrodakant, appealed against this decree to the High Court of Calcutta, but by the decree of that Court made on the 8th of June 1863, it was ordered and decreed that the decree of the Lower Court should be, and the same was thereby affirmed; and that the defendant appellant should pay to the plaintiffs' respondents the sum of 350 rupees being the costs of the appeal with interest thereon at the rate of 12 per cent. per annum, from the date of the decree to the date of realization.

A petition of appeal to Her Majesty in Council against the decree was then presented by the Rajah. He tendered security for costs, and the usual reference was made to ascertain its sufficiency. But the security was never perfected. On the 8th of April 1865, he presented a petition to the Court, suggesting that negotiations for a compromise between him and the appellants were pending, and praying that proceedings in regard to the appeal to England might be stayed for two months. On the same day the appellant filed a petition consenting to that application, and praying that the two months should be granted. The Court, on the 4th August 1865, made an order "postponing the case for two months, as there were hopes of the parties coming to an amicable settlement." The two months expired on the 6th of October, and nothing came of the negotiations, and, on the 9th of May 1866, the High Court struck the appeal off the file in default of prosecution.

On the 22nd of April 1867, the appellants made their first application to the Zillah Court for execution against the respondent. Their application was in the tabular form prescribed by Section 212 of the Code of Procedure which requires the date of the decree of which execution is sought to be mentioned with other particulars. The only decree so specified was the decree of the 25th of March 1862. But the fact of its affirmance on appeal was stated in the next column, and the amount sought to be levied included the 350 rupees decreed by the High Court as the costs of the appeal. On the 27th of April 1867, the Zillah Judge rejected the application for execution on the ground that it was barred by Section 20 of Act XIV of 1859; no step having been taken since the 8th of June 1863 to keep the decree in force within the meaning of that Section.

The appellants appealed from that decision to the High Court, which, on the 27th of November 1867, ruled that, in so far as the appellants sought to realize the amount decreed to them by the original decree, their application for execution fell within the three years' limitation of the 20th Section; but that, inasmuch as their claim for the costs of the appeal being 850 rupees rested on the decree of the High Court, and that was a Court established by Royal Charter, they were entitled, under the 19th Section of the Limitation Act, to sue out execution for that amount at any time within twelve years from the date of that decree; and the case was sent back to the Zillah Court with instructions to deal with it accordingly. The appellants have brought this appeal against so much of this order as held that their right to execution for any part of their demand was barred, but there has been no cross-appeal against that part of the order which was in their favor.

The argument on this appeal has raised the following questions:—

1st. Is the execution of a decree of the High Court made on appeal from one of the Courts in the Mofussil to be governed by the 20th or by the 19th Section of Act XIV of 1859; or, in other words, is it subject to the three years' or to the twelve years' rule of limitation?

2ndly. What is the effect of a decree of the High Court affirming a decree of a Zillah Court? Is it to be taken to incorporate the latter in itself, so that for the purpose of execution the decree to be executed is to be taken to be a decree of the High Court?

3rdly. If, on any ground, the decree to be executed in this case is to be deemed subject to the three years' limitation, had anything sufficient to keep it in force within the meaning of the 20th Section been done within three years of the date of the application for execution?

Upon the two first and general questions there have been conflicting decisions by the High Courts in India.

The order under appeal appears to have been the earliest which decided that decrees of the High Court were within the 19th Section. It has been followed at least in one case in Bengal decided as lately as the 6th of September 1870 (14th Weekly Reporter, p. 288); and it has has been recognized as sound law by the High Court of Bombay in the case reported in 5 Bombay High Court Reports, 214. But in two cases decided by the High Court of Madras, on the 4th of March 1870, it was ruled by Chief Justice Scotland and Mr. Justice Bittleston (apparently without any dissent on that point on the part of the other Judges composing the Full Bench of the Court) that a decree of the High Court made on appeal from a Mofussil Court is not a decree of a Court established by Royal Charter, within the meaning of the 19th Section of the Limitation Act, and is a decree subject to the provisions of the 20th Section of that Act. It may be observed that, neither in these Madras cases, nor in that decided at Bombay, was the determination of this question essential to the decision of the Court upon the particular appeal before it; since in none of them had the period of three years' limitation, if calculated from the date of the decree of the Appellate Court, expired. This ruling, however, of Chief Justice Scotland appears to have led to a reconsideration of the question by the High Court of Bengal.

Their Lordships find that in a case, not cited at the Bar during the argument, which is to be found among the Full Bench Rulings of the High Court of Bengal in the 16th volume of Sutherland's Weekly Reporter, under date the 12th of June 1871, a Division Bench of the High Court referred for the determination of the Full Bench two questions, in the following terms:—1st, whether a decree of the District Court affirmed on appeal by the High Court becomes a decree of the last mentioned Court: and 2ndly, whether execution of that decree of affirmance passed by the High Court is to be governed by the provisions of Section 19 of the Statute of Limitation Act XIV of 1859, or Section 20 of that enactment, *i. e.*, whether the rule of three years or of twelve will apply. The Full Bench, consisting of the late Mr. Justice Norman (then acting as Chief Justice), Messrs. Loch, Bayley, Macpherson, and Dwarkanath Mitter, unanimously decided the first of these questions in the affirmative; and ruled on the second that when under Section 361 of the Code of Procedure a Decree of the High Court on its appellate side is transmitted to the District Court which passed the first decree in the suit for execution, it will have the effect of a decree of such Court, and must be executed within the period limited by the 20th Section of Act XIV of 1859.

The preponderance, therefore, of authority in India is now in favour of the proposition that the execution of decrees of the High Court made on appeal from the District Courts is subject to the three years' rule of limitation.

Their Lordships are of opinion that this conclusion is correct.

The object of Act XIV of 1859 was to carry out a recommendation made many years before by the Law Commissioners for India, by passing one general law of limitation applicable to all Courts in India. It is hardly necessary to remark that the Legislature, in framing the Act, had then to deal with two distinct judicial systems—the one consisting of what had been the Courts of the East India Company, and may here be called the Mofussil Courts; the other, the Courts established in the Presidency Towns and elsewhere by Royal Charter, and administering to all within their jurisdiction, subject to certain statutory exceptions and modifications, the law of England. The law of limitation which governed the former was to be found in the Regulations which had no force within the Presidency Towns; whilst the law of limitation which governed the latter consisted of the Statute of James, together with such other portions of the Statute Law of England applicable to the subject (if any) as had been introduced into India, and the general rules touching the effect to be given to lapse of time which depend on the decisions of the Courts in England. It is not surprising that, in framing a law designed to be common to both systems of Judicature, it was deemed necessary to make certain exceptions to the general rule of uniformity. And it may be presumed that, in dealing with this matter of execution, the Legislature was moved by certain reasons which approved themselves to the minds of those who were conversant with the administration of justice in the Mofussil to subject the execution of the decrees of the Mofussil Courts, whether of appellate or of original jurisdiction, to the three years' limitation; whilst, on the other hand, being pressed by the weight and value which the Law of England gives to a judgment or decree of a superior Court, it determined not to reduce the period for enforcing the decrees of the Supreme Courts to less than twelve years. Hence the distinction made by the 19th and 20th Sections of the Act, in which the term "Courts established by Royal Charter" was obviously used not by reason of anything inherent in every Court established by Royal Charter, but simply because it was thought to define (whether happily or not it is needless to enquire) certain existing Courts, *viz.*, the Supreme Courts in the three Presidency Towns, and the Recorders' Courts in the Straits Settlements, and possibly to include other Courts of similar constitution and functions which might thereafter be established. The same term, it may be observed, is to be found in the preamble of Act VIII of 1859 (the Code of Procedure), which, when first passed, was not intended to have operation in the Supreme Courts.

That being so, we have to consider how the question is affected by the subsequent amalgamation of the two systems of Judicature, and the establishment of the High Courts by Letters Patent under the powers given by the 24 and 25 Vict. cap. 104, and the 28th Vict. cap. 15. It will be convenient to speak only of the High Court of Bengal. The general scheme of the amalgamation was to constitute one general Court, of which the Judges sitting in various divisional Courts were to exercise the functions both of the Supreme Court and the Appellate Mofussil Courts (the Sudder Dewanny Adawlut and the Sudder Nizamut Adawlut), all of which were abolished.

The powers and jurisdiction of the Supreme Court, with some slight modification of the latter, were transferred to the High Court to be exercised by it as a Court of Original Jurisdiction; and the powers and jurisdiction of the Appellate Mofussil Courts were transferred to it, to be exercised by it as an Appellate Court. But the law to be administered by it as a Court of Original Jurisdiction was substantially that previously administered by the Supreme Court; whilst that to be administered by it on appeal from the Mofussil Courts was necessarily that of those Courts. The Code of Procedure (Act VIII of 1859) was indeed made the procedure of the Court in its original as well as in its appellate jurisdiction, and superseded the procedure which had previously obtained in the Supreme Court. But that Code did not touch the subject of limitation, which continued to be regulated by Act XIV of 1859.

So far, therefore, there can be no ground for inferring that there was any intention on the part either of Parliament or of the Crown to alter the period within which a decree made on appeal from a Mofussil Court could be executed. The decree like the decree of the former Sudder Court was to be sent down to the Lower Court, and entry to be made of it in the register of the Lower Court, and execution sued out there. Every reason of policy which induced the Legislature to require that execution to be issued within three years was, presumably, as operative after the amalgamation of the Courts as it was before that event. Accordingly, one of the learned Judges who decided the case now under appeal, has admitted that his construction involved consequences "absurd" in themselves, and, presumably, contrary to the intention of the Legislature. He felt, however, bound by the words "Courts established by Royal Charter." It seems to their Lordships, considering the date and history of the Limitation Act, that the High Court of Madras, and the High Court of Bengal in its decision of the 12th June 1871, were warranted in holding that the High Courts, though unquestionably "Courts established by Royal Charter" in the broad and general sense of the term, were not, when exercising their appellate jurisdiction from the Mofussil Courts, such Courts *within the meaning of Act XIV of* 1859.

There remains the difficulty occasioned by the use of the words "such Court," which has been adverted to in some of the Indian cases. But if those words be held to import the Court issuing the process of execution, *i.e.*, the Zillah Court, the difficulty would equally have applied to the decree of the former Sudder Court, which, not being the decree of a Court established by Royal Charter, would have been subject to no rule of limitation. It seems necessary to construe the words "such Court" as meaning "any Court not established by Royal Charter within the meaning of the Act." On the whole, therefore, though it is to be regretted that the Indian Legislature did not upon the amalgamation of the Courts provide more precisely for the application of the Limitation Act, and possibly of other Statutes, to the new Court, their Lordships are of opinion that the first question ought to be determined in accordance with the rulings of the High Court of Madras, and the Full Bench of the High Court of Bengal. The sound and convenient rule is undoubtedly that the Court which has to execute the decree of the High Court, should be governed by the rules which govern the execution of its own decrees, and their Lordships do not feel constrained by the words of the Statutes or of the Letters Patent to adopt the contrary construction.

If this be so, the consideration of the second question is not necessary for the determination of this appeal; since it is admitted that the period of three years, if calculated from the date of the decree of the High Court, had expired before the application for execution was made.

Nor, indeed, is the general question, upon which there have also been conflicting decisions in India, of much practical importance; since it is admitted that the date from which the three years are to be calculated is the date of the decree of the Appellate Court; whether that decree is to be treated as the decree to be executed; or the appeal of which it is the termination is to be deemed "a proceeding taken to keep the original decree in force." That an appeal prosecuted to a decree would be such a proceeding is shown both by the judgment of the Full Bench delivered by Chief Justice Peacock, in the 7th Weekly Reporter, p. 521; and also by the judgment of this Board, delivered by Lord Cairns, in the case of Maharajah Dheraj Mahtab Chand, on the 14th of July, 1870 (14 Weekly Reporter, Privy Council, p. 21).

The state of the Indian authorities upon the general question seems to be this. In the case before us, the High Court obviously proceeded on the principle that a simple decree of affirmance did not so incorporate the mandatory part of the original decree as to make, for all purposes, the decree of the Appellate Court the sole decree to be executed. And this ruling appears to have been followed in the case in the 14th Weekly Reporter, p. 288, in which it was ruled that, in order to make the decree of the Appellate Court, the final decree in the suit for all the purposes of execution, it was necessary that it should have decreed a material modification of the original decree. The rule so expressed seems open to the objection of vagueness. The Full Bench of the High Court of Bengal, however, in the decision of the 12th of June 1871, already referred to, has ruled that, whether the decree of the Lower Court is reversed, or modified, or affirmed, the decree passed by the Appellate Court is the final decree in the suit; and, in the words of Mr. Justice Mitter, "as such the only decree which is capable of being enforced by execution." And that is in accordance with the Madras decision already cited. Chief Justice Scotland's words are "whether that decree be in affirmance, or reversal, or modification of the decree appealed from, it becomes the final decree in the suit, and therefore the decree enforceable by execution."

The function of an Appellate Court is to determine what decree the Court below ought to have made. It may affirm, reverse, or vary the decree under appeal. In the first case, it leaves the original decree standing, superadding, it may be, an order for the payment of the costs of the appeal, or for interest on the amount originally decreed. In the other two cases it substitutes other relief for the relief originally given.

In all these cases the decree of the Appellate Court may be regarded either as a direction to the Lower Court to make and execute a decree of its own accordingly, or as an independent decree, whether it is to be executed by the Appellate Court or by the Lower Court. In the latter case a further question arises, *viz.*, whether the original decree, if wholly affirmed (or so much of it as has been affirmed, if it has been partially affirmed), is to be treated as merged or incorporated in the decree of the Appellate Court as the sole decree capable of execution; or whether both decrees should be treated as standing, execution being had on each in respect of what is enjoyed by the one, and not expressly enjoyed by the other.

In this country the nature and effect of a decree on appeal would seem to vary according to the nature of the decree under appeal, the constitution of the Appellate Tribunal, the proceedings in appeal, and the fact whether the record or merely a transcript is brought up. The determination, however, of the question before their Lordships must depend on the provisions of the Indian Code of Procedure. It is clear that, under that Code, whatever decree is executed, is to be executed by the Lower Court in which the record remains, or to which it is to be returned.

But Sections 360, 361, and 362, which prescribe the form of the decree of the Appellate Court, direct a copy of it to be entered on the register, and treat that decree as a decree to be executed, seem to exclude the notion that it is a mere direction to the Lower Court to pass and execute a certain decree.

If the question were *res integra*, their Lordships would incline to the view taken by the Judges of the High Court in the present case, *viz.*: that the execution ought to proceed on a decree, of which the mandatory part expressly declares the right sought to be enforced. Considering however that, for the reasons already given, the question is not of much practical importance, their Lordships will not express dissent from the rulings of the Madras Court, and of the Full Bench of the Bengal Court, further than by saying that there may be cases in which the Appellate Court, particularly on special appeal, might see good reasons to limit its decision to a simple dismissal of the appeal, and to abstain from confirming a decree erroneous or questionable, yet not open to examination by reason of the special and limited nature of the appeal. Their Lordships may further suggest that in all cases it may be expedient expressly to embody in a decree of affirmance so much of the decree below as it is intended to affirm, and thus avoid the necessity of a reference to the superseded decree.

From a passage in the judgment of Mr. Justice Mitter, already referred to, it appears to have been decided in India, that what are there termed "the decrees of the Privy Council," are not subject to any law of limitation. That question is not before their Lordships; and if it ever arises, must be determined on its own merits.

The ground of the decision seems to have been, that the order of Her Majesty in Council being an act done by virtue of her prerogative, it was not competent to the Indian Legislature to limit the time within which that order could be enforced. Their Lordships desire to say that they are not prepared, without full argument and consideration, to accept this ruling as correct. Should the question ever be brought here, it will have to be considered whether the Order in Council, which is not, properly speaking, the decree of a Court, but an order of Her Majesty made on the recommendation of a Committee of Her Privy Council, does more than prescribe what shall be the final decree in the cause, leaving it to be executed by the ordinary process of the Courts in India. It may well thus finally ascertain and define the rights of the parties without relieving them from the obligation imposed upon them by the general law of enforcing those rights with due diligence,—a matter with which the Prerogative has no concern.

The result of what has been said is, that the determination of this appeal must depend on the third question, *viz.*, whether any proceeding sufficient to keep the decree in force within the meaning of the 20th Section, was had between the 8th of June 1863, and the 22nd of April 1867, date of the application for execution. It has been argued that the presentation of the petition of appeal to England was such a proceeding, and that the period of limitation was to be calculated from the 9th of May 1866, when that petition was finally dismissed.

It was further argued that the filing by the appellants of the petition consenting to the respondent's application for further time to prosecute his appeal was such a proceeding, and that the time was to be calculated from the date of that petition (the 8th of April 1864), or from the 4th of October 1865, when the two months granted expired. Their Lordships are of opinion that there is no ground for the first contention; that the respondent's petition of appeal being a proceeding taken in order to destroy the decree, cannot of itself be treated as a proceeding to keep it in force; and in this opinion they are supported by all the Indian authorities cited, except the observations of Mr. Justice Holloway in the Madras case. It is, however, admitted, that had the appeal to England been allowed, the present appellants, being respondents to it, and, as such, supporting the decrees, would have been entitled to sue out execution at any time within three years at least after the final dismissal of that appeal.

The appeal, it is true, never was allowed, but during the period between the date of the presentation of the petition and that of its dismissal, the allowance of the appeal depended on the respondent's compliance with the rules which regulate the admission and allowance of appeals to England; and the appellants had a right to intervene and see that there was a compliance with these rules, particularly with such of them as relate to security, and in the event of non-compliance, to insist on the dismissal of the petition. In their Lordships' opinion there is in this case sufficient evidence that the appellants did so intervene. The petition, by which they consented to the application for two months' further time, is pregnant evidence of this fact; for unless they had then been active parties to the proceedings, their consent would have been unnecessary. Their Lordships, therefore, though they would have been glad to have had fuller evidence of what was actually done in this matter, have come to the conclusion that there was at that time such a *contestatio* between the parties touching the allowance of the appeal to England as suffices to bring this case within the principle laid down by Lord Cairns in the case of Maharajah Dheraj Mahtab Chand, already referred to, and to relieve their Lordships from the necessity of depriving the appellants of the fruits of what appear to be just decrees by the application of the Statute of Limitations.

Their Lordships, therefore, will humbly advise Her Majesty that this appeal ought to be allowed: that the orders of the Zillah Judge and of the High Court ought to be reversed; and that the appellants ought to be declared entitled to sue out execution of the decrees, and to recover also the costs of the proceedings in execution in both the Indian Courts. They will also be entitled to the costs of this appeal.

The 7th February 1872.

Present:

The Hon'ble F. B. Kemp and E. Jackson,
Judges.

Mesne Profits—Apportionment of Government Revenue on Lands within, and Lands not within Court's Jurisdiction — Jurisdiction —Ancient Jummabundee Papers—Local Investigation.

Case No. 349 of 1871.

Miscellaneous Appeal from an order passed by the Additional Judge of Hooghly, dated the 21st June 1871, affirming an order of the Subordinate Judge of that district, dated the 1st December 1870.

Puran Chunder Roy (Judgment-debtor)
Appellant,

versus

Juggessur Mookerjee and another (decree-holders) *Respondents.*

Baboo Luckhee Churn Bose for Appellant.

Baboo Hem Chunder Banerjee for
Respondents.

Where application was made for execution of a decree for possession with mesne profits of five mouzahs situated within the Court's jurisdiction, and Government revenue was so assessed upon these five mouzahs and two other mouzahs situated in another district that the amount paid on account of the five mouzahs and the two mouzahs respectively could not be apportioned, the Courts had no jurisdiction to determine and award mesne profits for the latter two mouzahs not within their jurisdiction but to have made an apportionment to the best of their ability.

Nor ought the Court to have assessed the mesne profits by relying upon certain *jummabundee* papers made by the Government Revenue Officers some thirty years ago without enquiring into the actual rents or proceeds of the estate during the period of dispossession.

Kemp, J.—THE judgment-debtor is the appellant in this case. It appears that the decree-holder obtained a decree in July 1857, for possession of certain mouzahs with mesne profits; the mesne profits to date from the 6th of February 1855 to some time in March 1865. The decree-holder applied to the Court to depute an Ameen to ascertain the mesne profits. An Ameen was accordingly deputed, who took the evidence of almost every ryot on the estate, 163 in number, and fixed the amount of *wassilat* according to the statements of the ryots as to what they had paid to the judgment-debtors. On these papers being filed in Court, the Subordinate Judge calculated the *wassilat* according to the Ameen's papers, and neither party filed any appeal against the order of the Subordinate Judge. The judgment-debtor, however, after this decision, finding that he had not been given credit for certain payments of Government revenue for which he had *challans* of the Collectorate to support him, applied for a review whereupon the judgment-creditor, who hitherto had been contended with the report of the Ameen who had been deputed at his own instance, to use the words of the Subordinate Judge "retorted upon the judgment-debtor," and also applied for a review praying that the *wassilat* might be calculated according to certain *jummabundee* papers prepared by the Government Revenue Officers some thirty years ago. The Subordinate Judge appears to have admitted both reviews and altered his former decision in this way, namely; he assumed the Government assessment papers as the proper basis to calculate *wassilat*, and he also allowed further deductions to the judgment-debtor for certain sums paid by him to the Collector and covered by the *challans* produced.

The judgment-debtor appealed to the Judge who also was of opinion that the Government assessment papers were the proper basis to calculate the *wassilat* upon; and with reference to the objection of the judgment-debtor that the Court had no jurisdiction to award *wassilat* for the two mouzahs situated in Midnapore, the Judge held that inasmuch as the payments made to the Collector by the judgment-debtor on account of Government revenue could not be apportioned, that is to say, that the amount which was paid in for the five mouzahs in Hooghly and the amount paid in for the two mouzahs in Midnapore district could not be apportioned, he thought proper to allow *wassilat* for the seven mouzahs.

In special appeal two points are taken, 1st, that the Lower Courts have acted without jurisdiction in determining and awarding mesne profits in respect of the two mouzahs not situated in the district of Hooghly, for which no mesne profits were claimed by the decree-holders in their petition for execution, and 2nd, that the Lower Courts ought not to have assessed the mesne profits relying upon certain *jummabundee* papers made by the Government Revenue Officers some thirty years ago without enquiring into the actual rents or proceeds of the estate during the period of dispossession.

We think that on both these grounds the decision of the Lower Court was wrong. It is very clear that the Lower Courts had no jurisdiction to award *wassilat* for the two mouzahs in Midnapore. It may be, and no doubt it is, difficult to apportion the amount paid on account of Government revenue upon the five mouzahs in Hooghly and the two mouzahs in Midnapore. The pleader for the judgment-creditor admits that he cannot assist us in doing so, and he also states that his client cannot come to any agreement with the opposite party as amongst themselves upon that point. The Court, therefore, think it right to make an apportionment to the best of their ability. We amend the decision of the Lower Court; *wassilat* will be calculated as per Ameen's calculation upon the five mouzahs in Zillah Hooghly, and a deduction will be made of the whole sum paid in by the judgment-debtor on account of Government revenue; but in consideration of this, when execution of the decree with reference to the two other mouzahs in Zillah Midnapore is taken out, no deduction will be allowed on account of any payments made on account of Government revenue, the whole sum so paid being deducted in these execution proceedings.

With reference to the second ground of appeal, we think it quite clear that the Lower Courts were wrong in assuming the Government assessment papers made thirty years ago as a safe and fair basis on which to calculate the *wassilat*. The proper way of calculating mesne profits was, as was done in the first instance, by deputing an Ameen to ascertain on the spot what the judgment-debtor had actually collected.

This was done originally and the judgment-creditor made no objection to that mode of assessment until the opposite party filed a review claiming a deduction of the sums paid by him for Government revenue, when he also filed a counter-application setting up these Government assessment papers. The decision of the Lower Court is therefore amended to this extent. The *wassilat* will be awarded on the five mouzahs in Zillah Hooghly according to the Ameen's calculations as modified by the decision of the Subordinate Judge, and upon this the judgment-debtor will receive a deduction for the whole amount paid in by him on account of Government revenue for the seven mouzahs, receiving no deduction on this account when the decree-holder shall execute his decree for *wassilat* for the two mouzahs in Zillah Midnapore.

The 15th February 1872.

Present :

The Hon'ble A. G. Macpherson and F. A. Glover, *Judges.*

Irregularity—Appeal—Local Investigation—Further Evidence—Remand—Act VIII of 1859 *ss.* 180, 354, *and* 355.

Case No. 834 of 1871.

Special Appeal from a decision passed by the Judge of Gya, dated the 16*th January* 1871, *affirming a decision of the Subordinate Judge of that district, dated the* 1*st March* 1870.

Roy Sooltan Bahadoor (One of the Defendants) *Appellant,*

versus

Mussamut Laloo Kooer (Plaintiff) *Respondent.*

Mr. C. Gregory and *Moonshee Mahomed Yusoof* for Appellant.

Mr. R. T. Allan and *Baboos Mohesh Chunder Chowdhry* and *Boodh Sein Singh* for Respondent.

A Judge has no power to order a Subordinate Judge, whose judgment is before him on appeal, to go and inspect the locality and make a report. Such a report cannot be treated as evidence one way or the other. If the Judge was of opinion that it was necessary to take further evidence, he ought to have proceeded as directed by Sections 354 and 355 Act VIII of 1859, and it was competent to him, if necessary, to order an Ameen or any suitable person to make a local investigation under Section 180. But a Judge from whose decision an appeal is pending is the most unsuitable person to make such investigation.

Macpherson, J.—THE issues in this case are whether the plaintiff has a right to take water from the pyne of *Tolya Nuddee* to *Bokopore Bijara* for the purposes of irrigation ? and whether, if she has a right at all, that right consists in a *parabundee* of two days out of eight ? Involved in the first issue is the further question whether or no the pyne of *Goorkha* terminates in *Chuni Ahar.* The Subordinate Judge who first tried the case (in a judgment which we are bound to say is not particularly satisfactory on the face of it), dismissed the plaintiff's suit. The plaintiff having appealed, the Judge states that, "from "the condition in which the papers of the case "were first received in appeal, it was not easy "to come to any decided opinion on the "question, or determine whose allegation "was the correct one. I, therefore, returned "the record to the Lower Court, with instructions that the Subordinate Judge should "make a local investigation." Upon the case being sent back in this fashion, the Subordinate Judge, being the same officer whose judgment was under appeal, made a local investigation, that is to say, he went to the ground and examined the water-course which was the subject of this suit. The result was that, whereas on 31st March 1870, he had dismissed the plaintiff's suit, he, having made his local investigation, made a report on the 5th January 1871, the practical effect of which was to upset his own judgment, and lead to the conclusion that judgment ought to be given in favor of the plaintiff. The Subordinate Judge having thus reported, the Judge, Mr. Tayler, on the 16th January 1871, acting solely upon this report, reversed the decree of the 31st March 1870, and decided in favor of the plaintiff.

The judgment of the Judge is extremely curt, and does not in fact show why he should have decided for the plaintiff more than for the defendant. Furthermore, while the Judge has based his decision exclusively upon the report made by the Subordinate Judge after the local investigation, it seems to us that that report was irregular, was not legally before the Court, and was not a report which the Court was justified in acting upon. If the Judge was of opinion that the case which was pending before him on appeal, had not been properly tried, and that it was necessary to take further evidence, he ought to have proceeded as directed by Sections 254 and 355 of the Code of Civil Procedure. But we know of no precedent for the course which the Judge adopted in ordering that the Subordinate Judge, whose judgment was before him on appeal, should go out and inspect the ground, and then make a report, or in other words, that the Court of original jurisdiction should inspect the locality, and then write a fresh judgment in the case, which was what the Subordinate Judge substantially was intended to do and did. No doubt, under the provisions of the Civil Procedure Code, it was quite competent to the Judge, for sufficient reasons, to direct that further evidence should be taken; and no doubt it might have been competent to him (we do not say whether it was or was not, under the particular circumstances of the case) to order an Ameen to make a local investigation. But the Judge had no power whatever to order the Subordinate Judge to make a local investigation in this fashion: and if the Judge thought that, in ordering the Subordinate Judge to make the investigation, he was acting under Section 180 of Act VIII of 1859, we can only say that it seems to us that, so far from selecting a "suitable person," he selected the most unsuitable person that could possibly have been found for the purpose. So long as an appeal is pending from the decision of a Judge, whatever his grade may be, he is clearly the most unsuitable person that can be selected for the purpose of making a local investigation, with reference to the matters which are the subject of the appeal.

In this instance, the report of the Subordinate Judge was merely a record of that which he personally saw; he merely recorded the result of his inspection of the ground, and he examined no witnesses. This suit, it is to be observed, was instituted in September 1869; and it is matter for consideration how far the appearance of these *pynes*, and of the ground on the 5th January 1871, when the Subordinate Judge made the local investigation, may not have differed from their appearance fifteen months before, when the suit was commenced.

We think, under the circumstances, that the proceedings of the Judge have been extremely irregular, and that the report of the 5th January 1871 must be excluded altogether from the record, and must not be treated as evidence in the cause one way or the other. It is the duty of the Judge, after examining the other evidence on the record, to satisfy himself whether it is or is not sufficient to enable him to determine the issues between the parties. If the Judge shall be of opinion that further evidence is necessary, he may proceed as directed by Sections 354 and 355 or otherwise as the Code of Civil Procedure permits. Eventually the Judge must decide expressly in the first place whether the plaintiff has any right of taking water from these *pynes*, and in the next place what that right is; and if he shall be of opinion that the plaintiff has a right, the Judge must show what its precise nature is, and the grounds on which he considers that such right rests.

The decision of the Lower Appellate Court is reversed, and the case is remanded to the Judge for re-trial, with reference to the above remarks. Costs to abide the result.

The 20th February 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Principal and Agent—Lease by Agent to Naib—Charge of Fraud—Presumption—Ratification by Person duly authorised.

Case No. 1016 of 1871.

Special Appeal from a decision passed by the Judge of Twenty-four Pergunnahs, dated the 13th April 1871, *reversing a decision of the second Subordinate Judge of that district, dated the 26th August* 1870.

Anund Chunder Bose (One of the Defendants) *Appellant*,

versus

Mr. L. P. D. Broughton (Plaintiff) *Respondent.*

Mr. J. W. B. Money for Appellant.

Mr. Wilkinson for Respondent.

Suit to set aside a lease, as granted without authority by an agent to the defendant who was the *naib* of the estate and as procured by fraud by the defendant in collusion with the agent, the latter charge of collusion having been withdrawn at the hearing before the Subordinate Judge. The HIGH COURT remarked on the impropriety of presenting a plaint charging collusion between the agent and defendant without good grounds for such imputation, and on the withdrawal of such charge at the hearing if there were grounds for it; and agreed with the Subordinate Judge in thinking that the owner of the estate in issue must be presumed to know what was being done on her behalf by her agent. The presumption is that a man acts rightly and not fraudulently. The mere circumstance that the rents were low does not give rise to the presumption that there had been fraudulent conduct on the part of the *naib* or that he did not state the circumstance to the agent before obtaining the lease from him.

There is also this difference between this case and other cases in which contracts between principals and agents are sought to be set aside on the ground of want of good faith, that here another agent is interposed, and it is not the case of the defendant (the *naib*) making a report to the owner in England. Even supposing the original transaction liable to be set aside, the ratification by a person having authority from the owner to make enquiries and ratify what had been done would render it valid.

Couch, C. J.—The plaint in this case originally sought to have the lease set aside on the ground that Mr. Shaw, the agent who granted it, had no authority to do so, and also that the pottah was procured by fraudulent means by the defendant, who was then *naib* of the estate, in collusion with Mr. Shaw, the agent. But it appears that the charge of collusion between Mr. Shaw and the defendant was withdrawn by the plaintiff's Counsel at the hearing before the Subordinate Judge.

Now it is to be observed that this withdrawal of the charge of collusion at the hearing made a very material difference in the nature of the case presented by the plaintiff. A charge of collusion between Mr. Shaw and the defendant, and a prayer that the pottah or lease might be set aside on that account, would have rendered it necessary for the plaintiff to give some evidence of the collusion which was charged. When the case was so framed, the *onus* of proof was upon the plaintiff. She would have to give some evidence that her agent, whom she charged to have colluded with the defendant, had done so. The withdrawal of the charge of collusion, and presenting the case, as it was presented, as a case of the defendant having fraudulently misled the agent, would, seeing the position which the defendant held of *naib*, make the burden to some extent lie upon him, to show that the lease which he had obtained had been obtained upon a fair representation of the circumstances, and that his conduct has been *bonâ fide*. The case really became changed by that withdrawal; and we cannot refrain from observing that we do not think that a plaint should have been presented, charging collusion between the agent and the defendant, unless it was known that there were grounds for imputing it, and if there were grounds for it, then it was not right at the hearing to withdraw the charge.

However it was withdrawn; and the case is to be dealt with in its new aspect, and in which Mr. Beaufort regarded it when it came before him, namely, as the case of an agent obtaining a lease for his own benefit. As the Court below observes, the proceedings must be marked with perfect good faith.

Now it cannot be questioned by the learned Counsel for the respondent (and he admitted that as the case comes before us in special appeal with the findings of the two Lower Courts, he could not question it) that the agents had authority to grant perpetual leases. Mr. Wilkinson, it is true, said that they had authority to grant perpetual leases of lands of a certain description, that it was limited to them; but we do not think that the findings of the Courts, or the inferences to be drawn from the conduct of the agents, lead to the conclusion that they were so limited, and that they had not the power to determine, when they granted a perpetual lease, whether the case was a fit one for granting it. The agents appear, during a long course of years, to have been granting perpetual leases. We think it must be presumed that they did so after making proper enquiries and satisfying themselves that the case was a proper one in which to grant it. It must be taken on the findings that that was the authority which they had.

Then, applying that, let us see what the judgment is which comes before us in special appeal. Mr. Beaufort, although he does not in express terms find that the agents did possess the authority, uses language which shows that he adopted the finding of the Lower Court with regard to it. He said,—"It appears to me equally clear that a Court "of Equity ought to recognize as permanent, "that is to say, as not determinable at the "will of the landlord,' tenures which have "been created *bonâ fide* for the benefit of "the estate under circumstances which "justify the manager in exceeding his gene- "ral power." "Exceeding his general power" is inaccurate, because the manager would be exercising, and not exceeding his power. He proceeds: "Now such circum- "stances may, I think, be found in the case "of a Soonderbun estate the owner of which "has gone to Europe, leaving the estate for "a long series of years under the uncon- "trolled management of an agent, especially "where successive agents have assumed "authority to grant such leases, and where "the owner has neither questioned the autho- "rity nor repudiated the deed, and the Court "might fairly assume that the land-owner "has tacitly sanctioned such leases and the "exercise of such an authority by the local "manager." "The Court will look closely "to the *bona fides* of the transaction, and "will not sanction the exercise of an assumed "power, unless it be clearly established that "material loss would otherwise have accrued "to the estate": and then assuming that there was a power to do it, if the proper case arose and was presented to the agent, he says, "the defendant has failed to prove "that any portion of the land was covered "with what may be called the primeval "tree-jungle, or required the expenditure of "more labor than was required for the clearance of the *jhope jungle* or brushwood "which had grown up in two or three years. "He does not even allege that the lands had "not previously been brought under cultivation. Under such circumstances, there "might have been some reason for granting "a lease rent-free for a year, or at low rates "for a year or two, but there was no ground "for demanding a permanent tenure, and "certainly there was no ground for granting "a permanent tenure at a lower rate than "that paid for other lands in the same estate. "It appears from the evidence that the land "in question would have been of the same "value as other lands of the estate, if the "embankments had been kept in good repair, "and consequently it must be assumed "until the contrary be shown that it "could bear the same rate of rent as "is paid for other lands." Then he says, "that "the *onus* of justifying the terms of his lease lies on the defendant," which it did in the shape which the case had then assumed, because if an agent takes a lease from his principal, the *onus* is upon him to show that the transaction is a proper one, and that it was done with good faith. So far the Judge is undoubtedly correct. Having laid that down, he then says, "it is especially incumbent on "the defendant to establish by good evidence "that better terms could not have been obtained from other ryots, because it appears "that it was on his representation to the "manager made in his fiduciary position as "the local *naib* that the lease was granted." And that as the defendant obtained the lease "at an unusually low rate, and at a *russudee* "*jumma*, the maximum rate of which is "this unusually low rate, I must presume "that he fraudulently misled the manager for "his own benefit; and on that ground I "must declare that the plaintiff is entitled to "ignore the lease and to treat it as invalid." The foundation of his judgment is this, that because, in the opinion of the learned Judge, the rent was unusually low, it was to be presumed that the defendant, the *naib*, had fraudulently misled the manager of the estate.

Now we think that cannot be supported. Upon that proposition, it becomes very material to consider that the charge of collusion against Mr. Shaw had been withdrawn, and we must treat the case as if Mr Shaw had acted honestly in the transaction, without any collusion with the defendant, and in the performance of his duties as manager of the estate.

Mr. Beaufort, just before this part of his judgment, says, "It cannot be presumed, "as has been urged by the respondent, that "the manager, Mr. Shaw, made proper "enquiries at the time, or that a subsequent "manager acted rightly when he refused "or omitted to interfere with the lease in the "interest of his principal." In our opinion, when Mr. Shaw so acted as agent, the presumption, instead of being that he had not made proper enquiries, would rather be that he had done his duty as an agent, and before granting the lease to the defendant, had satisfied himself that it was a proper case in which to grant it. We have nothing to show that the defendant did not state to Mr. Shaw the circumstances under which he asked to have the lease; and if we are to act upon presumptions, the presumption is that Mr. Shaw had done his duty and had made proper enquiries.

It seems to us probable that that was felt at the outset by the advisers of the plaintiff, and hence it was that the plaint contained the charge of collusion in the first instance, the object being to get rid of the difficulty which might arise from the agent being presumed to have done his duty. The presumption is that a man acts rightly and not fraudulently and wrongly. The mere circumstance that the rates were low, does not give rise to the presumption that there had been fraudulent conduct on the part of the *naib* or that he had not stated the circumstances to the agent before obtaining the lease from him, and if he did that, there would not be ground, without something more appearing, for setting it aside. And there is this difference between this case and other cases in which contracts between principals and agents are sought to be set aside on the ground of want of good faith, that here another agent is interposed, and it is not the case of the agent, the *naib*, making a report to Mrs. Adams herself, who might possibly have been more easily imposed upon than Mr. Shaw who was the manager of the estate. Therefore, independently of any question of ratification, we should have considered that the judgment which is appealed against is wrong; that it is erroneous in point of law as resting upon a presumption which really did not rise in the case.

But it also appears to us that there is considerable *primâ facie* evidence that Mr Steer had sufficient authority to enquire into the propriety of this pottah being granted, and after making enquiries to ratify what had been done. Even supposing the original transaction liable to be set aside, the ratification, if by a person having authority from Mrs. Adams to make enquiries and ratify what had been done, would render it valid, and it cannot now be set aside. The Subordinate Judge has found, apparently, that Mr. Steer had that authority. He says,—"Mr. "Steer went so far as to make enquiry regarding the pottahs obtained by the defendant, as also the state of the lands covered "by them, and he could find nothing improper in them; on the contrary, he granted "a new pottah of a similar nature in 1278. "Mrs. Adams cannot be presumed to have "remained in ignorance of such acts on the "part of her managers."

It appears to us, therefore, that there is evidence in the case, which, in the absence of any evidence on the other side, sufficiently shows that Mr. Steer had authority to make the enquiry and to ratify what had been done. And we should be reluctant to come to the conclusion that an agent such as Mr Steer was coming out to India, going amongst the tenants of the estate, making all these enquiries, and apparently making them in person (but whether the enquiry should be made personally or through others was a matter for him to determine) and then ratifying the pottah, had not authority; all this being held out to the tenants as acts which there was authority to perform on behalf of the owner who was absent in England and with whom it would be impossible for the tenants to communicate in order to learn whether the agents had authority or not. We think the agents themselves would have been astonished if the tenants had stated that they could not take leases from them unless they were satisfied that the agents had authority to grant them. Under such circumstances, we say we should be extremely reluctant to come to the conclusion that Mr. Steer had not authority to act as he did.

As we pointed out in the course of the argument, it would be an unfortunate state of things if the acts of agents of this description granting leases for a long series of years, could be set aside on the allegation that their principals in England were ignorant of their conduct. We concur with the Subordinate Judge in thinking that the owner in England must be presumed to know what was being done on her behalf by her agents. The owner got the benefit of those acts, and it is a fair presumption that she took pains to ascertain what the agent was doing, and to keep herself acquainted with the way in which the estate was being managed.

The judgment of the Lower Appellate Court will be reversed. The Subordinate Judge, we think, was right; and his judgment will stand. The appellant must have the costs both of this and of the Lower Appellate Court.

The 20th February 1872.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Case No. 996 of 1871.

Act VIII of 1859, *s.* 246 *(Object of)—Claims to attached Property (Nature of).*

Special Appeal from a decision passed by the Subordinate Judge of Purneah, dated the 11*th May* 1871, *reversing a decision of the Moonsiff of Kishengunge, dated the* 15*th February* 1871.

Amjud Ali (one of the Defendants) *Appellant,*

versus

Kunkoo Shaw and another (Plaintiffs) *Respondents.*

Baboos Grish Chunder Ghose and *Taruck Nath Dutt* for Appellant.

Baboo Kalee Kishen Sein for Respondents.

In order to maintain a suit under Section 246 Act VIII of 1859, the plaintiff must be prepared to prove that the right which he put forward and is seeking to have declared has been investigated and disallowed, that it is still in existence, that it has been infringed and that he is seeking compensation, or to recover possession. But it never was intended by the Legislature by that Section that the time of the Court should be taken up with a perfectly useless enquiry into a dispute apart from any claim for compensation or possession, *e. g.*, as in this case, where the plaintiff's object was to establish the truth of his assertion that the interest of a judgment-debtor, which was put up for sale, was that of a tenant only and not that of an usufructuary mortgagee.

Markby, J.—For the purpose of deciding the question which is now before us, namely, whether the present suit will lie, I will assume that the facts which the plaintiff is desirous to establish in proof have been alleged at the proper time and in the proper manner in the plaint or otherwise; and that he has also stated with sufficient clearness and accuracy the nature of the decree which he seeks to obtain. In other words, I will consider the question independently of any technical rules as to the form in which the allegations in a suit ought to be made on the plaint drawn.

The case of the plaintiff, as I understand it, is that he was the proprietor of certain land which was let to one Maun Singh, and that whilst Maun Singh was in possession and whilst there were still some few months to run before his tenancy expired, a creditor took out execution against him, and put up for sale the future profits of the property (*wassilat*) which would come into the hands of Maun Singh, alleging that the interest of Maun Singh was not, as the plaintiff says, that of a tenant, but that of a usufructuary mortgagee. The plaintiff says that upon this he put in a claim under Section 246, but that his claim was rejected; and the present suit is said to be brought under that Section to establish the truth of the plaintiff's assertion that Maun Singh's interest in the property was that of a tenant only, and not that of an usufructuary mortgagee.

It is stated by the plaintiff that, on the expiration of Maun Singh's settlement, he relet it to a fresh tenant; so that, whatever may have been the nature of Maun Singh's interest, there is no assertion by any one that that interest is now in existence.

The terms of the order of adjudication of the plaintiff's claim are not stated; nor are the terms of the order for attachment and sale; but the plaintiff states that the latter did not specify any period of time during which the profits of the land were attached.

Now, putting all or any part of the above facts into the most formal shape possible, they do not seem to me to present any ground for maintaining a suit. It is not attempted to assert that they lay the foundation for a declaratory decree under the general law, but it is contended that the plaintiff's claim in execution having been disallowed, he is at liberty to bring a suit "to establish his right" under Section 246.

Certainly, the words of that Section are not very precise. But I take it that, in order to maintain a suit under it, the plaintiff must be prepared to prove two things; *first*, that the right which he put forward has been investigated and disallowed; and *secondly*, that the right which he seeks to have declared is still in existence. It has been held that, if the claim has been investigated and disallowed, the claimant is bound to bring his suit within the year; but that if the execution is allowed to proceed without the claim having been investigated, the ordinary rule of limitation applies. This is upon the ground that the latter part of Section 246 only applies where the claim has been investigated and disallowed; and therefore, unless the plaintiff's claim has been investigated and disallowed, no suit will lie at all under the Section and the plaintiff is left to his ordinary remedy; that is to say, he may bring a suit when and not until his right has been disturbed. So also upon a reasonable construction of the words of this Section, I do not think the Court could be called upon to investigate the claim if the claim made and disallowed had ceased to exist. That might be material if any right of the plaintiff had been infringed and the plaintiffs were seeking compensation or to recover possession. But *the object of the suit* contemplated by this Section and the plaintiff's object in this suit is not to obtain compensation for any injury or to recover possession. We have at present nothing to do with that. The object is to establish a right which has been impugned by the proceedings in execution, and I do not think the Legislature can have intended that, apart from any claim for compensation or possession, the time of the Court would be taken up in enquiring into a dispute which for any present or future purpose is wholly immaterial.

It is said that the plaintiff's claim having been dismissed, it must have been disallowed; but that does not follow. The question which the plaintiff raised by his claim was whether Maun Singh's interest was that of a tenant or an usufructuary mortgagee. The plaintiff himself states in his plaint, as I am informed, that the attachment of the profits to accrue was made without any specification of time or other particulars; and it being admitted that the judgment-debtor had some interest, the execution may have been ordered to proceed without any disallowance of the present plaintiff's claim.

So it is also clear that it is not an existing right which the plaintiff now seeks to establish. He seeks to establish that, at a time now gone by, he was owner of this land, and that Maun Singh was his tenant and not his usufructuary mortgagee. It seems to me that, no claim being made for compensation or for possession, and there having been no infringement of the plaintiff's right, this would be a perfectly useless enquiry. The pleader for the plaintiff was unable to suggest any possible advantage that would arise by this right being declared; and, as I have already said, I do not think it was intended by Section 246 that we should prosecute an enquiry which would produce no result.

It was said that this objection was not taken below; nor was it in the precise form in which it is taken now, thouhg the suit was dismissed by the Moonsiff on somewhat different ground as informally brought. For the reasons I have stated, I think that judgment was right, and that it ought to be affirmed, and it is unnecessary to consider in this case whether, after a suit has been heard and determined without objection, the Court of appeal will allow an objection to be taken that the suit as brought will not lie.

I think the suit should be dismissed, and that the plaintiff should pay the costs in this Court and the Courts below. But I think that the plaintiff may be at liberty to bring a fresh suit, upon condition of his first paying to the defendant the costs which he has been ordered to pay in this suit.

Bayley, J.—I am of the same opinion. Under the facts of the case the plaintiff's pleader could show no real cause of action or specific subject matter of inquiry, but wanted a declaration vaguely of a right the actual destruction or injury of which right is not shown.

I concur in all the order passed by Mr. Justice Markby.

The 21st February 1872.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Act X of 1859 (*Object of*)—*Gorabundee tenures.*

Cases Nos. 703 and 704 of 1871.

Special Appeals from a decision passed by the Judge of Bhaugulpore, dated the 3rd April 1871, *reversing a decision of the Subordinate Judge of that district, dated the 2nd December* 1869.

Rajah Leelanund Singh Bahadoor and others (Defendants) *Appellants,*

versus

Nirput Mahtoon (Plaintiff) *Respondent.*

Mr. J. W. B. Money for Appellants.

Baboo Mohesh Chunder Chowdhry for Respondents.

The object of Act X of 1859 was to re-enact the provisions of existing laws relative to the rights of ryots, and not in any way to destroy those rights. If, therefore, the plaintiff had a *gorabundee* tenure existing before the enactment of Act X (and it had been found that the plaintiff's *gorabundee* tenure had been recognized in a long series of decisions commencing from the year 1846), the enactment of that Act in no wise deprived him of his rights in that tenure.

Jackson, J.—THE litigation out of which these suits arose seems to have been going on for some 14 or 15 years. There are now two suits which originated in 1865 and 1866. The plaintiff prefers a claim to certain lands which he states belong to a *gorabundee* tenure which was formerly the property of his uncle and which has descended from his uncle to him. The plaintiff states that, so far back as in the year 1846, an attempt was made to destroy that tenure by distraint proceedings, but these proceedings were afterwards set aside by the Collector and the *gorabundee* tenure upheld. Subsequently again he states that in 1857 the same attempt was made; on that occasion the Collector and the Commissioner decided against the plaintiff's uncle, but on appeal to the Civil Courts, the Moonsiff, the Principal Sudder Ameen, and the High Court all decided in his favor, and the distraint proceedings of 1857 were altogether set aside. The plaintiff goes on to say that then, in 1864, his uncle from whom he inherited the tenure brought suits for possession against the tenants on these lands under Section 25 Act X of 1859, and obtained a decree for possession, which decree was confirmed by the Commissioner in 1864. In the meanwhile, the plaintiff's uncle died and the plaintiff states that he then came into possession of his uncle's rights, executed this decree, and got possession; that objections were subsequently raised by the tenants alleging that the lands of which he got possession were not the lands for which the plaintiff's uncle obtained his decree, and that he had fraudulently got possession of other lands. An enquiry was made, and the Collector came to the conclusion that the plaintiff had been trying in execution to get possession of other lands than those covered by the decree obtained by his uncle which he was then executing. The Collector therefore recalled the orders for execution of that decree, and this has led to the plaintiff now bringing the present suits. The suit, as I understand it, is to get possession of the lands for which his uncle obtained a decree in 1864, for a declaration that the lands for which he is now suing are identical with the lands covered by that decree, and that the decision of the Collector saying that they were not the lands decreed was a wrong decision. The defendants raised a number of pleas on the first occasion. They alleged that the plaintiff had no cause of action at all, and the Judge, when the case first came before him in appeal, held that he had no cause of action. There was then an appeal to this Court, and this Court found that there was a cause of action to the plaintiff and that the Judge must try the case upon the merits. This Court fixed three issues and returned the case to the Judge with directions to try these issues and that if there were any material issues in the case, these issues also should be properly raised and tried. The case has gone back, and in addition to the three issues raised by this Court, the defendants have attempted to raise two additional issues before the Lower Courts. As regards one of these issues, both the Lower Courts have refused to try it, and as regards the other issue and the three issues sent by the High Court, the Judge on remand, differing from the first Court has found all points in favor of the plaintiff, and the only one point upon which the Judge agrees with the first Court is on the additional issue which was admittedly raised before the Lower Courts after the remand of the case.

The first ground which is taken in appeal to this Court is that the Lower Courts were wrong in refusing to allow the issue to be raised as regards the right of the plaintiff to succeed his uncle. The Courts below have decided that this point not having been raised in the written statement, it was not a point upon which an issue could be raised merely upon the oral statement of a pleader. It does seem to us also that, if it was the intention of the parties to raise such a point as this, it should have been raised originally. It is on the face of it a direct answer to the whole case, and there is no allegation even up to this time, although this case has been pending for six years, to the effect that the plaintiff is not the nephew of his uncle, and that there are other people now alive who are the lawful heirs of that uncle. If there was any direct allegation to that effect on the part of the defendants, there might be some reason to try the issue, but it is only a mere denial of a fact, and there is no question to try as to whether any other person than the plaintiff is the lawful heir of his uncle, and under such circumstances we think we ought not to interfere with the decision of the Lower Appellate Court upon this point.

The second ground taken in special appeal is a more important one. It is upon the additional issue which was raised by the Lower Courts subsequent to the remand, and is to the effect that the Lower Court has decreed lands to the plaintiff which belong to other ryots and do not belong to the *gorabundee* tenure which the plaintiff is claiming. There can be no doubt that this point was properly tried by the Lower Courts. An Ameen had been sent, when the case was first being tried, to the spot with orders that the plaintiff was to point out which lands he said belonged to the *gorabundee* tenure of his uncle, and that the defendant should point out which lands belonged to that tenure; and the Ameen was to make enquiries and to ascertain whether the lands which the uncle of the plaintiff had declared in 1864 to be the lands of his *gorabundee* tenure and for which he obtained a decree were the lands which the plaintiff now claims. The Ameen went to the spot, prepared a map of the lands and gave his opinion upon the points which he was directed to ascertain. It was on many points against the plaintiff's contention, but the first Court as well as the Judge have considered the report of the Ameen and have gone into the question for themselves and have differed from the Ameen, the Subordinate Judge's Court giving its reasons for doing so as regards each plot of land, in its decision of the 13th of April 1867. We have, therefore, two decisions of the Subordinate Judge, for I suppose the subject was again considered by him and in both he comes to the same conclusion that these lands are the lands which were claimed by the plaintiff's uncle as belonging to his *gorabundee* tenure, for which he brought his suit and for which he obtained a decree for possession, and that the plaintiff is entitled to these lands. The Judge has not gone into so much detail, but he comes to the same conclusion.

We are told now that this land does not belong to the plaintiff, but that it belongs to other ryots, and that the question should be retried. We should certainly object to reopen a point which has been in litigation for six or seven years; but still if this point had really not been tried we should have found it necessary to have it tried; but we find not only that the Courts have found these lands to be identical with those of the decree obtained by the plaintiff's uncle and that not one of the ryots, or the zemindar himself, have in the course of this special appeal raised any objection that this point has not been fully tried and considered by the Lower Court, and if there is anything in this plea it is certainly strange that the ryots should not have raised it and stated upon this special appeal that such and such lands decreed to the plaintiff belong to and are held by me under such and such a title, and the Judge has taken no notice whatever of this objection and has omitted to consider such and such evidence which was offered in support of the contention. There is no objection of any sort to that effect on this special appeal, and we therefore, think that we ought not to continue the litigation upon this point.

The only other point which we think remains is that it is said that the Judge has misconstrued the purport of the former litigation. We have considered the effect of that litigation, the learned Counsel for the appellant has gone through the whole of the proceedings connected with it, and we have heard it from beginning to end, and it does seem to us that this evidence supports the case of the plaintiff that his uncle did hold a *gorabundee* tenure, whatever a *gorabundee* tenure may be; and he calls it a "*mowrosee gorabundee* tenure," and, it does appear from these decisions that between the years 1846 and 1857 repeated attempts were made to get rid of this tenure, that the plaintiff's uncle successfully overcame all opposition, and down to the year 1868 obtained decrees putting him in possession of these lands, and that the plaintiff in 1864 obtained orders for possession in execution of that decree, which orders the Collector subsequently and, as it has been found now, improperly set aside. The Civil Court has now decided that the Collector in execution ought to have put the plaintiff in possession, and that the grounds upon which the Collector set aside those execution proceedings were wrong.

There is also an argument raised before us that although the plaintiff may have held a *gorabundee* tenure before Act X of 1859 came into operation, all these former tenures have lapsed and that the only rights that ryots can now hold are those contained in Act X of 1859. I understand this argument to be based upon the assumption that a *gorabundee* ryot is a *khodkasht* ryot; but I must say that it does seem to me that a *gorabundee* tenure is put in this case upon a much higher position than that of a *khodkasht* ryot as it is spoken of as a *mokururee* tenure. However, without deciding what it is, there can be no doubt that it is an old tenure, and that whatever rights the uncle held under this tenure have devolved upon the plaintiff, and that the plaintiff is entitled to these rights whatever they may be. I do not understand that Act X of 1859 put an end to any description of rights; it certainly conferred certain rights upon some classes of tenants; but that the rights of *khodkasht* ryots or of any other ryots were in any way destroyed under Act X of 1859, I am not prepared to say.

We think that there is no ground for interference with the decision of the Lower Appellate Court. It has been properly found that the plaintiff is entitled to possession of the lands of this tenure and that the lands in suit are these lands. The appeal is, therefore, dismissed with costs.

Kemp, J.—I wish to add a few words in concurrence with this judgment. The learned Counsel for the appellants has argued that under Act X of 1859 any rights which the plaintiff may have possessed under this *gorabundee* tenure previous to the passing of that Act no longer existed, and that under the Act he was bound to prove that he had been paying at an uniform rate for twenty years, a view which apparently was the one taken by the Judge who tried the case in the first instance. In reply to that argument, I would observe that the object of Act X of 1859 was to re-enact the provisions of existing laws relative to the rights of ryots and not in any way to destroy those rights; and if the plaintiff had a *gorabundee* tenure existing before the enactment of Act X, the enactment of that Act did in no wise deprive him of his rights in that tenure. It has been found in this case by the Judge, and I think rightly, that this *gorabundee* tenure of the plaintiff has been recognized in a long series of decisions commencing from the year 1846. The plea set up by the Rajah was that the uncle of the plaintiff had abandoned this tenure, and that he therefore, the Rajah, in the exercise of his right as Zemindar, had leased out the land to other parties. I think that the conduct of the plaintiff's uncle, which was afterwards followed up by the plaintiff, is wholly inconsistent with any such theory, for we find the uncle and after him the plaintiff asserting and strenuously asserting their rights in that tenure and successfully resisting every attempt to get rid of that tenure for a period of twenty-six years.

It appears to me very clear that the plea which has been now set up for the first time and is not even taken in the grounds of special appeal, namely, that the lands of which the plaintiff now seeks to obtain possession under his decree are lands belonging to, and in the possession of independent parties, is an afterthought.

Both Courts have found on the question of identity, which is a question of fact, that the lands in suit are the same which the plaintiff originally obtained possession of by the order of the Collector which was subsequently withdrawn and we think erroneously withdrawn by that officer; and this plea has been put forward in my opinion simply with the view to try and deprive the plaintiff of any fruit which he would be entitled to obtain from a decision in his favor in this suit, in the execution stage.

I, therefore, entirely concur in dismissing this special appeal with costs.

The 29th January 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble H. V. Bayley, Louis S. Jackson, A. G. Macpherson, F. A. Glover, and Dwarkanath Mitter, *Judges*.

Small Cause Courts—Act XI of 1865 *s.* 19—*Jurisdiction—Sale of Moveable Property (in Execution of Decree)—Huts.*

Case No. 508 of 1871.

Special Appeal from a decision passed by the Additional Subordinate Judge of Dacca, dated the 28th January 1871, *affirming a decision of the Moonsiff of that district, dated the 3rd September* 1870.

Nattoo Meah and another (Defendants) *Appellants,*

versus

Nund Ranee (Plaintiff) *Respondent.*

Baboo Nullit Chunder Sein for Appellants.

Baboo Chunder Madhub Ghose for Respondent.

Huts are not moveable property within the meaning of Section 19 Act XI of 1865.

A purchaser acquires no title to huts by a sale in execution of a decree of a Small Cause Court, such Court having no jurisdiction to deal with immoveable property.

This case was referred to a Full Bench by E. Jackson and Onoocool Chunder Mookerjee, JJ., with the following remarks:—

THIS was a suit instituted by the respondent for a declaration of his right to two huts purchased by him at a sale held in execution of a decree of the Small Cause Court. Plaintiff's purchase is dated 21st July 1868.

Subsequently, in execution of another decree against the same judgment-debtor, these two huts were attached by the ordinary Civil Court and put up to sale. Plaintiff intervened in this execution case, and pleaded his prior purchase, but his objection was ultimately rejected and the two huts attached were sold on the 31st Jeyt 1276, when the defendant became the purchaser.

Plaintiff now brings this suit for a declaration of his right under his purchase and for the setting aside, as it is called, of the other passed by the Civil Court rejecting his claim.

The suit is instituted in the Court of the Moonsiff of Naraingunge. Objection was raised by the defendant to the jurisdiction of the Moonsiff to entertain the suit, on the ground that the subject-matter of the claim being two huts which are moveable property, the suit ought to have been brought in the Small Cause Court.

Both the Lower Courts, the Moonsiff of Naraingunge, as well as the Subordinate Judge of Dacca, over-ruled this objection, and on the merits of the case decided in favor of the plaintiff. The defendant appeals specially and urges that the plaintiff had obtained no legal or valid title to the property, inasmuch as the Court of Small Causes had no jurisdiction or power to attach or sell these huts which are immoveable properties and, therefore, could not have been sold by the Court of Small Causes in execution of its decree. A decision of the late Chief Justice, Sir Barnes Peacock, and Justice Dwarkanath Mitter, reported in page 416 of the 10th Weekly Reporter, is cited in support of this contention. In this case it was held that huts are not moveable property within the meaning of Section 19 Act XI of 1865, and that, therefore, they cannot be seized in execution of a decree of the Court of Small Causes.

The pleader for the respondent contends that huts are moveable property, and has been so held by Bayley and Macpherson, JJ. in a case to be found in page 29 of the same volume of the Weekly Reporter, as also in page 29 of Sutherland's Book on References from the Court of Small Causes.

There being thus a conflict of decisions on the point, we think it necessary to refer the following questions for the decision of a Full Bench:—

First.—Whether huts in this country are to be considered as moveable property within the meaning of Section 19 of the Small Cause Court Act, or immoveable property?

Second.—When a Court of Small Causes had actually sold in execution of its decree, without any objection on the part of the judgment-debtor, whether the purchaser at such a sale acquires any title to those huts by virtue of such a purchase?

The following are the judgments of the Full Bench:—

Couch, C. J.—Two questions have been submitted to the Full Bench in this case.

First.—Whether huts in this country are to be considered as moveable property within the meaning of Section 19 of the Small Cause Court Act, or immoveable property?

Second.—When a Court of Small Causes had actually sold in execution of its decree, without any objection on the part of the judgment-debtor, whether the purchaser at such a sale acquires any title to those huts by virtue of such a purchase?

Section 19 of the Small Cause Court Act provides that, when a decree is passed in any suit of the nature and amount cognizable under this Act, the Court passing the decree may order immediate execution thereof by the issue of a warrant directed either against the person of the judgment-debtor, if he is within the local limits of the jurisdiction of the Court passing the decree, or against his moveable property within the same limits. If the warrant be directed against the moveable property of the judgment-debtor, it may be general against any personal property of the judgment-debtor wherever it may be found within the local limits of the jurisdiction of the Court, or special against any personal property belonging to the judgment-debtor within the same limits, and which shall be indicated by the judgment-debtor.

Now it is to be observed that, in the latter part of this Section, there is a change in the phraseology; instead of the words "moveable property," we find "personal property." But I think that the words personal property are used synonymously with *moveable* property and in their proper sense, namely, to mean goods, money, or other things of a like nature which may attend the owner's person wherever he thinks proper to go; they are not used in the sense in which they are used in English law where some things are included that cannot be moved. On this account I think that the words do not extend the meaning of the words moveable property.

We have, therefore, to consider whether huts in this country are moveable or immoveable property. The distinction between moveable and immoveable property is well known to the laws of all countries, but it is not so strictly observed in English law.

What is moveable property? Physically moveable things are such as can be moved from the places which they presently occupy without an essential change in their actual natures; and immoveable things are such as cannot be moved from their present places, or cannot be moved from their present places without an essential change in their actual natures. For instance, a field is immoveable because it cannot be moved; a house also is immoveable, not because it cannot be moved, but because it cannot be moved without an essential change in its actual nature. You can move a house, but if you do, there is an essential change in its nature. The materials remain, but it is no longer a house.

So, when you remove a hut, you take away the materials of which it is built, but there is an essential change in their nature; and between a house and a hut there is only a difference of degree. They are both attached to the ground, both capable of being moved, but neither can be moved without undergoing an essential change in its actual nature.

The distinction between moveable and removeable which is referred to by Sir Barnes Peacock, in his judgment in the case of Raj Chunder Bose *vs.* Dhurmo Chunder Bose, X Weekly Reporter, page 416, is noticed in the English case of Lee *vs.* Risdon, VII Taunton's Reports, page 188.

Any one acquainted with the decisions of the English Courts will know the great difficulty of making a distinction between moveable and immoveable property in the case of fixtures which although coming within the definition of immoveables belong to the executor and not to the heir, and in the case of a lessee becoming a bankrupt, belong to his assignees and not to the lessor.

In the case of Lee and Risdon the question, what are immoveables, arose in a technical way upon the form of a pleading. The question was whether the price of fixtures to a house could be recovered under a declaration for goods sold and delivered. The Court held that they could not. Chief Justice Gibbs in his judgment says:—"I was struck by "one proposition of the Solicitor-General "that these (the fixtures) would pass to the "executor, because the line is drawn the "strictest between heir and executor; and "whatever is fixed cannot be severed. And "it is to be recollected that the right between "landlord and tenant does not altogether "depend upon this principle, that the articles "continue in the state of chattels; many of "these articles though originally goods and "chattels, yet when affixed by the tenant to

" the freehold, cease to be goods and chattels " by becoming part of the freehold,"—and, continuing, he notices the distinction made by Sir Barnes Peacock in his judgment in the case in the X Weekly Reporter, 614, between moveables and things which there is a right to remove, saying—" and though it is " in his power to reduce them to the estate " of goods and chattels again by severing them " during his term, yet until they are severed " they are a part of the freehold, as wainscots " screwed to the wall, trees in a nursery " ground, which, when severed, are chattels, " but standing, are part of the freehold."

The rule stated is that these things, which are called fixtures, as soon as they are severed, become goods and chattels, but so long as they remain attached to the freehold they are immoveable property.

There are several decisions that seem to have favored the view that in considering whether huts are moveable or immoveable property, the usage of the country must be taken into consideration. At one time during the argument, I was inclined to take this view of the question; but after considering the matter, it seems to me that the actual annexation and total disconnection of the thing is the most certain and practical rule. A departure from the ordinary meaning of the word moveable will introduce many difficulties. In each case it will be necessary to enquire whether by the custom of the district or sometimes of a trade the thing annexed to the land can be rightfully removed.

For these reasons I would answer the first question which has been submitted to us by saying that huts are not moveable property within the meaning of Section 19 of Act XI of 1865.

But I wish to notice a decision of the High Court of Bombay, VI Bombay High Court Reports, 114, to which I was a party, which seems to conflict with my opinion in this case. In that case, it was held that a suit for damages for injury to crops is a suit for damages for injury to personal property within the meaning of Clause 2 of Section 1 of the Limitation Act.

In coming to that conclusion, I had in my mind the English law as to standing crops, and which is stated in Williams on Executors, page 680, note (b) :—

" They are in fact not only in this respect, " but in most others, looked upon as chattels; " for the rule seems now to be established, " that all those vegetables which go to the " executor, and not to the heir, are for most " purposes considered mere chattels. They " may consequently be seized and sold under " a *fieri facias*; and the sale of them while " growing is not a contract or sale of any " lands, tenements, or hereditaments, *or any* " *interest in or concerning them* within the " 4th Section of the Statute of Frauds; but a " sale of goods, wares, and merchandize " within the meaning of the 17th Section."

The learned author then refers to several decisions of the English Courts in which this was held. It was for this reason that, in applying the Limitation Act, I considered that growing crops should be held to be personal property. It was a choice between one year and six years as the period of limitation. If the crops were cut, although still on the ground, the suit would have to be brought within one year; but if the injury were done to them while standing although about to be cut, and they were not to be considered as personal property, six years would be allowed for bringing the suit.

This will not be so under the new Law of Limitation. And the propriety of the decision is, I think, shown by the Registration Act 1866, having defined moveable property as including growing crops. Possibly, if I had to consider the question again, I might feel obliged to adhere to the strict meaning of personal property, and hold that it does not include standing crops, and take the consequence of the anomaly in the periods of limitation resulting from it.

I have thought it desirable to advert to this case to show to what extent that ruling went should the case come to be cited hereafter as an authority.

I think it is possible that, in passing the General Clauses Act I of 1868, property of this description was overlooked.

As to the second question which has been referred to us, I am of opinion that the purchaser acquires no title to huts by a sale in execution of a decree of a Court of Small Causes. Such Court has no jurisdiction to deal with immoveable property, and no title can accrue to the purchaser by the sale of property which the Court has no jurisdiction to sell.

Jackson, J.—I concur in the answer given by the learned Chief Justice, and generally in the reasoning on which the answer to the first question is rested.

Glover, J.—I concur.

Mitter, J.—I concur.

Macpherson, J.—I concur in the proposed answers. But I desire to rest my decision that " huts" are " immoveable" on the ground that they are " houses," and that in Act VIII of 1859 houses are classed with land and other immoveable property.

Act XI of 1865 Section 47 declares that, except as provided by that Act, the Code of Civil Procedure shall apply to cases in the Small Cause Courts.

It is enacted in Section 283 of Act VIII of 1859 that, "when the property shall consist of goods, chattels, *or other moveable property*," attachment shall be made in a particular manner. Similarly, provision is made in Section 235 for cases in which "the property shall consist of lands, houses, *or other immoveable property*." And these two expressions occur in various other Sections of the Act. From this we may take it that, under the Code of Civil Procedure, and consequently under the Small Cause Court Act, lands, houses, and the like are "immoveable" property while goods and chattels are "moveable."

According to this definition, if a hut, such as is the subject of the present reference is to be deemed "a house," then no doubt it is "immoveable" property, and not liable to attachment by the Small Cause Courts. But the question is whether such a hut is a house within the meaning of Section 235, or whether it comes under the head of goods, chattels, or other "moveable" property. It may be contended that this is a question to which no certain general answer can be given, and that everything will depend on the circumstances of each particular case. It may be said that, if the hut is of a permanent character, solid and lasting in its construction, it is a house falling under the head of "immoveable" property; and that on the other hand, if it is not solid or permanent in its construction, but can be readily removed and erected elsewhere, it is not such a house as is "immoveable" property. Such "huts" have, in fact, not always been deemed identical with houses. Thus, in Act VI of 1868 (B. C.) Section 55, we have the expression "houses, buildings, lands, and huts": and a like use of the word huts occurs in other Sections of that and others of the Bengal Municipal Acts. But it appears to me to be impossible to say that a common hut, whether its walls be of mud or of mat, is not for ordinary purposes a house; and I think that we are not justified in introducing modifications and limitations into the definition given in Act VIII of 1859, when there is nothing to lead to the conclusion that the Legislature intended that the word house should be read in any other than its widest sense. And, doubtless, by reading it in its widest sense, we avoid a vast sea of difficulty, inasmuch as no other certain rule can be laid down: and any departure from it would necessitate a special enquiry in each case, before it could be determined whether any particular hut was or was not "immoveable."

There is to my mind considerable difficulty in dealing with this question.

In *Meares* v. *Ackobur Shaikh*, W. R. S. C. Court Reports, page 31, Bayley and Morgan JJ. said:—"We understand from the statements in the case that the huts are made by the ryots, and afterwards at will removed by them; that the construction of the huts is not solid or permanent; and that according to the ordinary usage and understanding of the people of the district, such huts are treated and regarded as moveable property. Under such circumstances, we are of opinion that, according to law, such huts are moveable property." And the same view of the matter has been taken substantially by the Court in several subsequent cases.

So, according to the practice of the Calcutta Court of Small Causes, mat huts have for many years been treated as personal property, as goods and chattels, and have been seized and sold in execution of decrees of that Court. This practice has been based on the fact that huts in Calcutta are not usually permanent or solid in their construction, consisting merely of posts, mats, and thatch, removeable easily and at will, the custom of the place treating them always, in the case of tenants, as the property of the tenant who erects them, and not as the property of the landlord, or as in any way following the land. In Temple's "Practice of the Calcutta Small Cause Court," published in 1860, it is stated that it was at one time the practice to seize tiled and thatched huts under the writs of the Court of Small Causes, but that the practice had been altered. I believe that I am correct in saying that the old practice, if ever really departed from, has been revived, and has been uniformly followed for years past; in fact, ever since about the date of the publication of Mr. Temple's work. It is to be borne in mind, however, that the Calcutta Small Cause Court has a procedure of its own, under Act IX of 1850, which differs widely from that of the Code of Civil Procedure: and that the High Court, on its original side, in executing decrees under the Civil Procedure Code, does not in practice treat huts as moveable property.

The present reference has arisen out of a decision of Peacock, C. J., and Mitter, J., to the effect that huts are "immoveable" property. This was in the case of *Raj Chunder*

Bose vs. *Dhurmo Chunder Bose*, X Weekly Reporter, 416. The same question had arisen before the same Judges a short time previously in the case of *Rohinee Kant Ghose*, X Weekly Reporter, 258; but in that case no opinion one way or other was expressed by the Court on this point.

As I have said, I prefer to base my decision that huts are immoveable upon the ground that they are houses, and that in Act VIII of 1859 houses are classed with land and other immoveable property. I do not base my decision on the ground that a hut is attached to the earth, nor on any of the various definitions of "moveable" and "immoveable" property which (involving the subject in great confusion) are to be found in recent Acts of the Legislature. As to these last, I shall only say that, since Act VIII of 1859 was passed, "moveable" and "immoveable" property have been defined in no less than five different Acts (namely, the Penal Code, the Succession Act, the General Clauses Act, the Registration Act, 1866, and the Registration Act, 1871), and no two of the definitions given are precisely the same.

Bayley, J.—I concur in the views expressed by Mr. Justice Macpherson in this judgment. I think that, although the former decisions were based on the prevalent custom, still the proper definition of a hut occupied as a house is that it is immoveable property.

The 31st January 1872.

Present:

Sir James W. Colvile, Sir Montague Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Attachment—Alienation—Act VIII of 1859 *ss.* 235 *and* 240.

On Appeal from a Full Bench judgment of the High Court (Original Jurisdiction) at Calcutta.[*]

Anund Lall Doss,

versus

Jullodhur Shaw and another.

The Privy Council affirmed the judgment of the majority of the Full Bench, by which it was held, that a private alienation of property, during the continuance of an attachment, was null and void only as respects the attaching creditor and those who claimed under or through the attachment.

THE facts under which this question arises may be thus shortly stated. A obtains an execution against his debtor, in the form of an attachment against the debtor's real property. The debtor, with the consent of A, makes a private sale of the property, and out of the proceeds satisfies the debt, but no application is made to the Court for the confirmation of the sale or for the removal of the attachment, and the attachment still remains, at all events formally, in force. Subsequently B, another creditor, obtains an attachment upon another judgment. He proceeds to a judicial sale, treating the former sale as void; and the question is whether the purchaser under the second sale has a good title and is entitled to say that the prior sale was to all intents and purposes void as against him?

Their Lordships adopt the view taken by the late Mr. Justice Norman in the first instance, and by the majority of the Court above, including the Chief Justice, upon appeal. The question turns mainly upon the interpretation of two Sections of Act VIII of 1859, under the head, "Execution of decrees for money by attachment of property;" and in construing these Sections, it should be borne in mind that we are not dealing with provisions prescribing the mode of administering property amongst creditors generally, but with provisions prescribing the rights of particular creditors who have obtained judgments and execution.

Now the Sections alluded to are in these terms: Section 235, "Where the property "shall consist of lands, houses, or other im- "moveable property, the attachment shall be "made by written order prohibiting the "defendant from alienating the property by "sale, gift, or in any other way, and all per- "sons from receiving the same by purchase, "gift, or otherwise." Section 240 says, "After any attachment shall have been made "by actual seizure or by written order as "aforesaid, and in case of an attachment by "written order after it shall have been duly "intimated and made known in manner afore- "said, any private alienation of the property "attached, whether by sale, gift, or other- "wise, and any payment of the debt or debts "or dividends or shares to the defendant "during the continuance of the attachment "shall be null and void."

The question is whether those words, "any private alienation of the property "attached, whether by sale, gift, or other- "wise, shall be null and void," are to be taken in the widest possible sense as null and void against all the world, including even the vendor, or to be taken in the comparatively limited sense attached to them by the Courts in India? Their Lordships adopt the language of the Chief Justice, who expresses his opinion that "the object was to "make the sale null and void so far as it "might be necessary to secure the execution "of the decree; it relates only to alienation "which would affect the creditor who ob-"tained the attachment." That appears to their Lordships to be the true meaning of the Section. It could scarcely be held, in fact it was scarcely maintained in argument, that a sale made to a *bonâ fide* purchaser by the vendor could be set aside by the vendor himself; the words must therefore necessarily be read with some limitation. It appears to their Lordships that their construction must be limited in the manner indicated by the Chief Justice, on the ground that they were intended for the protection of the creditor who had obtained an execution, and not for the protection of all persons who at any future time might possibly obtain executions.

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[*] 11 W. R., Origl. Jurisdiction, 1.

Reference has been made to Section 271, which is to this effect: "If after the claim "of the person on whose application the "property was attached has been satisfied in "full from the proceeds of the sale any sur-"plus remain, such surplus shall be distri-"buted rateably amongst any other persons "who prior to the order for such distribu-"tion may have taken out execution of "decrees against the same defendant and not obtained satisfaction thereof." This Section only applies where there has been a judicial sale, and appears to their Lordships to have little or no bearing on the question in the present case, which is, whether or not under the circumstances a private sale was valid.

Their Lordships understand that the Courts in India have generally proceeded upon the view taken by the Chief Justice and the majority of the Court, and would be unwilling to interfere with an established course of practice unless they came to a very clear opinion that it was wrong.

Under these circumstances their Lordships will humbly advise Her Majesty that the decree of the High Court should be affirmed, and this appeal dismissed, with costs.

The 20th February 1872.

Present :

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Act XL of 1858*—Minor (not properly represented)—Discretion of Court to allow Guardian to sue or be sued without Certificate—Special Appeal—Weight of Evidence.*

Case No. 989 of 1871.

Special Appeal from a decision passed by the Judge of Sarun, dated the 12*th June* 1871, *reversing a decision of the Subordinate Judge of that district, dated the* 30*th July* 1870.

Baboo Dhoondh Bahadoor Singh (Plaintiff) *Appellant,*

versus

Baboo Priag Sing (Defendant) *Respondent.*

Mr. R. T. Allan for Appellant.

Baboos Chunder Madhub Ghose and *Hem Chunder Banerjee* for Respondent.

HELD that the Lower Appellate Court had properly exercised its discretion under Act XL of 1858, when it found that the minor plaintiff was not properly represented, in refusing to allow decree to be passed against him so as to be binding upon him when he came of age.

Weight of evidence is not a point on which the High Court can interfere in Special Appeal.

Bayley, J.—THE *first* point that arises in this case is whether any liability attaches to the plaintiff, Jung Bahadoor Singh, who is brought on the record by his guardian Doondh Bahadoor Singh. On this point, the Lower Appellate Court has found as a fact that Doondh Bahadoor was not the constituted guardian of Jung Bahadoor under any law or custom, and had no right to sue on his behalf. Further that the minor could not be held responsible for the consequences of the suit, and that the loss must fall on the two brothers who, the Lower Appellate Court thinks, were evidently acting in collusion. Now, under the provisions of Act XL of 1858, the Court has the discretion to allow or refuse to allow the relative of a minor to sue or defend a suit on his behalf without a certificate ; and there is nothing in this case to show that the discretion exercised by the Judge under the findings above given has been otherwise than judicial. Looking to those findings and the position of the parties, I consider that the interests of the minor are likely to suffer from the consequences of this suit where he is not properly represented ; and I therefore think that he should be removed from this suit without any liability and with perfect freedom of action when he comes of age or is properly represented.

To come then to the facts : The plaintiff sued for the recovery of certain lands as assigned to the defendant Priag Singh without any valid title under the Hindoo law.

The finding of the Lower Appellate Court is expressed in two short passages. The Lower Appellate Court says. "Priag Singh "for self and Ram Narain Singh for self and "on behalf of his brothers mutually divided "the Mouzahs forming the estate of their "deceased father among themselves in equal "portions, and out of the *serat* alone the defendant was assigned a fourth share in "addition to his quarter share as *jettums*." Further on—"In the above arrangement "Ram Narain acquiesced for eleven years, and "in deeds executed from time to time he has "acknowledged the defendant's right to, and "possession over, the *jettums* land. Also the "plaintiff, Doondh Bahadoor Singh, came of "age in 1271 F. (1864 A. D.), and he has "acquiesced in the arrangement for six years, "and in deeds executed by him in 1864 and "in 1868 he has admitted his knowledge "that Priag held those lands as *jettums* and "had a right so to hold them." The Lower Appellate Court then notices the objection that under the Hindoo law the award of a larger share to the eldest brother was illegal, but goes on to say that the transaction was a voluntary family arrangement and the members of the family were quite competent to enter into any arrangement they pleased among themselves in regard to their own property.

I think the judgment of the Lower Appellate Court is right and cannot be disturbed in special appeal. There is some evidence to justify the above findings of fact by the Lower Appellate Court. No contention is raised as to the finding being based on no evidence, but it is argued that it is against the weight of evidence. Now, weight of evidence is not a point on which we are to interfere in special appeal, as it is for the Lower Appellate Court to decide what amount of credibility is due to what evidence. I see no error in law in the judgment of the Lower Appellate Court on the facts, and we therefore dismiss this special appeal with costs.

Markby, J.—I also think that this special appeal must be dismissed. As regards the first point, it does not seem necessary to consider whether or not an order allowing the relation of a minor to institute a suit on his behalf without a certificate from Court is or is not open to appeal, because whether or no it is so, I think it is always in the discretion of any Court to deal with the case of the infant according to what it may consider necessary to protect his interests. Indeed, it is not only open to it, but it is bound to do so. What I understand the Lower Appellate Court in this case to have done is that, coming to the conclusion that the minor is not properly represented, he refused to allow a decree dismissing his suit to be passed against him which, when he came of age, he would be unable to dispute. I think the Judge has taken the course which under the circumstances is the right one. Thinking that the minor is not properly represented, he has struck him out of the suit so that the result might not be binding against him, so that, as I have said before, the question as to whether an appeal lies from an order allowing the relative of a minor to institute a suit on his behalf without a certificate from Court does not arise before us.

On the other point, I have nothing to add to what has been said by Mr. Justice Bayley, namely, that there is no ground for us to interfere in special appeal.

The 20th February 1872.

Present :

The Hon'ble G. Loch and W. Ainslie,
Judges.

Ghatwalee Tenures (Nature of).

Case No. 2648 of 1868.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 28th May 1868, affirming a decision of the Subordinate Judge of that District, dated the 11th July 1865.

Rajah Leelamund Singh and another (Two of the Plaintiffs) *Appellants,*

versus

Kunhya Lall and others (Defendants) *Respondents.*

Messrs. G. C. Paul and *R. E. Twidale,* for Appellants.

No one for Respondents.

As to the nature of *ghatwalee* tenures and the rulings of the High Court which should govern such cases.

Loch, J.—This is one of a number of appeals filed in this Court either as regular or special appeals which were allowed to lie over as the parties proposed to come to an amicable arrangement. All the other cases beside this and No. 2669 have been settled, and we are now asked to dispose of these two remaining cases.

On 5th May 1865, the Subordinate Judge of Bhaugulpore, disposed of suits 103, 104, and others, by one judgment. The latter (104) being valued under Rs. 5,000 was appealed to the Judge, the former being above Rs. 5,000 was appealed to the High Court and was registered as Regular Appeal No. 296, and was disposed of by the High Court on 5th July 1866 (VI Weekly Reporter, page 80) which reversed the judgment of the Court below.

The appeal in No. 104 preferred to the Judge was dismissed, the order of the Subordinate Judge being affirmed, and from the Judge's order the present Special Appeal No. 2648 has been preferred.

The Judge has rested his judgment on a Full Bench decision in the case of Kooldeep Narain (VI Weekly Reporter, 199) in which the judgment of the Subordinate Judge was affirmed; and the Judge considers that the decision in question lays down broad and general principles which should guide the Courts in disposing of these *ghatwalee* cases. But the Judge has overlooked the fact that the decision in the case of Kooldeep was limited, by the majority of the Judges before whom it came, to the particular circumstances of the case, and though the Chief Justice expressed certain views as to the position of the *ghatwals*, those views were not concurred in by the other Judges, and subsequent to the Full Bench decision when an application was made to review the judgment of the 5th July 1866, the application was refused by the Judges of the Division Bench who heard that case though they were cognizant of the decision come to by the Full Bench in Kooldeep Narain's case. Thus we have two opposite judgments of Appellate Courts upon an appeal from the judgment of the first Court, that of the High Court of 5th July 1866, reversing the decision of the first Court and that of the Judges of 28th May 1868, affirming it. I have elsewhere expressed my opinion as to the nature of these *ghatwalee* tenures; and as the tenure in this case is of a similar character to that which formed the subject of Appeal 296 disposed of by this Court on 5th July 1866, I think that judgment should govern the finding in this case. I reverse, therefore, the judgments of the Courts below and give a decree for the plaintiff with costs.

Ainslie, J.—These very judgments which have now been affirmed by the Judge were reversed by a Division Bench of this Court in 1866, and the decisions were adhered to on review after the judgment of the Full Bench was delivered in the case of Kooldeep Narain Singh *versus* Mohadeo Singh. It would have saved unnecessary litigation, if the Judge had followed the ruling of this Court on these particular judgments. I think we are bound to follow the rulings of the Court already recorded, and concur in reversing the decrees of the Lower Appellate Court and Court of first instance and allowing this appeal giving the plaintiff a decree in the suit with costs.

The 22nd February 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble A. G. Macpherson and F. A. Glover, *Judges.*

Ramghur Raj or Zemindaree—Ancestral Property—Impartible Estate—Joint Family—Succession—Exclusion of Females—Hindoo Law—Custom.

Case No. 8 of 1871.

Appeal preferred under Section 15 of the Letters Patent of 28th December 1865, against a Judgment of the Hon'ble Louis S. Jackson and W. Markby, two of the Judges of this Court, dated the 14th April 1871, in Regular Appeal No 254 of 1868, from a Decree of the Zillah Court of Lohurduggah, dated the 12th September 1868, the said Judges having been equally divided in opinion.

Maharanee Heeranath Kooer (Defendant) *Appellant,*

versus

Baboo Burm Narain Singh (Plaintiff) *Respondent.*

Messrs. J. W. B. Money and *M. M. Ghose* and *Baboo Hem Chunder Banerjee* for Appellant.

Mr. J. T. Woodroffe and *Baboos Unnoda Pershad Banerjee, Mohesh Chunder Chowdhry, Romesh Chunder Mitter, Aubinash Chunder Banerjee,* and *Gopal Chunder Banerjee* for Respondent.

Upon the authority of decided cases as well as the evidence of custom in the family, it was held that, the Raj or zemindaree of Ramghur being an ancestral impartible estate, and the family an undivided family governed by the *Mitakshara*, the plaintiff as eldest male heir was entitled to succeed to the dignity and estates of the family in preference to the mother of the late infant Rajah and widow of his father the last actual Rajah.

The appeal in this case was originally heard on the 14*th April* 1871, *before L. S. Jackson and Markby, JJ., who delivered the following judgments*:—

L. S. Jackson, J.—THE subject of investigation in this suit is the right of succession to the Raj or zemindaree (the dignity and the estates) of Ramghur in Chota Nagpore, vacant by the death of Triloknath, the infant son of the last actual Maharajah, Ramnath Singh, Bahadoor. The infant in question was a posthumous child, and it seems that, on the death of the Maharajah without issue, the Court of Wards had assumed the charge of the estates which it still retains, pending a decision by the Civil Courts as to the party really entitled. The present suit was commenced by Baboo Burm Narain Singh as next cognate against the officer of the Court of Wards in possession, and against the widow of the late Maharajah Ramnath, mother of the deceased infant, as "opposer of the plaintiff's claim." This lady alleged herself to be entitled as heir on the death of her husband and her son; but she claimed one portion of the property in suit, namely, Guddee Khurkhar as her own, alleging it to have been purchased for her with her money by her late husband. In a separate suit the same local Court had to decide between the claims of the present plaintiff, and a third person who asserted his right as a nearer kinsman, but cognate. Burm Narain was successful in both suits, and both his opponents appealed to this Court; the appeal of the cognate has been decided, and we are now concerned with the appeal of the widow-mother.

In determining this appeal there are two considerations which it seems to me important to keep in view. The first is that, although in point of form, Burm Narain is plaintiff, and the Ranee, a defendant, yet in fact both stand upon the same ground as claimants of an estate which is in the custody of the Court of Wards, and, therefore, the burthen of proof does not lie on the one side more than the other. The second is that the Ranee does not, any more than her antagonist, claim the property under the strict provisions of the Hindoo law, but that both parties, while referring severally to the *shasters* (see the plaint and written statement respectively), also appealed to the custom which regulates the devolution of this Raj, and this, I think it abundantly clear for other reasons, must be the basis of our decision. The plaintiff of course more emphatically relies on this custom or *koolachar*, but the defendant also gives her own version of it so as to show her own right, and to exclude the plaintiff, which, I think, is evident on reading the 5th, 6th, 7th, and 8th, and a portion of the last paragraph of her written statement together. But what seems to me decisive on this point is the judgment of the Sudder Court in 1818 between the ancestor of Burm Narain and the Maharajah of that time (11 Sel. Rep., pp. 92—97). The opinion of the Court (which disposed of the suit) was in these terms:—"Adverting, however, to the extent and situation of the estate to the zemindar possessing the title of Rajah, and to his maintaining a sort of feudal establishment of troops and dependant *jageerdars*, the Court could entertain little doubt that it was not a common estate divisible by the laws of inheritance." It does not precisely appear whether the Sudder Dewany Adawlut concurred in, or dissented from, the view taken by the Provincial Court in that case, namely, that Regulation X of 1800 did not apply to the estate (I should have been inclined to think that it did); but the question does not seem to be of much importance, for the custom abolished by Regulation XI of 1793, and partially restored by the later law, is that of non-partition, and that alone. Nor, I think, is it material to enquire whether, as stated by Baboo Shama Churn Sircar [in his digest, p. 19 (footnote) 2nd edition] the effect of the *bewasta* and the judgment in the case of Ishan Chand *vs.* Ishur Chunder Roy is to clothe huge zemindaries with the attributes of principalities.

The term Raj and the title Rajah, as used in modern times, do undoubtedly occasion a certain amount of confusion. A pretty clear account will be found in the answers to a series of questions on the rights and privileges of landholders given by Gholam Hossein Khan (author of the *Siar-ool Mooktakhireen*) and the *Roy Royan* printed in Harrington's Analysis, Vol. III, pp. 314-356. See especially the answers to question 31, and the case of Rajah Tej Sing (then called Tej Sing) is expressly mentioned by Gholam Hossein Khan, who calls him (Question 30) the zemindar of Ramghur. The true question, therefore, in this case seems to be whether the custom of the Ramghur zemindaree or Raj, as deposed to by persons acquainted with it, as known by public functionaries of the district, as recognized by the family itself, and as established by precedents, favors the succession of the male line, or of the widow and mother. The question has been a little complicated by a shifting or widening of the issue (I am not sure which) so as to include a *local* custom, but it seems to me that, as far as the plaintiff is concerned, this amounts to nothing more than his seeking to strenghen his evidence as to *koolachar* or custom in his own family, by showing that a similar custom prevailed in families of the same or nearly the same rank in the vicinity. If we look at it in this point of view, we are, I think, relieved from certain difficulties as to the kind of proof required, and as to the precise allegation of the plaintiff. In this way also we are less embarrassed by abstract questions of Hindoo law, and we also conform to the injunctions of Menu, Book VIII, v. 41, where he prescribes enquiry into the "rules of certain families " as among the peculiar laws which are to be established" (if they be not repugnant to the law of God, adds Culluca.)

Upon the issue I have stated, it seems to me that the plaintiff was entitled to judgment, and that he has been properly declared entitled to succeed to the Raj and the estates. I think that the witnesses called by the plaintiff prove that, in the belief of members of the family and by general repute, the *koolachar* excluded females. From the mode in which the Judge's notes of the evidence are worded, it would seem, at first sight, as if the witnesses, or at any rate most of them, meant to affirm, as the only custom with which they were acquainted, the succession of a single heir, and the non-participation of younger brothers; but I think this was not the meaning of the witnesses as shown by the original depositions, and that they meant to be as explicit on the one point as on the other. The occasional conflict between the Judge's memoranda and the recorded depositions is no doubt very embarrassing, and it is especially vexatious where the memorandum is not full, and where the Judges of appeal are unacquainted or imperfectly acquainted with the vernaculars. In fact, the more nearly the note approaches to a complete representation of the witnesses' testimony, the greater is the difficulty; and I may say that, in some cases, the inclination of my mind has been to suspect that the note represented more exactly the witnesses' meaning than the actual deposition did. But I think there can be no doubt that, in case of difference, the actual recorded evidence *in extenso* is what we must be guided by, and it is to be hoped that the Procedure Code may shortly be improved in this respect, so as to get rid altogether of the double record.

And in considering the recorded evidence in this case as well as the written statements, allegations, and oral pleadings of the parties, large allowance must be made for the circumstances of the trial. Courts highly untechnical, and simple, pleaders very imperfectly educated, and trained agents whose advice continually misleads, compel us to be extremely cautious in the inference we draw from the line taken by either party in Court, and in the construction which we put on the evidence recorded. It is safer to collect the meaning of a witness from the whole of his testimony than to give their full meaning to isolated parts of it; and if the witnesses in the present case be so dealt with, I think the plaintiff's contention will be found to be amply substantiated, so far, that is, as in the nature of the case the witnesses could go. For instance, I understand the first witness, Thakoor Jeth Sing, a witness from his age and position of great importance, to affirm a family custom whereby Maharanees, widows, do not inherit the estates, but receive an assignment of land worth Rs. 4,000 yearly for their maintenance. He also affirms the custom of succession by a single heir, younger brothers receiving maintenance in both cases, as usual under the *Mitakshara*, indicating incapacity for and exclusion from inheritance of the estate. In like manner, Thakoor Sirree Singh, a person of good family, it would seem, though not of the Ramghur house, positively says, "No Maharanee has ever sat on the *guddee*, it is not the custom of the family," which in native idiom is tantamount to saying there is a custom against it. The third witness, Nund Lall Sing, does not speak very decidedly, but the tendency of his evidence is against female succession, and it is remarkable that such evidence was, though remotely, against his own interest, his father having married a daughter of Koonwar Boh Singh, (plaintiff's ancestor and youngest son of the first Maharajah), and he himself, therefore, being in the possible line of descent if daughter's sons could inherit, which, according to the other witnesses, they could not in this family. The 4th and 5th witnesses merely say that they have never heard of instances of a woman succeeding to the *guddee;* but it is to be observed that the defendant does not appear to have asked in cross-examination whether a female could succeed if the case were to arise. The same observation applies to the 6th witness, but he refers to the fact (as did the preceding witness) of the widows of three previous Maharajahs being alive, and (says the preceding witness) in the receipt of maintenance. The 9th witness strongly affirms the custom to exclude females, and he is descended on the maternal side from this family. A still more important witness is the Rajah of Heersote (No. 11) the head of another great family which intermarried with that of Echuk (Ramghur), and he distinctly affirms that neither in his own family, nor in that of Ramghur, are females capable of succeeding. It is true he goes on to state,—"I say this because no woman has ever sat on the *guddee* in that family, or in mine." I do not understand the witness by these words to retract his previous affirmance of the custom, but merely to support it by reference to the first. Some of these witnesses were afterwards re-called, and gave evidence to prove other instances in which a similar custom existed and had been maintained in spite of efforts by the widows to break through it. I have no hesitation in saying that, if we are to decide between this evidence and that which is adduced by the defendant to rebut it, I prefer the evidence for the plaintiff. But to my mind the oral evidence is the least convincing part of the plaintiff's case, and there is much more decisive matter behind. For the purpose of ascertaining the custom of any given family in particular points, there can be no more important source of information than the declaration of successive heads of the family on solemn occasions, and in this case that source of information is open to us. In the first place we have the return made by Maharajah Sumbhoonath Sing on the 22nd June 1846, in obedience to a requisition of the Governor General's Agent and Commissioner, calling for a statement of heirship to the zemindary and *ilakadars* of the division. On that occasion the Maharajah distinctly and publicly acknowledged the plaintiff Burm Narain as heir next in succession to his surviving brother Ramnath, who followed him as Maharajah. It is said that the form in which the return is framed would not permit of the mention of wives, but this appears to me to be quite idle; the paper is called a "statement of heirship," and the ample column of "remarks" would certainly permit, and would have contained, the mention of the wife if she had been capable of succeeding. As the Maharajah left a widow, and as among Hindoos, marriage is contracted at a very early age, I think it is to be presumed that he was married at the time he made this return—a presumption much strengthened by the words in the 4th column of the form, "at present no son is born." These words appear to me indicative of the married state, and of the expectation of issue. This public act of the Maharajah Sumbhoonath Sing appears to me to be an insuperable obstacle for the defendant, and all but conclusive in favor of the plaintiff.

But next we have the petition or memorial of the succeeding Maharajah; but before I speak of that paper, I will advert to the history of succession in the family. Testimony seems unanimous as to this, that neither in times antecedent to Tez Sing, the first Rajah of the present family, nor in later days, has there been any instance of a female succeeding to the *guddee;* but as observed by the Judge below, there is no exact information as to the state of the family before Tej Sing, so that it cannot be said whether it affords examples of the supersession of a female heir or not. Nor is there any such instance in the early days of the present family, for, down to the generation just past, there has been abundant male issue. But it so happened that the three sons of Maharajah Sidhnath Sing (who was the grandson of Tej Sing) all died without male, or indeed, it seems, any issue, but leaving widows. In each instance the succession was taken up by the next brother, the widows being passed over. There are thus two instances which, although modern, are in exact accordance with the custom alleged by the plaintiff.

The defendant seeks to get over these facts by the averment contained in the 5th paragraph of her written statement, where she says that the three brothers (of whom the last was her husband) had lived in mutual good feeling and commensality, and "held in partnership the ancestral property." She goes on to say,—"In this estate of common interest, on the demise of one brother without issue, the next brother, upon receiving the mark of Rajah elect on his forehead from the hands of his elder brother, assumed the reign of the principality one after another, and for reasons above stated, as also under the provisions of *shasters* the right of succession to the Raj at that time was disallowed." Now, unfortunately for her, the decision of the Sudder Court in 1818 had set at rest the question of "partnership" in the property, not to speak of the evidence on that point; and it is difficult to conceive any theory of joint ownership which should make brother succeed after brother, and then suddenly terminate the course of such descent in favor of the youngest widow. But the defendant apparently rests her case very much on the fact of commensality between the brothers as justifying their preference to widows, and in the 4th paragraph she asserts that plaintiff is disqualified by reason of his having lived (as well as his ancestors) separate and at a distance from the senior branch, and in the 8th paragraph she puts this in a different way by objecting to him as a *jageerdar.* These objections appear to be disposed of by Maharajah Sumbhoonath's return, which of course would not have recognized Burm Narain, if he had been disqualified for any such reasons.

But it is on this point of the case that the memorial of Maharajah Ramnath, which I mentioned a little way back, appears to me to have so much significance. This document is dated 17th November 1862, and was written by way of answer and in obedience to a *purwannah* apparently of the Deputy Commissioner, transmitting to the Maharajah for explanation two copies of *urzees* submitted by Maharanee Thakoornath Sahee, widow of the late Maharajah Sumbhoonath Sing, in which she appears to have made certain allegations and complaints, to the refutation of which accordingly the Rajah addresses himself.

In considering the terms of this petition, it is natural to observe that it begins with a most important recital. It sets out the contents of the official *purwannahs,* to which it is an answer, to the following effect: "that Koonwar Ramnath Sing, *brother and heir* of the deceased Maharajah Sumbhoonath Sing, has been appointed Rajah; that the Maharanee, petitioner, is entitled to maintenance only," &c., &c. The title of the Rajah being thus fully acknowledged by the official whom he was addressing, it was not necessary for him to insist upon the validity of that title, or else we might have expected to find a clear statement of the custom on which that title rested; but he is only concerned to answer the particular statements made by the Maharanee to which his attention had been called. But what has struck me very much in connexion with this paper is this. If the custom or tradition of the family had been what the defendant represents, namely, that of brothers living in commensality, one took after the other in the absence of male issue, and that the last of such brothers would be succeeded by his widow (the brief existence of the posthumous son is little noticed throughout this case), we should most probably have found it asserted in the petition of this Rajah, for he was precisely in this position: the last of three brothers who had one after another succeeded to the *guddee,* not young, married, but with doubtful chances of male issue. Is it likely that in such circumstances he would not have served the claim of his own wife (the now defendant) as against a distant relation, with whom he does not appear to have been on any terms of intimacy? But he nowhere makes any reference to such rights, and speaks of the wife of the late Maharajah as being entitled to maintenance, according to the custom of the family, "just as other Maharanees receive," without any sort of distinction. Nor does he appear, at any time previous to his death, to have made any such statement in her favor, although he might reasonably have been expected to do so; for she was only three months advanced in pregnancy at the time of his death, and it would be of course uncertain of which sex the child would be.

Another very important point in the plaintiff's favor is the declaration of the Judge who tried the suit, that in that part of the country women do not inherit estates of the class to which the Ramghur zemindaree belongs. I understand the Judge to refer not merely to the district of Lohardugga in which he happened to be sitting, or that of Hazareebagh to which the suit properly belonged, but to the division or province of Chota Nagpore, and the declaration is of the more importance, because the Judge is not merely the officer presiding in the Civil Court, but also the head of the district in executive matters, and necessarily versed in the political condition of the province.

The times, and the present constitution of our Civil Courts, are favorable to the advancement of claims which in other days would not have been brought forward. The pretension which was faintly suggested on the death of a former Maharajah has now been set up with more boldness; but I think it has been properly over-ruled, and I am bound to add that, according to my own knowledge and belief in such cases, to reverse the judgment of the Court below, and to sanction the claims of the defendant, would create a most dangerous precedent, and would introduce into a large tract of country the most serious confusion and distrust.

In my judgment, therefore, the decision of the Lower Court should be affirmed and the appeal dismissed with costs.

Markby, J.—This was a suit brought by the plaintiff to recover a large amount of real and personal property which was in the hands of the Court of Wards. The plaintiff alleged that the property in question belonged to him as successor to the Raj of Ramghur. The representative of the Court of Wards, who is a defendant, claims no interest in or right to retain the property, and only asks for costs. The other defendant claims also, by right of succession, all the property except that called Guddee Khurkhar, and this she claims as her ***stridhun.***

The general history of the Ramghur family, and the estates belonging to it during the past 100 years, is well known and not disputed. About the year 1772, the then Rajah Mokund Sing, having come into collision with the British Government on account of his refusal to pay revenue, an expedition was sent against him. Two members of the family, Tez Sing and Jyeeree Sing, assisted the British Government against their relative; and ultimately the estate having been declared to be forfeited, it was conferred upon Tez Sing by the British Government, together with the title of Rajah or Maharajah, which is the title generally used in this family. Successive pottahs were granted by the British Government to Maharajah Tez Sing, and his eldest son Maharajah Parusnath Sing, for limited periods, and ultimately, on the 25th March 1790, an ordinary settlement for ten years was made with Maharajah Muninath Sing, the eldest son of Maharajah Parusnath Sing, which settlement was by legislative provision subsequently made perpetual.

In the life-time of Maharajah Muninath Sing, a claim was made by Bodh Singh, the youngest son of Maharajah Tej Sing, to have the family property divided in the usual way. The claim was contested, and the litigation was continued after the death of Maharajah Muninath Sing by his eldest son, Maharajah Sidhnath Sing. Bodh Sing in that case rested his claim to the partition on two grounds,—***first,*** on an arrangement between the Maharajah Tez Sing and his sons made at the time of the grant; and, ***secondly,*** on the general law of inheritance. The Sudder Court, confirming the decision of the Courts below, considered that the alleged arrangement was not established by proof; and according to the report of the case in the Select Reports, (Vol. 2, page 97), "with respect to the validity of the claim of the plaintiff according to the Hindoo Law of Inheritance, the Court observed, that this point turned upon the further question, whether the estate in dispute was to be considered a common zemindaree divisible by the laws of inheritance, or one of those estates which by the custom noticed in and abolished by Regulation XI of 1793" (but restored by Regulation X of 1800) "descended to one heir in exclusion of all the other members of the family. Adverting, however, to the extent and situation of the estate, to the zemindar possessing the title of Rajah, and to his maintaining a sort of feudal establishment of troops and dependant *jageerdars*, the Court could entertain little doubt that it was not a common zemindaree divisible by the laws of inheritance"—the term Raj is not used in this judgment—that the Maharajah on that occasion, in stating his case, says, "according to the custom of the mountainous country and the usage of the family, the estate was not divisible, but that, on the death of the Rajah for the time being, he is always succeeded in the Raj and zemindaree by the eldest son to the entire exclusion of the other branches of the family." Maharajah Sidhnath Sing, who was thus confirmed in the possession of the dignity and estates, left three sons, Maharajah Luchmeenath Sing, who died in the year 1842 without issue, but leaving a widow. The widow did not, however, succeed, as she would have done in the usual course of succession, to a husband's separate estate, but the next brother, Maharajah Sumbhoonath Sing, did so. He died about the year 1862, also without issue, and leaving a widow; but again the widow was passed over, and the succession was assumed by Maharajah Ramnath Sing, who died on the 9th October 1866, leaving his widow, the present defendant. She was then pregnant, and was delivered of a son in the following April, but this son survived only a few months, and it was during this period that the Court of Wards took possession of the estate. On the death of this child, both the plaintiff and the female defendant claimed the property, and the plaintiff brought this suit.

What we have, therefore, to consider is, whether the plaintiff has made out his title. If he has not, this suit must be dismissed without regard to whether the widow has made out her claim or not.

Before considering whether the plaintiff's title is established by the evidence, I will state generally what I consider to be the nature of the claim which the plaintiff seeks to establish, and which differs in important particulars from an ordinary claim to immoveable property.

I am not aware of any definition of a Raj which will enable me to say precisely, whether or not the succession in dispute in this case is properly denominated the succession to a Raj. I imagine that, where that term is used, it rather represents a dignity than an estate, though it may sometimes be used to include an estate where that estate is appurtenant to the dignity; and from the expressions which have been currently used in this family, such as "ascending the *guddee*," "affixing the *teeluk*," and so forth, I imagine that there was in this family some hereditary dignity, and this dignity has been sometimes called a Raj.

It is at any rate certain that the estates now in dispute are not susceptible of division, and that the persons, who, under the ordinary *Mitakshara* law of inheritance, would have been joint owners, were entitled to maintenance only. That appears to have been disputed in the Court below, but is not in dispute now. Whether this was by *koolachar, i. e.* family custom, or by local custom, or how otherwise, has not in this case been distinctly asserted. In the case in the Select Reports already referred to, it was put by the then Maharajah on two grounds, but of course only one can exist in point of fact; and I gather that the Sudder Court considers that the custom which regulated the descent of these estates was that abolished by Regulation XI of 1793, and re-established by Regulation X of 1800. But that custom, as it exists now, is not, strictly speaking, either a family or a local one. It is hardly what is usually called a custom at all. It is the exceptional course of descent of particular estates, not having its legal origin in any ancient usage of a family or district, but in purely financial considerations; and clearly, therefore, founded on the special permission or agreement of the ruling power. That exceptional course of descent was abolished, but Regulation X of 1800 provided that the "local custom of the country" in the Jungle Mehals and other similar districts should nevertheless be continued in full force.

There is no doubt that this last Regulation applies to the district where this property is situated, and the Sudder Court seems to have thought the succession to these estates was governed by it. But, I think, it may be considered as a matter of great doubt, whether these Regulations have any application to the course of descent either of the dignity, or of the estates of this family. I think it more probable that this is one of those cases in which primogeniture has been adopted, not for financial reasons regarding the estate, as in the cases referred to in Regulation XI of 1793, but for political reasons regarding the dignity which at one time was in all probability, if not regal, at least viceregal, and by its very nature, therefore, indivisible; and it appears to me that the estates are, as the plaintiff puts it in his plaint, appurtenant to the Raj, or as it is put by the Privy Council in the case of the Tipperah Raj (and which comes to the same thing), the title to the dignity and to the estate are one.

If this be the right view of this case, (and, I think, it is so), then it is clear that the impartibility of the dignity and estates has its origin not in any custom, family or local, nor in the Regulations, but in the peculiar character of the Raj itself. The question might, indeed, arise how the estates became appended to the dignity, so that they passed under one and the same title—whether by permission or agreement of the governing body, or by family or local custom. This, however, is only a matter of historical interest, because the origin of a particular course of descent is only important as assisting to clear up obscure questions of inheritance which arise under it; but in the present case the estates being appurtenant to the Raj, their course of descent is, if I may so say, absorbed in that of the dignity, and may be altogether disregarded. Having ascertained the successor to the Raj, the succession to the estates follows.

This point of view appears to me important for several reasons. In the first place, we thus get rid entirely of the Regulations XI of 1793 and X of 1800, and thus, of a question which appears to me of some difficulty, namely, whether all customs being swept away in 1793, any custom, except the single one of impartibility which alone was revived in 1800, could now exist. In the next place, it identifies the present case entirely with the case of the Tipperah Raj, and disposes of an argument which has been used here, as it was also used there—that the dignity and estates, though impartible, must nevertheless, in ascertaining the course of descent, be treated as the property of a joint family in which the family are jointly interested; that the only exceptional right is that they are held and enjoyed by the eldest among the persons, who would otherwise be entitled to hold jointly; and that on the death of a Rajah, the next successor to the Raj takes not as heir, but by virtue of his own previous but suspended right. In the case before us, both parties have asserted that the application of this rule would be favorable to their claim, but the Privy Council affirming the decision of this Court in the Tipperah case (1 Suth. W. R., p. 180,) expressly hold that this is not the rule to be applied in such cases; they lay down that the principle which governs the descent in these cases is that the heir will be that person who would have succeeded under the *Mitakshara* law to the separate property, unless that law has been modified by custom. This mode of establishing a title may, therefore, be put out of consideration, though I shall have to refer to it again, as throwing light upon a document which has been much relied on in this case.

Lastly, from this point of view, it is clear that the exceptional course of descent of the Raj, so far as it is grounded on the nature of the thing inherited, will only warrant a departure from the ordinary law of inheritance, so far as the nature of that thing requires. The nature of the Raj has been considered to require that it should be impartible, but it seems hardly possible to assert that the nature of the Raj itself excludes any persons of either sex, if they are without physical or intellectual infirmity. If then any person is to be excluded who would, as senior in age and nearest of kin under the ordinary Hindoo law, be entitled to succeed, it must be by some custom modifying still further the peculiar course of descent which has already sprung from the nature of the thing inherited.

I do not understand it to be disputed that the plaintiff's title stands in need of such a custom. Unless he can establish a custom to exclude females, he cannot succeed; whether or not the defendant, widow, would then succeed, is another question.

The question before us is thus reduced to this. There being an impartible dignity to which property is attached, and the succession to which is governed generally by the rules of inheritance of separate property according to the *Mitakshara*, have those rules been modified by any local or family custom?

Such a custom the plaintiff has attempted to establish, and the question which remains to be decided in this case is, whether or no he has succeeded in doing so. If he has not, then, as it seems to me clear, his suit must fail.

I think it is unfortunate in this case that the plaintiff, who relied upon the custom, was not called upon to state it with precision. It is in my opinion next to impossible that a custom should exist, and not be capable of being so stated. To my mind it would be a sign that the custom is either obsolete, or has never been fully established, if it did not readily assume a precise form of words familiar to the minds of those amongst whom it has to be applied. No legal skill or experience is required to state a custom. It is a mere statement of fact, and nothing is more common than to find ignorant people stating customs with precision. Indeed, we shall find that none of the witnesses in this case have any difficulty in stating a custom. Very likely from the ignorance or carelessness of those who drew this plaint, it might not be therein fully stated; but I think the Deputy Commissioner ought to have required it to be stated in a definite form, or at least in one or more definite forms, when settling the issues. I do not think this would have been an unreasonable demand on the intelligence of these parties, and I think it was impossible to try this suit properly without having done so. As the issue on this point was originally drawn on the 23rd June 1868, it stood thus:—

"According to the Hindoo *shasters* and the customs of the Ramghur family, who, among the different parties to the suit, is entitled to succeed to the Raj vacant by the death of Ramnath Sing's son Triloknath Sing?"

On the 19th August 1868, this issue was substituted: "According to the Hindoo *Mitakshara shasters* and the customs *of the Ramghur* family *and country*, who, of the different parties to this suit, is entitled to succeed to the *raj* vacant by the death of Ramnath Sing's son, Trilokuath Singh?"

This, as appears from the record, included both the so called custom as to impartibility, and the custom to exclude females. Intermediately between this change in the issue, that is to say, on the 14th August, ten witnesses had been examined by the plaintiff. When the issue was amended on the following day, both parties, on being asked, said they had no wish to examine their witnesses further, and the defendant then examined four witnesses. On the 17th August the defendant, widow, applied for and obtained a postponement on the ground that the insertion of the word "country" in the issue might make it necessary for her to procure further evidence. The case was accordingly postponed for final hearing to September 2nd, but it was intimated that "the other evidence now on the record would be duly examined at once," by which I understand it to be meant that the defendant might bring in any other witnesses than those already named in their list, at any time until the 2nd of September, but that, according to the irregular mode in which evidence is usually taken in this country, the examination of the witnesses already summoned would in the meantime proceed. On the same day (August 17th) notwithstanding the intimation to the contrary previously made, the 1st, 4th, and 5th witnesses for the plaintiff were re-called and re-examined. On the 27th August, the plaintiff examined his 11th witness. On the 10th September, the defendant called his 5th witness. Most of the documentary evidence was put in on the 19th August, but some further documents were put in on a date which is not given. My reasons for setting out at length these particulars will appear presently.

With regard to the evidence given by the witnesses, I must say I have felt very great difficulty in ascertaining what was really said by them. A printed copy has been furnished to us of what is called notes of evidence, which I suppose to be the notes taken by the Deputy Commissioner, and this is placed before us as the materials on which we are to base our decision. But it differs in many respects from the deposition taken in the vernacular by an officer of the Court below. The course taken on this argument, which I consider by no means a satisfactory one, has been to read the printed copy of the Deputy Commissioner's notes, correcting it by a reference, as the argument proceeded, to the deposition in the vernacular. I have found this course to be in this, as in other cases in which it has been followed, extremely embarrassing. It is not easy to follow an argument on evidence when there is a running conflict all through as to what the evidence is, and very difficult to decide upon evidence which we have to collect from two conflicting sources of information; and as there may still be discussion as to what the evidence really is, I desire to make it clear on what materials my judgment is based.

The first witness, Thakoor Jetta Sing, is a member of the Ramghur family. His evidence is chiefly confined to the existing state of the family, and he says that three widows of Maharajahs, besides the plaintiff, are still alive. He states that "these widows receive maintenance according to family custom. The family custom is for the widow, Maharanee, to receive land as maintenance, worth Rs. 4,000 yearly. *The custom of the family is for the actual heirs* to inherit the whole property. Younger sons get only maintenance." Further on, he says that, "prior to Tex Sing's time, no woman ever obtained the *guddee*;" and he also says "that in this family the son of a daughter never succeeds." Baboo Thakoor Sing (witness No. 4) who is also of the Ramghur family, says he has "never seen or heard of a woman inheriting the *guddee* in this family. *The custom of the family is that the eldest son inherits the guddee; the younger sons are Koonwars and get maintenance jageers.* I know of the family customs by hearsay, from the time of Tex Sing, and by what I have myself seen from the time of Luchmeenath Sing. I am descended from a branch of the family which branched off prior to Tex Sing's time. I never heard of any woman sitting on the *guddee* prior to Tex Sing's time."

Thakoor Kishen Persad Sing (witness No. 5) is also of the Ramghur family, of a line which branched off prior to Tex Sing's time. He states that "he never heard of a woman succeeding to the *guddee*. *The custom of the family is that the elder son inherits the guddee, and the younger sons, the Koonwars, get maintenance jageers.*"

Wtinesses 6, 7, 8, and 10 are servants of the family. Gholall Sing Chowdhry, witness No. 6, says, he "never heard of a woman ascending the *guddee* in the Ramghur family. *The family* custom is for the elder son to inherit the *guddee*, and the younger sons to get maintenance grants." Mahta Toolsee Ram, witness No. 7, says, "in that family females never did attain the *guddee*. The family custom is for the elder son *to inherit the guddee, and the younger sons to get maintenance.*" Gunnoo Sing, witness No. 8, a jemadar, says,—"since the time that I have seen, from that time I know that the "*custom of that family is that females never do attain the guddee.*" Chowdry Khemlall, witness No. 10, a mohurir says,—"*it is the custom in this family that no woman succeeds to the guddee.*" "On a Rajah dying the elder son succeeds to the *guddee* and younger gets maintenance."

Witnesses 2, 3, 9, and 11 are neighbours. Thakoor Servee Sing (No. 2) says,—"*no Maharanee has ever sat on the guddee, it is not the custom of the family.*" Thakoor Nund Lall Sing, witness No. 3, a connexion by marriage, says,—"I never heard of a woman in this family receiving the *guddee*." *The custom of the country is that the elder son ascends the guddee and the younger sons get maintenance.*" Baboo Churuna Sing, witness No 9, also a connexion of the family, says,—"*it is not the custom of the family for women to succeed to the guddee;* when there are more sons of a Maharajah than one, the eldest inherits the Raj, and the younger receives maintenance." Rajah Ramkurun Deo says that he is the Rajah of Beersote, and pays rent to the Maharajah of

Ramghur. "My family is distinct from the Ramghur family, but we eat together, and we intermarry. Maharajah Ramnath Singh married the daughter of my paternal grand-uncle's son, and there have been other intermarriages. The customs of my family and of the Ramgurh family are not the same on all points. I know the customs of the Maharajah of Echak's (*i. e.*, the Ramghur) family. Our customs as to inheritance are the same, and in the Maharajah of Echak's family no woman up to this time has sat on the *guddee*. Neither has such taken place nor have I seen it, and a *woman cannot succeed to the guddee by virtue of the family custom. It has never so happened, hence I say that a woman cannot succeed to the guddee.* No person in my family has up to this time died childless. My Raj is one of 52 generations, and the sons have continually succeeded all along."

These extracts contain all the oral evidence which I have been able to discover of a family custom by reputation. The principal document is one put in by the plaintiff. It is a petition of the husband of the defendant, the late Maharajah Ramnath Sing, denying the claim of the widow of Shumboonath Sing, who seemed at that time inclined to assert her rights. The following is a brief analysis of that petition according to the translation (apparently not a very satisfactory representation of the original) which has been laid before me. It is dated the 17th November 1862. It is not signed by any one, nor does it appear to whom it is addressed, but as both parties have relied on it as a statement made by Ramnath Sing, I may so take it. It begins by referring to two *purwannas* of the person to whom it is addressed, which had been sent to Ramnath Sing together with a copy of a petition of the Maharanee Thakoor Nath Sahi, the widow of the Maharajah Shumboonath Sing. One of these *purwannas* is then recited, and it seems to be an acknowledgment of the title of Ramnath Sing to the Raj, and of the Maharanee to maintenance, and to contain a request by the writer that proper provision for the Maharanee's maintenance should be made. After this recital the claim of the Maharanee to the suit as heiress is denied by Ramnath Sing, and his own claim is thus stated:—"As the Ramgurh zemindary is an ancient ancestral property of your petitioner according to the family and ancient usage, (the Maharajah) in good health and in a sound state of mind in the presence of assembled parties marked your petitioner with the *teeluk* of Raj and died." Then he sets out the history of the family from the time of Maharajah Sidhnath Sing, and points out that Maharajah Luchmeenath Sing, though survived by his widow and a daughter, was succeeded by his brother; and then he says "in view of these circumstances agreebly to the family usage, law and equity, reason and tradition, the Maharanee is entitled to nothing more than food and raiment, *because your petitioner and two others are three full brothers, and in default of heirs they succeed to the Raj one after another.*"

Then follows the answer to the 2nd *purwanna.* It again refers to the Maharanee's petition, and to an assertion by her that Ramnath Sing lived separate from his brother Shumboonath Sing, and acted as his dewan. This is strenuously denied by Ramnath, who asserts that he and Shumboonath were "full brothers sharing in each other's gain and loss," and that he only assumed the management of the property according to custom, when Shumboonath became too infirm to transact business. He then gives instances of a similar arrangement to this with regard to the management in other families, and denies that his having managed the business of the zemindaree is any evidence of separation. He goes on to say that with the exception of himself no one had any right in the property; and "*since he was a partner and had a right in the Raj*, no *benamee* could be effected in his name," for which reason all the business was transacted in the *benamee* or fictitious name of Kunnaree Burgah, a domestic. Subsequently he refers to the statement he had already made, that the *teeluk* was affixed on his forehead, and then again combats the statement that he had separated from his brother. He then denies some allegations which the Maharanee had made of ill-treatment. Next, he refers to certain instances of succession cited by the Maharanee in her petition in her own favor, and says that "the practice of the Jungle Mehals is different from that of other districts. Some instances of the practice and usage of the Jungle Mehals are here given." Then he cites the case (1) of Palgunge, in which the brother succeeded in presence of the widow and nephew of the late Rajah; (2) of Koonda, in which the nephew succeeded in presence of the late Rajah's widow; (3) of Gowan, in which a cousin, in the fourth degree, succeeded in presence of a female (the widow, no doubt) and a nephew of the late Rajah; "whereas," he says, "your petitioner is *the full brother* of the late Maharajah, and lived in commensality with him, hence he is entitled to the

Raj considering his right from any point of view. The instances adduced of the Tekaree Ranee are not sufficient. The share of Baboo Moteeram Sing was divided by the Court. Moreover, he left no near heir, and consequently the Ranees came to possession, but the case of your petitioner is different, for he is full brother, lived in the same house, and ate at the same table with the Maharajah, and received by the Maharajah's own hands the mark of *teeluk*." The rest of the petition is taken up with again denying the Maharanee's complaints of ill-treatment, and offering to allow her a suitable maintenance.

The only other documents relied on is a return filled up by Maharajah Shumboonath Sing at the request of the Agent of the Governor General, dated the 22nd June 1846. It relates to the succession to the Raj and the Ramghur estates, and there is no mention whatever of his wife in that document as his heiress. But the plaintiff, who relies on this document, has not shown whether or no Maharajah Shumboonath Sing had then a wife, and further, the form in which the information is asked for, itself to some extent precludes the mention of the wife; it therefore appears to me of little value.

After much consideration, I find myself unable to arrive at the conclusion that this evidence establishes any family custom which would exclude females. I take it that in order to establish a *koolachar* or family custom of descent, you must at least show one of two things—either a clear, distinct, and positive tradition in the family that the *koolachar* exists, or a long series of instances of anomalous inheritance from which the *koolachar* may be inferred.

It is said in a case reported in 2 Select Reports, 117, that "to legalise any deviation from the strict letter of the law, it is necessary that the usage should have been prevalent during a long succession of ancestors, when it becomes known by the name of *koolachar*." But I imagine that a distinct tradition in the family would supply the place of ancient examples of the application of the usage.

The evidence above-stated, however, fails to convince me that in this family there is any clear tradition that, by special family custom, females are excluded from inheritance.

Of the eleven witnesses called, all state what the custom is. Six witnesses, of whom three are members of the family, one is a neighbour, and two are servants of the family, state the custom without any reference to the exclusion of females. Four, of whom one is a neighbour, one is a distant connexion, and two are servants of the family, state that by custom females are excluded. The witnesses, who state the custom to exclude females, are, therefore, not only fewer in number, but considerably inferior in means of knowledge to the witnesses who omit that statement. Indeed, the omission of all the members of the family to state the custom to exclude females is to my mind almost conclusive against there being any clear and distinct reputation in the family that such a custom exists.

Next to the members of the family, by far the most important witness is the 11th Rajah, Ram Narain Deo. Indeed, I am not sure, from the evident care and detail with which his statements are made, and his knowledge of the subject, that he is not the most important witness of all; yet to my mind he as much as admits that there is no family tradition on the subject. Having said, "a woman cannot succeed by virtue of family custom," he immediately adds "it has never so happened; hence I say that a woman cannot succeed to the *guddee*." I can only look on this as an inference of a custom by the witness from a certain series of events, but that is an inference for the Court and not for the witness. How far that inference is justified, I will consider presently.

This evidence would, in my opinion, scarcely afford ground for inferring a family custom if it stood alone. But it appears to me to be much weakened by the petition of Ramnath which seems to me to make very strongly against any tradition in this family that females are excluded.

For whatever reason he may have been desirous of doing so, it is, I think, obvious that Ramnath was at that moment strongly contesting the rights of his brother's widow, and desirous of placing his own title on the strongest grounds. He would, therefore, assuredly have inserted so complete an answer to the Maharanee's claim, as a family custom to exclude females would afford, if he had been aware of its existence. But from beginning to end, I find not the least trace of it. The ground on which he bases his claim to the Raj and the estates are perfectly clear —*first*, because he has been marked with the *teeluk* by the late Maharajah; *secondly*, and principally, because he and the two last Maharajahs were *full brothers, joint and undivided*. It seems to me that he refers to family usage only as establishing the impartibility of the Raj, and that he takes up exactly the position which was assumed by the plaintiff in the Tipperah case, and which, though declared by the Privy Council to be erroneous, is not an uncommon notion, namely, that a full brother succeeds, in preference to the widow, to ancestral impartible property. I take this petition to fall, as evidence, little short of a categorical statement by Ramnath that, as far as he knew, no trace of any custom to exclude females generally existed in the family, and being made by a person strongly interested in asserting such a custom, it is entitled to full credit. It seems to me scarcely possible that any tradition of such a custom could exist in the family without Ramnath having been aware of it, and I do not find in the petition any sign whatever of carelessness or inability such as would lead me to suppose that he would omit so important a statement.

It seems to me, therefore, that, the attempt to establish the family custom by evidence of reputation has failed. I very much regret that there should be a difference of opinion on this point, and I regret that we have not here the assistance of the Deputy Commissioner who heard the evidence. He finds very clearly on the evidence that by family custom the Raj is impartible. But he expresses no opinion whatever on the oral evidence of the family custom to exclude females. He seems to me to base his opinion on that point on entirely different grounds.

I will now take the evidence of cases of anomalous descent, from which the custom to exclude females is sought to be inferred. This consists of two parts—*first*, the uniform statement of all the witnesses that they never knew or heard of a woman succeeding to the *guddee*-in this family; and, *secondly*, the fact that in 1842, and again in 1862, the widow of a Maharajah was passed over in favor of a younger brother.

With regard to the first part of this evidence, if we take the view that the Deputy Commissioner seems to have taken that there is no evidence of the succession prior to Tej Sing's time, and that we must judge of the custom entirely from what has happened since that time, there is of course nothing in it whatever. From Tez Sing to Luchmeenath, son succeeded father in regular course, and the occasion for exclusion of a widow never arose, and upon the whole, though some of the witnesses seem to assert, as a matter of family history, that no woman has ever been known to succeed, yet I think the Deputy Commissioner has rightly considered that this is not to be relied on as establishing a general exclusion of females. Succession in the direct line of father and son for ten or twelve generations would not be at all extraordinary; and even if a person out of the direct line were known to have succeeded, this would be nothing, unless it were also known that the deceased Maharajah in that case left a widow or daughter. Moreover, looking to the condition in which this district was for many years prior to our occupation of it (see some extracts from a letter of the Collector, 6 Select Reports, 184), I think, it would be difficult to draw any inference of legal rights from the events of that period. It seems to me, therefore, easy to account for what the witnesses say on this point without referring it to the exclusion of females by family custom. I think, therefore, that the only reliable evidence of actual exclusion of females, who would otherwise have been entitled to inherit, is in the two modern instances. We are, however, very imperfectly informed of the circumstances under which these two ladies were excluded. In the first instance, the point does not appear to have been much contested; the second instance is so recent that it is still quite open to the widow in that case to assert her rights; moreover, if we may judge from the petition of Ramnath, which has been already referred to, the widow of Shumboonath Singh yielded not to any assertion of a custom to exclude females, but to the erroneous view which, as we have seen, Ramnath took of the nature of the right of succession to an impartible Raj, namely, that a joint brother did succeed under the ordinary law, in preference to the widow, to property of this description; on the whole, therefore, I cannot infer any family custom to exclude females from the actual course of descent.

Then comes the question whether there is a local custom that women are excluded. I conclude from the evidence that this is the local custom relied on, though, as I said before, by a very serious error the plaintiff was not called upon to state, before the evidence was gone into. the exact custom on which he relied. Even stated as I now state it, the custom is extremely vague; yet nothing more definite than this has been stated, either in evidence or in argument, or even in the judgment of the Court below. I do not know now in what district the custom is said to prevail, or in regard to what kind of succession, or what sort of estates. According to English law, I imagine that such proceeding as this would not be allowed, but the plaintiff would be obliged to state the district in which the custom was alleged to exist, and to confine his evidence to that district. Take, for instance, a case where a plaintiff alleged the custom of a manor; he would not in general be allowed to show what the custom was in other adjoining manors. (Duke of Somerset *vs.* France, 1 Strange, 654; Marquis of Anglesey *vs.* Lord Hatherton, 10 Meeson and Welsby, 219). But as pointed out by Lord Mansfield in Furneaux *vs.* Hutchins, Cowper, 808, he may do so if he states the custom as a *general custom of the whole county* (not "a general custom of the *county*," as this passage is sometimes quoted, a *county* being a well defined and ancient division of the kingdom); so in the case reported by Lord Hale (Hargrave's Tracts, p. 84) the custom is laid as "the custom of *that county*," that is, the county on the borders of the river Severn (see also the observation of Lord Ellenborough in R. *vs.* Ellis, 1 Maule and Selwyn, 662); so in India the custom might be laid as the custom of a zillah or other similar district. This rule appears to me to be not an artificial rule of evidence, but as pointed out by Lord Abinger in the case in 10 M. and W., at p. 235, to be founded in good sense, because if there is not some limitation of this kind, it is plain that the custom of one district might be gradually extended indefinitely in all directions. Had the objection been taken, I think that in this case the defendant would have had a right to require that before any evidence of local custom was gone into, the plaintiff should state the locality to which the custom was alleged to apply.

The evidence produced by the plaintiff in support of the local custom is also most singular. The witnesses are none of them asked as to the general course of inheritance in any district, but as to what has happened in eleven specified estates, selected as, I imagine, by the plaintiff himself. In three of these only were the witnesses able to give any particulars of the descent, and it is rather remarkable that those are the very same three to which Ramnath referred in the petition. I have already discussed, namely, Palgunge, Koonda, and Gowan. The witnesses altogether refrain from stating that any local custom exists, and it is left to be inferred from those three instances of exclusion. The omission to state the locality over which the alleged custom prevails makes it difficult to deal with this evidence. All these three places are said to be now in Zillah Hazareebagh, but that I imagine to be quite a modern political division. This property and a large tract of the surrounding country was originally comprised in Zillah Ramghur (Regulation III of 1793, s. 2); subsequently a district was formed under the name of the Jungle Mehals, but which included no part of the Zillah of Ramghur. It was formed entirely of portions of the Zillah of Beerbhoom, Burdwan, Midnapore (Regulation XVIII of 1805); subsequently the Zillah of Ramghur was abolished, and a portion of Ramghur, including these estates, a great part of the Jungle Mehals, and what was then Midnapore, were made non-regulation districts, and put under the superintendence of an agent of the Governor General (Regulation XIII of 1833, for whom a Commissioner has been since substituted (Act XX of 1854.) This Commissionership is now divided into four Deputy Commissionerships—Hazareebagh, Manbhoom, Lohardugga, and Singbhoom. But these divisions have, I imagine, been made solely with reference to the convenient transaction of business, and do not correspond with any ancient divisions of the country. For the present purpose, therefore, the fact which was so much relied on that these three estates and Ramghur are all in the same district of Hazareebagh, seems to me to be immaterial. It seems to me that it would be absurd to find that this was a local custom of a modern division like Hazareebagh; but if not of Hazareebagh, to what other locality is it suggested to belong? I should say that to establish a *local* custom to exclude females from inheritance by instances of exclusion, a district must be stated in which the custom is now and for a long time has been prevalent and which includes the property in dispute. The district might be defined geographically, as it might correspond with some ancient political division. A sufficient number of instances of exclusion within that locality must then be adduced to establish that the custom extends to the whole district, and, therefore, governs the succession in dispute. It appears to me, however, that the plaintiff in this case has entirely failed to bring the evidence up to this point. Moreover, I think, the effect of the instances given is greatly weakened by the uncertainty in which it is left, whether or no these three estates are held as *ghatwalee* tenures. If that be so, and it is a point on which the plaintiff's witnesses are not agreed, the exclusion of females might possibly be accounted for, without resorting to any such inference as the general exclusion of females in the district.

Moroever, I think, the petition of Ramnath of 1846 shows clearly that he was as little aware of any *local* custom which would exclude females, as of any *family* custom to the same effect. If there had been such a local custom within his knowledge, he would certainly have mentioned it, and, I think, that it would be most strange if he had not then ascertained all the special rules of inheritance applicable to the question, whether peculiar to his own family, or to the district in which he resided.

The Deputy Commissioner says, however, in his judgment "that the Ramghur estate is a large feudal tenure which is not divisible, and that it is a matter of notoriety that in this part of the country women do not inherit such estates, they being disqualified by sex from performing all that it is incumbent on a Rajah to perform,"

With regard to the last part of this statement there is no evidence beyond that of two of the defendant's witnesses as to the duties of the Rajah; they say that it was customary for the Maharajah at times of *poojah* to sit under the umbrella and to hold *cutcherry* outside; and that this the Ranee could not do. But there is no evidence that this is an indispensable ceremony, and like many other ceremonies usually performed by men, but not usually performed by women, it might, as far as I am aware, be omitted without any serious consequences arising. I am not sure, I understand, in what sense the Deputy Commissioner calls the Ramgurh estate a "feudal tenure," but I shall show presently the terms on which the Rajah holds his estate are those of an ordinary zemindar. As to the notoriety of the custom, I have some doubts whether this is a matter on which a Judge is entitled to give the results of his own experience. If I am at liberty to consider this statement, I should have no hesitation in saying that it is the strongest part of the plaintiff's case. My chief objection to this statement is the very vague terms in which it is made. I am quite at a loss to know what district the Deputy Commissioner refers to when he speaks of "this part of the country." He may mean his own district of Lohardugga; but if so, that is nothing to the purpose, for this property is not in Lohardugga but in Hazareebagh, and this suit only came to be tried by the Deputy Commissioner of Lohardugga by an accident. Again, he seems to consider that the custom applies only where the owner of the estates has to perform duties which a woman is by sex disqualified from performing; but if so, it does not apply to the Ramghur estates, for the Maharajah has not, and never had, as far as I can discover, any such duties.

It is certainly remarkable that, if there does exist a local custom to exclude females so notorious as stated by the Deputy Commissioner and covering any extensive district, it is not noticed in any work upon the Hindoo Law of Inheritance, either general or special, as far as I am able to discover. The custom of primogeniture as it is sometimes called, but as it is more correctly called, of impartibility as observed in this part of India, has been the subject of legislation and has frequently been noticed by text writers, and the succession in this very family has upon that point been more than once referred to by Strange, Jagernath, Shama Churn Sircar, Harrington, and Macnaghten. All refer to the custom of primogeniture, or impartibility in this locality, but not one of them speaks of the exclusion of the females. Had such a custom been notorious as a local custom, I should think it must have been known to Mr. Harrington; and had it been known to him, I think it is hardly possible that he would have omitted to mention it in that part of his Analysis where he discusses the departure from the ordinary law of inheritance which has taken place in these very districts (Vol. I, part 1, p. 194, 899). I do not of course mean it to be inferred that the exclusion of females from succession is unknown in India. Since this case was argued, I have seen a list of twenty-five questions addressed to certain Rajahs and chiefs in the Regulation and Tributary Mehals, and the answers thereto illustrating the succession to those *guddees*. It is clear that in those cases, if those statements are reliable (and I believe them to be so), females are excluded, if not altogether, at least to a very great extent.

This district is immediately south and almost adjoins the district of the Assistant Commissioner of Lohardugga, and his statement as to the notoriety of the custom may perhaps be thus accounted for. But it is hardly necessary to repeat that until some connexion, either geographical or political, is shown to exist between the districts, there is no ground for inferring the custom of one district from its existence in another; and as far as I am aware, the country above designated as "Regulation and Tributary Mehals," is entirely distinct from that in which the Raj of Ramnugger is situate, and which has been generally known as the Jungle Mehals.

The course of inheritance in the case of impartible property is indeed almost always spoken of as if it went entirely in the male line, but it is clear to me that this is only an adoption of the Hindoo form of expression "*puttro poutradi*," which is the ordinary expression which is used to indicate heritability and which is, I believe, always understood to include females. That by the general Hindoo law females are not excluded from succession to a Raj, is I believe unquestioned. In the much contested case of the Shiva Gunga Raj, a woman eventually succeeded, without its ever being suggested that any such general rule of exclusion was known to exist (See 9 Moo., 589 and 605). Jagarnath says (B. X. 2 Ch. 4 Section 15, p. 118) "if the king give the whole of his dominions to his eldest son qualified for the empire, although his other sons be void of offence, the gift is valid." He says nothing about the exclusion of females and even in this respect in a curious passage at p. 127, he hints a doubt whether some modern princes who are not independent in the Government of their subjects, but merely employed in levying the revenue of Government, should be considered as princes. Of course, as against clear and ample evidence that the local custom existed, or that females had been over and over again excluded, these speculations would be nothing; but I think one is justified in referring to them in the present case. The direct evidence in support of the local custom is at the very best meagre and weak, and the most valuable testimony is that of the Judge himself speaking from his own experience.

The materials at my command for testing the value of the Deputy Commissioner's opinion on this point, are not very ample, but the result of such investigations, as I have been able to make, leads me to doubt the existence of such a local custom as is asserted. It leads me *undoubtedly* to the conclusion that there is none so notorious and so general as to be judicially noticed without proof.

There was indeed one argument used to which I was at first inclined to give considerable weight. It was asked by the Counsel for the plaintiff, if women succeed in this district to estates of this nature, why did not the widow prove instances of it? And it was pointed out that the case was adjourned expressly in order to give her time to enquire into the custom of the country, and yet she produced no one to speak to it; whereas prior to the adjournment, namely on August 15th, one of her own witnesses Banee Jyenundun Doss had stated that in the district of Hazareebagh no woman had to his knowledge ever succeeded to the *raj*. What exactly occurred with reference to his adjournment I have stated above, and it certainly does at first sight appear remarkable that, if it were possible, the defendant should not have taken this simple course of disproving the custom, and under some circumstances I should have presumed that search had been made and that not a single instance of a female succeeding to a *raj* in the immediate neighbourhood of this property at any rate could be produced. I should still have wished to know how many persons are possessed of that dignity in that neighbourhood, and something of their history; but from the evidence I presume that there are other Rajs besides Ramghur at no great distance, and it would have been necessary therefore to consider the effect of this inference from absence of proof on the part of the defendant. But, on consideration, I do not think it safe to presume either that such a search as I have indicated has been made, or what would be the result of it if it had taken place. We have a very careful and accurate report from the Deputy Commissioner of all the proceedings that took place in the Court below, and we see how vague the enquiry was to which the attention of the parties was directed. As I have already remarked, I do not find either in the issues, or in any part of their proceedings any statement on the part of the plaintiff of what local custom he intended to prove. As already pointed out, the witnesses recalled by the plaintiff on the 17th August, and that called on the 27th, made no assertion of any general custom; they only particularised certain estates in which women had been excluded. To this the defendant may have rested content to answer that these instances proved nothing in regard to the property in dispute, and that one of the plaintiff's own witnesses admitted them to be Ghatwal estates.

Some attempt was made to show that the terms of the tenure of these estates imposed duties upon the zemindar which a woman was unable to perform. I do not think so. This appears to me to be an ordinary zemindaree tenure. The pottahs, under which the estates are held, contain a clause which imposes duties on the zemindar in the nature of police duties, but it only extends to the protection of travellers, and to the arrest of criminals. These, I imagine, are the ordinary duties of zemindar. The zemindaree *sunnud* granted by the Mogul Government to Ramjewan the Zemindar of Rajshye in 1735, contains a precisely similar clause to that in the Rajah of Ramghur's pottah (Harrington's Analysis, Vol. 3, p. 279), and Ramjewan was succeeded on his death by his widow the Ranee Bhowany (ib. p 311). There appears to me to be no analogy between these duties and those of a *ghatwal*, which are of a much more general character; and which are usually expected to be personally discharged.

On the whole, although I feel much diffidence in coming to a different conclusion from that of the Deputy Commissioner upon a point of this kind, yet I cannot think that any local custom has been established with that clearness and definitiveness which would justify a departure from the ordinary rule of inheritance. Between impartibility and the exclusion of females there is no connexion whatever; and it lies on the plaintiff therefore to establish the exclusion upon which he relies, and this I think he has not done. I am not prepared to say that the investigation has been a satisfactory one; and had the law allowed it, I should for my own part have been most anxious to have had a further enquiry. But that course has not been even suggested to us, and I do not think that on our own motion, we have power to direct it. The case is very much in the same condition as that of Rai Manick Chund *versus* Madhoram, which was recently before the Privy Council (11 W. R., Privy Council, 42).

If the plaintiff has failed to lay before us the best evidence which might have been got, he alone will suffer. No other title ought in any way to be affected by this decision.

On the evidence before me, I think no custom, either family or local, to exclude females, has been established. I think therefore that the plaintiff has failed to make out his title; that the decision of the Lower Court ought to be reversed, and his suit dismissed with costs in this Court and in the Court below.

Of course, I express no sort of opinion whatever, whether or no the defendant has proved her title to any part of the property.

The Judges being equally divided in opinion, an appeal was preferred under Section 15 of the Letters Patent of 1865 *and heard before a Bench of three Judges. The judgment of the Full Bench was delivered as follows by—*

Couch, C.J.—This was a suit brought by Burm Narain Singh against the assistant of the Court of Wards of Ramghur, and Maharanee Heeranath Kooer, the wife of Maharajah Ramnath Singh, deceased, to recover possession of certain estates and property mentioned in the plaint and therein stated in detail, which were claimed as appertaining to the zemindaree of Ramghur, the right to which, the plaintiff alleged, had accrued to him according to the family and country usage as the eldest male heir on the death of Trilokenath Singh, the son of the second defendant. As the dispute is really with her, and the Court of Wards is only a formal party, we shall hereafter call her the defendant.

The zemindaree of Ramghur was acquired by Tej Singh, the common ancestor of the plaintiff, and the defendant's husband Ramnath Singh. Tej Singh had three sons, Ramnath being a descendant of his eldest son, and the plaintiff of his third son, and there being no male issue of the second. The defendant claimed the property, with the exception of a part called Guddee Khurkhar as heir to her son by Ramnath, Trilokenath Singh, who was born after the death of his father and died when four months old; and she claimed Guddee Khurkhar as having been purchased for her by her husband with her own private funds. The plaintiff's case was that the zemindaree of Ramghur was a Raj or principality which was impartible, and descended to him as the nearest male heir.

The family of Ramghur was an old and powerful one when the British power became paramount in India. In A. D. 1772, the then Maharajah Mokoond Singh being found in arms against the British Government was conquered by it, and his estate was taken from him and granted by the Government to Tej Singh, a member of the family, but not in the direct line of descent. No *sunnud* has been produced; nor is it shown that any existed: but there are in evidence pottahs which were granted by the British Government successively to Tej Singh and his son Purusnath Singh, and on the 25th of March 1790 a settlement for ten years was made with Muninath Singh, the eldest son of Purusnath, who had three sons, and this was afterwards made perpetual.

The question at once arises, what was the nature of the estate granted to Tej Singh, whether it was a fresh grant of the family Raj with its customary rule of descent, or a grant of the lands, formerly included in that

Raj, to be held as an ordinary zemindaree. To this the judgment in the Privy Council in Baboo Beer Pertab Sahee *vs.* Maharajah Rajendra Pertab Sahee, XII Moore's I. A., 1, * is closely applicable. There at page 31, † it is said. "There was not in this, as in the Shivagunga case, a new *sunnud.* "We have no evidence of the intention of "the grantors except that which is to be "collected from the proceedings and correspondence already referred to, nor have we "any record of the proceedings before the "Governor General, or any means of knowing the precise grounds on which Lord "Cornwallis's Government rejected the recommendation of the Board of Revenue, "and determined to confer the property on "Chutturdharee Sahee. Again, it cannot be "denied, that in these proceedings the term "Raj is never used, and that in some of "them the subject of the grant is spoken "of as 'the land in *Housapore* which belonged to Rajah Futteh Sahee.' On the "other hand, there is no express intention "to alter the nature of the tenure. The "estate, whilst it was in the hands of the "Company, had never been broken up. The "policy of the decennial settlement was to form "a body of landholders by ascertaining in "whom the zemindaree interest in the soil "actually was, and making with those persons "a permanent settlement of the Government "Revenue, so as to give them greater fixity "of tenure. Lord Cornwallis's Government "determined to set up Chutturdharee Sahee "as the zemindar with whom the settlement "in respect of this property should be made. "But the estate of a zemindar was not "merely the right to the possession or enjoyment of certain lands. It involved "rights against, and corresponding obligations to dependent *talookdars*, or other "under-tenants, *ryots* of various classes, and "others; and the decennial settlement, as "a reference to the rules re-enacted by "Regulation VIII of 1793 will show, "proceeded upon an enquiry into all or "many of these particulars. In the absence of all evidence to the contrary, "it must be presumed that the settlement "was made precisely as it would have been "made, had the estate continued in the line "of Rajah Futteh Sahee; and therefore, "that the subject conferred on Chutturdharee Sahee was the old zemindaree "with all its incidents, excepting at most its "descendible quality. It seems to follow, "that the intention to alter that quality, if "it existed, would have been expressed. "Again, the selection of a member of the "old family, the next in succession to the "excluded line, though it cannot make "ancestral that which was self-acquired, is a "very strong circumstance in favor of the "hypothesis, that the intention of Government was to restore the zemindaree as it "had existed before the confiscation or "attachment, making no further change than "was involved in the forfeiture of the rights "of Rajah Futteh Sahee and his descendants, "and in the substitution by an act of power "of the person next in the order of succession, and consequently that the transaction was not so much the creation of a new "tenure, as the change of the tenant by the "exercise of a *vis major.*"

The present case is stronger in favor of this view of the grant, as the ten years' settlement was made by the Government with the eldest son of Purusnath Singh, there being other sons living, which would not have been right if it had been an ordinary zemindaree, the property of the undivided family.

But this is not all. Tej Singh who died in 1774, left three sons, as appears by the pedigree in the case: and on the 19th of April 1802, an action was brought in the Zillah Court of Ramghur by the two younger sons to recover from Muninath, the son of the eldest, two-thirds of the estate. Pending the suit, Muninath died, and was succeeded by his son Sidnath. The defence set up was that according to the custom of the mountainous country in which the estate was situate, and to the usage of the family, the estate was not divisible, but that on the death of the Rajah for the time being he was always succeeded in the Raj and zemindaree by the eldest son to the entire exclusion of the other branches of the family:—The Zillah Court gave judgment against the plaintiffs, and this being concurred in on appeal by the Provincial Court of Patna, they appealed to the Sudder Dewanny Adawlut. The case is reported in II Select Reports, 92, and the Court held that adverting to the extent and situation of the estate, to the zemindar possessing the title of Rajah, and to his maintaining a sort of feudal establishment of troops and *jageedars*, the Court could entertain little doubt that it was not a common estate divisible by the laws of inheritance. The decrees of the Zillah and Provincial Courts were accordingly affirmed.

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* IX W. R., P. C., p. 15.

† *Ibid*, 31.

We have no evidence in the case of the custom or usage of the family before the grant to Tej Singh : but the want of it is supplied by this decision, which declared the estate to be impartible, the decision being pronounced in a suit between persons who are in privity with the plaintiff and defendant in this suit.

Having arrived at the fact that this is an impartible estate, we have to consider whether the defendant, a female, can succeed to it to the exclusion of the plaintiff who is the nearest male heir.

Where a family is governed, as this family was, by the law of the *Mitakshara*, by which, in an undivided family, females do not inherit as long as there are any male members of the family, it is improbable that a custom that females should inherit to the exclusion of males would grow up with, and form part of a custom that the eldest male member of the family should inherit. The object of the latter custom would be fully attained without the other; and there is no necessary connection between them. Before considering the evidence in this case, it will be convenient to refer to the decisions which are applicable to it. In a case in IV Select Reports, 57, the widows of Rajah Zorawur Singh sued his brother to recover possession of an estate in the Jungle Mehals, alleging that by the custom of the family, of the Pergunnah Jurria and of the other Jungle estates, the eldest son of the late incumbent took the whole estate, the other sons receiving lands for their support; and that in the event of the zemindar leaving no son, his widow took the estate to the exclusion of his brothers. A deed of gift by Zorawur Singh to the plaintiffs who were his second and third wives, was also set up. The Provincial Court of Calcutta, in which the suit was brought, put a question to the Pundit of the Court with directions to give an answer according to the *shaster* as current in the Western Provinces : and the answer was that the gift, if made, was not valid, and the right of inheritance in the estate vested on the death of the donor in his two brothers. The Provincial Court of Calcutta having dismissed the claim of the plaintiffs, they appealed to the Sudder Dewanny Adawlut. One of the Judges thereupon considering the whole case, held that the decision of the Provincial Court should be reversed; but the other two held it to be proved that the estate had always gone to the chief male heir, and confirmed the decision of the Provincial Court. In this case, the estate was ancestral and the family undivided, and the decision shows that the impartibility of the estate only interferes with the ordinary law so far as to make it pass to the chief of the male heirs.

In Naragunty Lutchmee Davamah *vs.* Vengama Naidoo, 9 Moore's I. A., 66,* the estate which was the subject of the suit was a *polliam*, a tenure known in Madras. It was an ancestral estate of the nature of a Raj, not subject to partition, and could be held by only one member of the family who was styled the *polligar*, and it was held that, being ancestral estate, the succession vested in the nearest undivided male cousin of the *polligar* last seised, who died without male issue, in preference to his widow. It appears in the judgment, page 86, that this was the opinion of the Pundits who were consulted by the Sudder Court, and that it was adopted by the Court and no objection was urged to it on the appeal, the ground taken being that it was not an ancestral estate nor were the parties in the suit members of an undivided Hindoo family. The answer of the Pundits, page 74, shows that the ground of their opinion was that all the members of an undivided family have a joint right in their ancestral property, although only one of them being capable, continues in possession thereof. The case at page 446 of the same Volume is clearly distinguishable from this, and was decided upon its own peculiar facts. Mr. Justice Markby referred to the Rajah of Shivagunga's case, 9 Moore's I. A., 539 † as an instance of a woman succeeding to a Raj, and near the end of his judgment, said that between impartibility, and the exclusion of females, there is no connection whatever. That need not be disputed. It is not upon the impartibility of the estate, but upon the family being undivided and the law of succession to ancestral undivided property that the exclusion of females rests. This appears clearly in the Shivagunga and subsequent cases.

The zemindaree of Shivagunga was created in 1730 by the Nabob of the Carnatic and by a proclamation of Lord Clive, dated the 6th of July 1801, the Government transferred the zemindaree, which it appeared was treated as an escheat for want of lineal heirs, to Gowery Vallabha Taver, who was collaterally descended from the progenitors of the first zemindar. By a *sunnud*, dated the 22nd of April 1803, the zemindaree was confirmed to him in perpetuity with power to transfer it by sale or gift, on payment to the Government of a permanent annual *jumma*. By the decree appealed from, the son of Oga Taver, the elder brother of Goury Vallabha Taver, was held entitled to the zemindaree in preference to his surviving widow, on the ground that they were undivided brothers. In the judgment of the Judicial Committee, page 605, it is said that the substantial contest was whether the zemindaree ought to have descended in the male and collateral line, and the determination of that issue depended on the answers to be given to one or more of the questions, *First*, were the brothers undivided in estate, or had a partition taken place between them? *Second*, If they were undivided, was the zemindaree the self-acquired and separate property of the younger? and if so, *Third*, what is the course of succession according to the Hindoo law of the south of India of such an acquisition where the family is in other respects an undivided family? From these questions, it is clear that the Shivagunga case was different from the present, and the decision in it is not applicable. But the law applicable to it is stated in the judgment at page 589, where it is said that if the zemindar, at the time of his death, and his nephews, were members of an undivided Hindoo family, and the zemindaree, though impartible, was part of the common family property, one of the nephews was entitled to succeed to it on the death of his uncle.

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* 1 W. R., P. C., p. 30.

† 2 W. R., P. C., p. 31.

We have thought it right to refer to this case at some length on account of the reference to it in Mr. Justice Markby's judgment. Another authority for the exclusion of females where the property is ancestral and the family undivided is in the judgment of the Privy Council in Jowala Buksh *vs.* Dharum Singh, 10 Moore's I. A., 524, where it is said that Lall Singh, a nephew, whose legitimacy was disputed, if the legitimate male heir of the great ancestor would have taken the Raj on the death of his uncle to the exclusion of the widow, the property being assumed to be ancestral and the family undivided; that in the case of Katama Natchier *vs.* The Rajah of Shivagunga, it was admitted that this would have been the course of descent according to the *Mitakshara* if the property had been ancestral; and that the reason of that decision was that the Shivagunga Raj was the separate acquisition of the deceased. And in the judgment of the Privy Council in a later case, 13 Moore's I. A., 140, it is again said that in the Shivagunga case the impartible zemindaree was shown conclusively to have been the separate acquisition of the person whose succession was the subject of dispute, and the ruling of the Court was, that in that case the zemindaree should follow the course of succession as to separate property, although the family was undivided, but that if that zemindaree had been shown to have been an ancestral zemindaree, the judgment of the Board would, no doubt, have been the other way.

There is, however, a judgment of the Privy Council which is referred to by Mr. Justice Markby as the Tipperah case, in which a different view is taken, and which we are unable to reconcile with the previous decisions. In Neel Kisto Deb Burmono *vs.* Beer Chunder Thakoor, 12 Moore's I. A., 540,* their Lordships say, "still when a Raj is enjoyed and inherited by one sole member of a family, it would be to introduce into the law by judicial construction a fiction, involving also a contradiction, to call this separate ownership though coming by inheritance at once sole and joint ownership and so to constitute a joint ownership without the common incidents of co-parcenership. The truth is, the title to the throne and the royal lands is, as in this case, one and the same title; survivorship cannot obtain in such a possession from its very nature, and there can be no community of interest; for claims to an estate in lands and to rights in others over it, as to maintenance for instance, are distinct and inconsistent claims. As there can be no such survivorship, title by survivorship, where it varies from the ordinary title by heirship, cannot in the absence of custom, furnish the rule to ascertain the heir to a property which is solely owned and enjoyed, and which passes by inheritance to a sole heir."

But in a later case, we find their Lordships adhering to the law laid down in the earlier cases. In the judgment in Stree Rajah Yanmula Venkayamah *vs.* Stree Rajah Yanmula Boochi Venkondora delivered on the 2nd of February 1870,† after stating that the question upon which the parties in the suit joined issue and went to trial was whether the family of which the plaintiff and the appellant's husbands were members, was an undivided, or a divided Hindoo family, and that the Courts below had properly decided that issue in favor of the plaintiff, they say,—"Accordingly, the strength of the argument of the learned Counsel for the appellant has been directed to show that this case should be governed by that in the 9th Volume of Moore's Indian Appeals, which is generally

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* 12 W. R., P. C., 21.

† 13 W. R., P. C., 21.

" known as the Shivagunga case. They have " gone so far as to argue that the estate in " question in this case, being impartible, must " from its very nature be taken to be separate " estate, and consequently that, according to " the decision in the Shivagunga case, the " succession to it is determinable by the law " which regulates the succession to a separate " estate whether the family be divided or undivided. The authority invoked, however, " affords no ground for this argument. The " decision in the Shivagunga case will be " found to proceed solely and expressly on " the finding of the Court that the zemindaree " in question was proved to be the self-acquired and separate property of Gonery " Vallabha Taver." And, after quoting from " the judgment, they say,—" It is therefore " clear, that the mere impartibility of the estate " is not sufficient to make the succession to " it follow the course of succession of separate estate. And their Lordships apprehend " that if they were to hold that it did so, they " would affect the titles to many estates held " and enjoyed as impartible in different parts " of India." And in observing on the evidence as to the estate being the separate property of the appellant's husband, they say,— " These grants by way of maintenance are in " the ordinary course of what is done by a " person in the enjoyment of a Raj or impartible estate in favor of the junior members " of the family, who, but for the impartibility " of the estate, would be co-parceners with " him."

This judgment is closely applicable to the present case. There is here an ancestral impartible estate and an undivided family; for there is no proof that the family of Tej Singh had become divided, and no issue was raised as to that. If there had been no evidence of custom in the case, we should have held, upon the authority of the decisions we have referred to, that the plaintiff is entitled to succeed to the estate.

The evidence, oral and documentary, is fully stated in the judgments in the division Court, and it is not necessary to re-state it. It shows that on the only occasions since the grant of the estate of Tej Singh when a female might have inherited, she was excluded. It is true that in both cases a brother succeeded in preference to the widow of the deceased; but this could only be justified by the family being an undivided one; and the undivided family was not that of Sidhnath Singh, the father of the brothers, but of Tej Singh, of which family the plaintiff is a member. And that this succession was not allowed, as was argued by the appellant's Counsel, because a brother was to succeed, is, we think, shown by the return made by Shumbhoo Nath Sing on the 26th June 1846, in which he acknowledged the plaintiff as heir next in succession to his surviving brother Ramnath.

The plaintiff's claim is, therefore, supported by such evidence as there is of a custom in the family. It does not in our opinion depend upon a local custom, and probably the instances which appear to be evidence of a local custom may all be explained by the rule of law which we think is established by the authorities we have quoted. The judgment of Mr. Justice Markby for the defendant appears to be founded on the assumption that the succession was governed generally by the rule of inheritance of separate property according to the *Mitakshara*, treating separate as if it were self-acquired, and this is supported by the judgment in the Tipperah case; but all the other authorities appear to show that this is not correct. Where the property is ancestral and the family undivided, a custom modifying the law, must be a custom to admit females, not a custom to exclude them. In our opinion the plaintiff is entitled to succeed to the estate.

Nothing is said in the judgments in the division Court about the Khurkhar property, and the judgment of the Lower Court as to that was confirmed, apparently, without any difference of opinion between the learned Judges. It has not been argued before us that this part of the decree is erroneous. The Lower Court found that the defendant had not proved her right to this property: and assuming that this question is before us in the present appeal, which we think it is, having been raised by the grounds of appeal to the High Court, and by the grounds of the present appeal, we cannot consider the evidence of the *mokurir* of the defendant as sufficient. On a question of fact, we think we ought to be guided by the rule of the Privy Council where there have been the decisions of two Courts to the same effect.

We think the appeal should be dismissed with costs. The decree of the Lower Court will thus be allowed to stand.

The 22nd February 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Contribution—Joint Hindoo Family.

Case No 183 of 1871.

Regular Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 17th June 1870.

Bissonath Chowdry and another (Defendants) *Appellants,*

versus

Goburdhun Chowdry and another (Plaintiffs) *Respondents.*

Mr. C. Gregory and *Baboo Ashootosh Dhur* for Appellants.

Baboos Hem Chunder Banerjee and *Romesh Chunder Mitter* for Respondents.

With reference to all the circumstances of the case it was held that it would be highly inequitable to allow the plaintiffs to recover any contribution from the defendants when they had completely failed to show that the assets and liabilities of the alleged joint-family had been divided fairly and honestly, and that they had duly accounted to the defendants for anything which came into their hands as managers of their estate.

Mitter, J.—This is a suit for contribution and the circumstances which have led to its institution are as follows :—

The plaintiff Goburdhun Lall and the defendant's father Greedharee Lall were two brothers, and the second plaintiff Beharee Lall is the son of Goburdhun Lall. Greedharee Lall died in the year 1264, F. S., leaving behind him his widow Sena Put Kooer and two infant sons, the defendants. The plaintiffs allege that the two branches of the family continued joint in food and estate down to the year 1271 F. S., when a division of "all the household goods," as well as of the debts due to the creditors of the joint family was made between them, through the intervention of certain persons, who were appointed arbitrators with the joint consent of Goburdhun Lall and of Sena Put Kooer, who was the lawful guardian of the defendants. The heaviest of these debts was one of 8,345 rupees 3 annas 10 pie, admittedly due to one Greedharee Lall Baboo, and the plaintiffs go on to say that, according to a "*furd*" or schedule of partition prepared by the arbitrators, it was settled that the defendants should pay 6,045 rupees 10 annas and 12 gundahs out of this amount together with a sum of Rs. 533 due to one Bullunder Sing, their own share of the liability being fixed at an equal amount consisting of the balance of Rs. 2,299, 8 annas, 17 gundahs due to Greedharee Lall Baboo and of certain other small debts to which we shall have occasion to refer more specifically hereafter. The plaintiffs add that they have, notwithstanding the arrangement above referred to, been obliged to pay more than their legitimate share of the debt due to Greedharee Lall Baboo as fixed by the arbitrators ; and the present suit has been accordingly brought by them for contribution.

The answer of defendant is to the effect that the family had been *separate* long before 1271 F. S., that with the exception of half the amount due to Greedharee Lall Baboo, and of the sum of Rs. 533 due to Bullender Singh, the defendants were not liable for any of the other debts mentioned in the schedule filed by the plaintiffs. It is added that the arbitration was fraudulent and collusive, and that the plaintiff Goburdhun Lall had misappropriated large sums of money belonging to the defendants during the time he acted as manager of their estate, that is to say, from 1264 to 1271 B. S.

The Subordinate Judge, who tried this case in the first instance, gave a decree to the plaintiffs, and the present defendants have appealed against it.

When this case came before us on a previous occasion, we found that the Subordinate Judge had taken a very narrow view of it, and we accordingly sent it back to him with directions to take further evidence from the parties with special reference to certain points specifically indicated in our order of remand. This evidence has now been taken, and after going through all the papers on the record, the conclusion we have arrived at is that the decree of the Lower Court cannot be sustained.

We do not think it necessary for the purposes of this case to express any opinion as to whether the family was *joint* or *separate.* Assuming that it was joint as alleged by the plaintiff, it would still be incumbent upon them to prove by the most satisfactory evidence that the so-called *partition* upon which their *claim is based* was perfectly fair and *boná fide* in all ways before they can be permitted to maintain this suit for contribution. It is admitted on all sides that the defendants were *minors* at the time, and it is also admitted that the *plaintiff* Goburdhun Lall had been the *sole* and exclusive *manager* of their estate since the death of their father in 1264 F. S. Under such circumstances, it is clear that the burden of proving the fairness and complete good faith of the partition rests entirely upon the plaintiffs. Plaintiffs have, however, in our opinion, completely failed to discharge this burden. That there was something in the nature of an arbitration, if arbitration it may be called, we have no doubt. But it is equally beyond doubt that the plaintiffs who were the only adult members of the family, who could take care of their own interests, managed every thing in their own way. So far as the so-called arbitrators are concerned, they appear by their own and other evidence on record to have done nothing more than affix their signatures to certain *furds* or schedules which they were requested to sign by the plaintiff Goburdhun Lall himself. No enquiry of any kind appears to have been made by them as to the real state of the assets and liabilities of the joint family, or whether in point of fact it was a joint family at all; and without laying any stress upon mere want of formality, we feel no hesitation in saying that the *furds* relied upon by the plaintiffs are utterly valueless for fixing the respective liabilities of the parties. Of the several arbitrators who have been examined in this case, only one says that he understood the accounts (*hesab sumuj lea*). But not only is this statement contradicted by the other witnesses, but it is, in our opinion, too vague and indefinte to warrant the conclusion that there was any settlement of accounts in the proper sense of due adjustment by the arbitrators themselves.

Then again, it is admitted that there was no division of the *paona* of joint family, that is to say, of the amounts which were due to it from third parties. All the bonds standing to its credit were retained by the plaintiff Goburdhun Lall himself, and it is not even pretended that any account was rendered by him of what he did with the defendant's estate during the seven years it remained under his management. Such a partition is unfair on the very face of it; and in the absence of all proof that the plaintiffs have duly accounted for every thing which came into their possession during the period above referred to, it would be unjust and inequitable to allow them to maintain this suit for contribution against the defendants. When we remanded the case on the last occasion, we expected that the plaintiffs would remove all doubts about the justice of their claim by producing the account books of the family which have been proved to be in their custody. This they have not done for reasons best known to themselves, and they have therefore no right to complaint if we draw the inference that those books if proved would have shown that the present suit is without any valid foundation whatever.

With reference to the debts which were allotted to the share of the plaintiffs, we wish to observe that with the exception of the single item of 2,299 rupees due to Gireedharee Lall Baboo, they were, all of them, contracted by the plaintiff Beharee Lall subsequent to the death of the defendant's father and upon his own personal responsibility. It is true that some of the persons to whom those debts are alleged to have been due have been examined as witnesses; but there is no satisfactory evidence to show that they were incurred for the benefit of the joint family. The vague surmises of the witnesses above referred to cannot supply the place of legal proof, more particularly when it is borne in mind that the plaintiffs could easily have removed all doubts on the point by producing the family books of account, which, if not wilfully and deliberately suppressed by them, have not been produced when certainly they should have been so if plaintiffs had an honest case. Plaintiffs have given no explanation whatever why the so-called joint debts of the family were divided by the arbitrators in the peculiar mode mentioned in the "*furd*" or schedule propounded by them. Instead of (as might have been reasonably and naturally expected) each party being made liable to pay half of each of those debts, the defendants have been saddled with by far the greater portion of the admittedly joint debt due to Gireedharee Lall Baboo, the plaintiff's share of the burden consisting chiefly of certain small debts contracted by Beharee Lall upon his own personal responsibility and at a time when his father Goburdhun Lall was the sole and exclusive manager of the defendant's estate.

All these facts certainly require some explanation, but the plaintiffs have not given any, notwithstanding the additional opportunity expressly given to them by our order of remand. It is true that the defendants were justly liable for half the debt due to Gireedharee Lall Baboo, and the plaintiffs would, under ordinary circumstances, have been entitled to demand contribution from them to that extent. But this is not the ground upon which the present suit is brought; nor do we think that the plaintiffs are entitled to fall back upon it, it being borne in mind that they stood in a fiduciary position towards the defendants down to the year 1271, and that they have upon their own showing completely failed to give any account whatever of what they did with the assets of the defendant's estate during the period it remained under their management. If the family was really joint, a point upon which we do not wish to express any opinion one way or the other, the proper course for the plaintiffs to adopt would have been to ask for a general settlement of accounts and not to sue for contribution for an isolated item like the one under our consideration. As for the alleged partition and settlement of accounts in 1271, we have already shown that they were managed by the plaintiffs entirely in their own way, the so-called arbitrators being introduced in the scene merely for the purpose of giving a color of fairness to the proceedings. Those who seek equity must do equity, and looking to all the facts and circumstances of this case, we feel no doubt whatever that it would be highly inequitable to allow the plaintiffs to recover any contribution from the defendants when they have completely failed to show that the assets and liabilities of the alleged joint family have been divided fairly and honestly, and that they have duly accounted to the defendants for everything which came into their hands as mangers of their estate.

For the above reasons, we reverse the decision of the Subordinate Judge and dismiss the plaintiffs' suit with all costs.

The 23rd February 1872.

Present:

The Hon'ble A. G. Macpherson and Dwarkanath Mitter, *Judges.*

Pleaders—Rule 2 of 23rd May 1871—Certificate and Grounds of Appeal—Copies of the Record.

Reference under Act XX of 1865 from the Judge of Chittagong.

In the Case of

Noor Ahmed, *Pleader of his Court.*

Mr. J. S. Rochfort and *Baboo Aukhil Chunder Sein* for Noor Ahmed.

A pleader is not guilty of grossly improper conduct, but substantially and sufficiently complies with the 2nd of the Rules of 23rd May 1871, if he examines *copies* of the record, and not the original record, before he draws the grounds of appeal and certifies them.

Macpherson, J.—THE case of the vakeel, Noor Ahmed, is somewhat different. He signed a certificate similar to that signed by Hadee Ali, stating that he had examined the record, and that in his opinion there were good grounds for the appeal. He admitted afterwards that he had not in fact examined the record, but he urged that he had read a copy of the judgment of the Lower Court, and copies of the more important papers filed in the cause, such copies having been supplied to him by the parties. The Judge finds that the evidence adduced fails to show that Noor Ahmed examined any papers or copies before signing the certificate.

Without saying that I feel sure that the Judge is not right in the view that he takes of the evidence, in so far as he thinks that the vakeel did not examine any copies, I think it is open to doubt whether he did not see some of the papers, and that we ought to give him the benefit of that doubt. In his case, therefore, we shall remove the order of suspension of the vakeel, without saying that under the circumstances his suspension was wrong.

This vakeel had clearly not complied literally with the 2nd of the Rules of the 23rd May 1871,* that is to say, he admittedly had not examined the original record. But I do not think it necessarily follows that he has been guilty of grossly improper conduct. I am not prepared to go quite so far as the Judge seems inclined to go with reference to the matter of copies. It is true that the words used in the Rule are:—"I "certify that I have examined *the record* in "this case." But if a vakeel has been supplied with copies of the record, and has *boná fide* examined those copies, and made himself acquainted with what is in the record, it seems to me, there has been a substantial and sufficient compliance with the Rule, even supposing he has not actually had in his hands anything excepting copies. Of course, if the vakeel, instead of going to the record, chooses to deal with copies, he is responsible for the copies being really true copies.

I would not read the words "examined the record" literally so as to hold that in every case a vakeel who examines copies only is guilty of improper conduct in certifying that he has examined the record. I read the Rule as meaning that a pleader must have thoroughly examined and made himself acquainted with the papers in the case before he draws the grounds of appeal and certifies them. Of course, the record is the surest source from which to get a knowledge of a case; but if the pleader has had copies, and has examined them carefully, it is in my opinion impossible to say that he has been guilty of grossly improper conduct, merely because he has examined copies instead of the actual original record.

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* 16 W. R. (Civil Circulars), 1.

The 26th February 1872.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Sale in Execution of Decree—Date of Sale—Purchase by Execution-Creditor—Injury to Judgment-debtor.

Case No. 360 of 1871.

Miscellaneous Appeal from an order passed by the Subordinate Judge of East Burdwan, dated the 22nd July 1871.

Kishen Prosunno Mojoomdar (Judgment-debtor) *Appellant,*

versus

Nurduma Dossee and another (Decree-holders) *Respondents.*

Baboos Mohinee Mohun Roy and *Bhyrub Chunder Banerjee* for Appellants.

Mr. R. E. Twidale for Respondents.

A decree-holder is entitled to prove, when his property has been sold without further notice on a date subsequent to that originally fixed, and especially when the execution-creditor is the purchaser for a very inadequate value, that he has been substantially injured by such sale.

Kemp, J.—THIS is an appeal on behalf of the judgment-debtor, Kishen Prosunno Mojoomdar. It appears that three properties were lotted for sale in execution of the decree of the opposite party, and one of these properties lot Nimdoho was sold on the 12th of September 1870, being the day originally fixed for the sale, and on that day the judgment-debtor put in a petition for permission to pay the amount covered by the decree on the 3rd of November following, agreeing that, if he did not pay the amount due by him on that date, the sale of lot Nimdoho would stand good, and the other lots would be sold on that day, without further notification. Accordingly, the judgment-debtor not having paid the whole amount due as promised on the 3rd of November, the sale of lot Nimdoho was confirmed and the sale of the other two properties was held, not on the 3rd of November, but on the 11th of November. The judgment-debtor then objected that he ought not to be held too strictly to the terms of his petition with reference to lot Nimdoho and that he had been injured by the sale of the other two properties on the 11th instead of on the 3rd of November, inasmuch as if they had been sold on the latter date, there would have been other purchasers in attendance, and these two lots would not have been knocked down to the decree-holder at very low prices. The Subordinate Judge overruled these objections, and the case has now come before us in Regular Appeal.

We think that the judgment-debtor was bound by his petition with reference to lot Nimdoho, for he clearly agreed that, in the event of his not paying the amount due on the 3rd of November, the sale of Nimdoho would stand good ; but we think that he is entitled to a remand with reference to lot Sovadangah and lot Maloteepore. It is very clear that he did object that he had been substantially injured by the sale of these two lots on any other date than that to which he bound himself, namely, the 3rd of November, and that the sale without further notice on a subsequent date was irregular, that no purchasers were present at the time, and that he has been damaged by that circumstance. We have been referred in the course of the argument to a decision published in Volume III Weekly Reporter, page 14, in which the late Chief Justice Sir Barnes Peacock ruled that it was always necessary to watch with jealousy sales made in execution of decrees, especially when it appears that the property has been sold much below its value, and that the execution-creditor was the purchaser ; and that is the case in the present instance. The execution-creditor is the purchaser, and the property apparently, as far as we can judge, has been sold for a very inadequate value. The late Chief Justice also says that in such cases the formalities which the law requires to ensure as far as possible a sale at a fair value must be gone through, and it is not unreasonable to set aside a sale and require a fresh sale to take place if these formalities have not been gone through ; that public notice of the time and place of sale is one of the most important measures towards ensuring a fair sale ; and further that if the execution-creditor has not purchased at too low a price, he will not be damnified by having the estate again put up to auction.

We, therefore, think that this case must be remanded. The Subordinate Judge will give the judgment-debtor an opportunity of proving that he has been substantially injured by the sale of Sonadangah and other properties without fresh issue of notice, and will pass such orders as the circumstances of the case may require. Costs to follow the result.

The 28th February 1872.

Present:

The Hon'ble A. G. Macpherson, *Judge.*

Appeal to England—Decree of Privy Council—Mis-translation—Execution.

In the matter of

Meer Muzuffer Hossein Chowdhry and another (Respondents to England), *Petitioners,*

versus

Ameeroonissa Khatoon (Appellant to England) *Opposite party.*

Baboos Doorga Mohun Doss and *Kashee Kant Sein* for Petitioners.

Baboo Sreenath Banerjee for Opposite party.

In this appeal the Privy Council, in confirming the decree of the High Court, were doubtful as to whether the respondents to England were, on the face of the plaint, entitled by Mahomedan law to the full amount claimed and left the matter to be determined by the High Court in execution. It appearing that the doubt raised in the Privy Council was owing to the word *shohodur* in the plaint being wrongly translated "sons" instead of "uterine brothers," the High Court allowed the respondents to take out execution for the whole amount.

Macpherson, J.—In this appeal their Lordships of the Privy Council, on the 3rd of July last, gave judgment confirming the decree of the High Court with costs, but subject to the following proviso and declaration, that is to say, "inasmuch as it has been represented by the Counsel for the appellant "on the hearing of this appeal that, assuming "the pedigree of the family to have been as "stated in the plaint filed in the original suit of "Meer Abdool Mujeed Chowdhry, the share "of Eadenissa in the estate left by Ru"heemoonissa was, according to Mahome"dan law, one-eighth only instead of one"third as stated in the said plaint, and that "the share of each of the respondents, the "plaintiffs in the present suit, in the estate "left by the said Eadenissa being accord"ing to Mahomedan law one-fourth, the "said respondents were, on the face of the "plaint, entitled by Mahomedan law to at "most one-sixteenth of the sums in question "instead of the proportion therein mentioned, "that is to say, to the sum of Rs. 30,333-5-4 "instead of Rs. 62,913-9-3; and inasmuch "as the record in the said appeal does not "afford sufficient grounds for determining the "correctness of such representations, it "is ordered that execution is not to be issued "for any greater amount than the said sum "of Rs. 30,333-5-4, with interest thereon, "from the 29th July 1859, and the costs "payable by the appellant in the two suits, "and the costs of the appeal, unless and "until the said respondents shall show to the "satisfaction of the High Court that, accord"ing to Mahomedan law, and the pedigree "of the family, they were at the time of the "institution of the original suit entitled to "some larger sum than the said sum of "Rs. 30,333-5-4, in which case execution "may be issued accordingly."

The case having come back to this Court, leave was given to the respondents to take out execution for the sum of Rs. 30,333-5-4, with interest and costs, and the matter was (with the consent of the pleaders for all parties) set down before me in order to the determination of the question whether, according to Mahomedan law and the pedigree of the family as stated in the plaint filed in the original suit, the respondents were, at the time of the institution of the original suit, entitled to a larger sum than the said sum of Rs. 30,333 5-4.

The doubt which has been raised in the Privy Council, and which never was raised in any of the Courts in this country, has evidently sprung from an error which has accidentally crept into the translation, made many years ago, of the plaint in the old suit. The doubt arises on a passage near the commencement of the translation which is as follows:—"In 1234 B. S. Ruheemoonnissa departed this life, leaving two infant daughters; "Ibadoonnissa and Fukuroonnissa, *and two* "*sons* Fuzl Ali and Mahomed Afzul, as "her heirs and successors." "A third; or a "5 annas 6 gundahs 2 cowries 2 krants "share of the estate of Ruheemoonnissa "devolved on Ibadoonnissa, and a like share "on Fukuroonnissa according to the Maho"medan Law of Inheritance." Now the words out of which this question has arisen are the words "two *sons*, Fuzl Ali and Mahomed Afzul." Looking at the original plaint in Bengalee, it appears that the word used is *shohodur*, which means not "sons" but "uterine brothers." The case made by the plaintiff in the original suit was one resting upon the fact of Fuzl Ali and Mahomed Afzul being the uterine brothers of Ruheemoonnissa; and that fact appears to me to have been always admitted and never to have been disputed by anybody, until, in consequence of this mis-translation, the point was observed and raised for the first time in the Privy Council.

If Fuzl Ali and Mahomed Afzul were uterine brothers, as stated in the original Bengalee plaint, then the plaint stated the Mahomedan law correctly when it stated that "a "one-third" share of the estate of Ruheemoonnissa devolved on Ibadoonnissa and "like share on Fukuroonnissa according to "the Mahomedan Law of Inheritance." But if the plaint had stated that Fuzl Ali and Mahomed Afzul were the sons of Ruheemoonnissa, then the law would have been wrongly stated, for if Ruheemoonnissa had left two sons as well as her husband and her two daughters, each daughter would have taken only one-eighth.

There is, however, no doubt that the use of the word "sons" instead of "brothers" is a mere slip in translating. I have the original plaint now before me, and the word *shokodur* is perfectly clear and distinct; and the word has been in no way altered or tampered with, and has evidently stood from the first as it is now.

The translation in which the error first occurred was made for the use of the Backergunge Court by one of the officers of that Court: and the mistake has crept into the statement of the pleadings which is given in the judgment delivered in the original suit on the 29th July 1859 by Mr. Justice Kemp, who was then the district Judge of Backergunge. But though this wrong statement of the relationship of Fuzl Ali and Mahomed Afzul does exist in his judgment, Mr. Kemp must have been aware of the fact that they were really not sons but uterine brothers, inasmuch as he adopted the distribution of the estate given in the plaint, which he never could have done unless he had treated those persons as uterine brothers. As a matter of fact, it has never been suggested by anybody in this country that they were sons; and I find from a translation now before me of a replication filed by the plaintiffs in the original suit (which was instituted under the old procedure), it is expressly stated in paragraph 8 (with reference to another question) that Ruheemoonnissa was the sister of Fuzl Ali.

With reference to this replication, however, I ought to add that in para 3, it is stated that Ibadoonnissa (called Eadennissa in the judgment of the Privy Council) in her lifetime applied for permission to sue as a pauper for a third share of this *kabin* property valuing her claim at Rs. 80, 333-5-6. Now this sum is exactly the sum which their Lordships of the Privy Council give as representing a one-eighth share: and how Ibadoonnissa came to claim only that amount when she claimed a one-third share is a matter which I am unable to explain. Although it certainly is curious that she should have valued her suit at Rs. 80,333 only, the statement in the replication that she claimed a one-third share, and that Fuzl Ali was the brother of Ruheemoonnissa was a repetition of the case made by the original plaint, which has never been contested on these points, except in the Privy Council.

The pleader for the defendant, who was appellant to the Privy Council, has seen the original plaint and admits that the word used is *shokodur*, and that there is no doubt whatever that *shokodur* means "uterine brothers" and not "sons", and the pleader does not suggest that he has any means of showing that, according to Mahomedan law and the pedigree of the family, the plaintiffs were not at the time of the institution of the original suit entitled to the amount which was decreed to them by Mr Kemp.

It is clear to me that the whole of the doubt has arisen simply from this slip in the English translation made in the Court of Backergunge in 1859, which has gone on being reproduced up to the present time, but that there has been no substantial mistake in decreeing the 62,913 rupees which were awarded by Mr. Kemp.

The result will be that the respondents will be entitled to take out execution for the further sum above 80,333-5-4, with the costs of this proceeding which I fix at 50 rupees.

The 29th February 1872.

Present:

The Hon'ble G. Loch and W. Ainslie,
Judges.

Execution of Decree (Staying)—Procedure—Jurisdiction.

In the matter of

T. C. Barlow, Executor of the estate of T. Teil, deceased, *Petitioner,*

versus

Moulvee Abdool Haye and another,
Opposite party.

Messrs. J. T. Woodroffe and *C. Gregory* for Petitioner.

Mr. R. E. Twidale for Opposite party.

The Judge's order directing a precept to be sent to the Subordinate Judge, upon which precept the latter stayed execution of the decree, was set aside as made without authority; and the Subordinate Judge was reminded that a decree-holder coming and asking for execution of his decree is entitled to have that decree properly executed.

Loch, J.—We think that this rule must be made absolute, and the order passed by the Judge must be set aside. It is clear he had no authority to pass an order in an execution case not before him, directing a precept to be sent to the Subordinate Judge, upon which precept the Subordinate Judge has acted and stayed the execution of this decree. We must remind the Subordinate Judge that a decree-holder coming and asking for execution of his decree is entitled to have that decree properly executed; and therefore the Subordinate Judge must dispose of this case without reference to anything that the Judge has said, and must deal with it as if it were an application made in the usual course to him for execution of a decree.

The petitioner will get his costs, which are assessed at fifty rupees.

The 29th February 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Execution—Estoppel—Judgment-creditor (Claiming under different Title).

Case No 676 of 1871.

Special appeal from a decision passed by the Additional Subordinate Judge of Dacca, dated the 24th February 1871, *affirming a decision of the Moonsiff of Leohragunge, dated the 25th July* 1870.

Chunder Kant Gangolly (Defendant) *Appellant,*

versus

Mr. P. Wise (Plaintiff) *Respondent.*

Baboo Sreenath Banerjee for Appellant.

Baboo Kashee Kant Sein for Respondent.

A judgment-creditor, by putting up the rights and interests of his judgment-debtor in a *talook* for sale in execution, is not estopped from afterwards claiming a portion of that *talook* under a different title, *e. g.*, under a mortgage.

Glover, J.—The only point taken in this special appeal is that the respondent, who had formerly in execution of a decree against Gureeb Hossein put up the entire *talook* No. 2332 for sale as being the property of his judgment-debtor, cannot now claim under a mortgage a four-annas share of the same *talook* as the property of Rumzan Khatoon.

This objection does not appear to have been taken in the Lower Appellate Court; it certainly was not argued; and although there is some mention of it in the petition of appeal, the special appellant's vakeel is not able to satisfy us that it was in any way pressed before the Judge. But supposing for the sake of argument that it was pressed, we are of opinion that it cannot avail the appellant. What was sold by Mr. Wise in execution of his decree against Gureeb Hossein, was not the *talook* No. 2332, but the judgment-debtor's rights and interests in that *talook* whatever they might turn out to be. It is, therefore, impossible to say that by putting up these rights and interests, undetermined as they were, for sale in execution, Mr. Wise in any way estopped himself from afterwards claiming a portion of that *talook* under a different title.

The special appeal must be dismissed with costs.

The 1st March 1872.

Present:

The Hon'ble G. Loch and W. Ainslie, *Judges.*

Mortgage—Mortgagor's Suit for Possession—Tender of whole Debt.

Case No. 929 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Sarun, dated the 19th June 1871, *reversing a decision of the Moonsiff of Sewan, dated the 21st December* 1870.

Joygobind Roy *alias* Bhojraj Roy and others (Defendants) *Appellants,*

versus

Bundhoo Singh (Plaintiff) *Respondent.*

Baboos Mohesh Chunder Chowdhry and *Gopal Chunder Mookerjee* for Appellants.

Baboos Chunder Madhub Ghose and *Kalee Kishen Sein* for Respondent.

A mortgagor cannot ask for a decree for possession without tendering the whole of the mortgage-debt.

Loch, J.—The judgment of the Lower Appellate Court cannot stand. It is very clear that the plaintiff had no cause of action.

He comes into Court wishing to pay off a portion of the mortgage-debt, and asking the Court to give him a decree for possession on his paying a certain sum of money, which is only a fractional part of the mortgage-debt for which the property was mortgaged. But up to the present date it is clear he has made no tender of the whole amount which is due; and until he has done that, the plaintiff has no ground for his suit.

The judgment of the Lower Appellate Court is reversed, and that of the first Court restored and affirmed. The appellant will get his costs in this Court and in the Lower Appellate Court.

The 1st March 1872.

Present:

The Hon'ble G. Loch and W. Ainslie,
Judges.

Pre-emption—Rights of Sharers in Appendages and in Body of Estate.

Case No. 890 of 1871.

Special Appeal from a decision passed by the Additional Judge of Tirhoot, dated the 11*th May* 1871, *reversing a decision of the Moonsiff of Durbhangah, dated the 2nd February* 1871.

Golam Ali Khan (Plaintiff) *Appellant,*

versus

Agurjeet Roy (one of the defendants) *Respondent.*

Baboo Boodh Sein Singh for Appellant.

Baboo Nil Madhub Sein for Respondent.

A sharer in the appendages has not an equal right to pre-emption with a sharer in the body of the estate.

Loch, J.—We think the judgment of the Lower Appellate Court in this case must be set aside. The suit is one for pre-emption, and the Judge, by his finding, considers that the sharer in the appendages has equal right with the sharer in the body of the estate. It appears that there was a *butwarra*, that the plaintiff and the defendant No. 2 had possession of one *puttee*, and that the *julkars* and *nounick sayers*, &c., were left *ijmalee* between the plaintiff, the defendant No. 2, and the defendant No. 1 who is the proprietor of another *puttee*. The Judge has held that, though the defendant No. 1 has no share whatever in the *puttee* held by the plaintiff and the defendant No. 2, but has only a share in the appendages, he has an equal right to pre-emption with the plaintiff who is the sharer with the defendant No. 2 in the *puttee* now sold by that defendant.

We think the view taken by the Judge is erroneous, and it is in fact given up by the pleader for the respondent. He however urges that there is another ground of objection taken by him before the Lower Appellate Court that *tullubeh mowasibut* had not been carried out as required by the Mahomedan law. But we find that the Judge has disposed of that question inasmuch as he has accepted the evidence of the witnesses for the plaintiff upon the point.

The judgment of the Lower Appellate Court is reversed, and that of the first Court is restored and affirmed. The appellant will have his costs in this Court and in the Lower Appellate Court.

The 1st March 1872.

Present:

The Hon'ble G. Loch and W. Ainslie,
Judges.

Certificate (under Act XXVII of 1860*)—Object of.*

Case No. 2 of 1872.

Miscellaneous Appeal from an order passed by the Judge of Sarun, dated the 25th September 1871.

Mussamut Jhanjoo Kooer (Intervenor) *Appellant,*

versus

Mussamut Dameenah Kooer and another (Petitioners) *Respondents.*

Baboo Doorga Doss Dutt for Appellant.

Baboo Boodh Sein Singh for Respondents.

The object of a certificate under Act XXVII of 1860 is to enable the parties who represent the deceased to realize debts due to the deceased at the time of his death, and not to recover fresh claims that may accrue subsequent to his death and which may be due to other parties.

Loch, J.—This is an application for a certificate under the provisions of Act XXVII of 1860. The appellant sets forth that her father Sunkur Sookul died in 1249, that after his death her mother Sujun held possession of the property until her death in

1261, that there were three daughters, Bhijna Kooer, Dameenah Kooer, and herself Jhanjoo Kooer, and she claims the whole property on the ground that she is in possession of the whole property, that she has always lived with her parents since her husband's death, and that she is indigent whereas her sisters are wealthy.

The other two sisters have applied for the certificate of one-third as heirs entitled to one-third of their father's estate, and the Judge has given a certificate accordingly.

It appears that the contest between the parties is not to realise debts that were due to Sunkur Sookul, but debts that are now due from ryots on account of their current rent. Under such circumstances, a certificate should not be given. The object of a certificate under Act XXVII of 1860 is to enable the parties who represent the deceased to realise debts due to the deceased at the time of his death and not to recover fresh claims that may accrue subsequent to his death and which may be due to other parties. When therefore this application was made by Dameenah Kooer and by Bhijna Kooer, the Judge ought at once to have rejected it, unless the petitioners could have shown that their object was to realise debts due to Sunkur Sookul or to Sujun.

It appears to us that this is just one of those cases which are constantly coming up in which the heirs of the deceased try to establish a title to his property by asking for a certificate under the provisions of Act XXVII of 1860, and too frequently certificates are given, as in this case, for purposes which are entirely foreign to the law.

We think the whole of the proceedings in this case must be quashed.

Parties to pay their own costs.

The 1st March 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Procedure—Sale in Execution of Decree—Rights of Purchaser—Possession—Sale Certificate—Boundary.

Case No. 751 of 1871.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 15th May 1871, reversing a decision of the Moonsiff of Bancoorah, dated the 27th January 1871.

Raj Bullub Mitter (Plaintiff) *Appellant,*

versus

Bheem Deashee and others (Defendants) *Respondents.*

Baboo Bhyrub Chunder Banerjee for Appellant.

No one for Respondents.

Plaintiff purchased in execution of a decree the rights and interests of a judgment-debtor in a share of a *mouzah*, and was entitled to possession of that share. The sale certificate set forth what title passed by the sale to him and also the boundaries of the *mouzah*. HELD that the Judge, instead of dismissing the suit because the sale certificate did not prove the boundary and the plaintiff had not proved the boundary, ought to have enquired whether the boundaries as stated in the sale certificate included any land other than the *mouzah* in question, and to have decided accordingly.

Kemp, J.—THE plaintiff is the special appellant in the case. He purchased in execution of a decree the rights and interests of one Mooroolee Chowdhry in a 4-anna share of *mouzah* Bykuntpore; he states in his plaint that he purchased the property on the 9th Bysack 1277; that he got possession by *boush nussuh;* and that subsequently he was ousted by the defendants. The defendants denied the ouster, and stated that the boundaries set forth in the plaintiff's sale certificate included three beegahs of land belonging to *mál khamar* of another village.

The Moonsiff, after going thoroughly into the case and commenting at great length on the evidence adduced by both parties, found for the plaintiff, and passed a decree that the plaintiff was to obtain possession of the subject of suit. On appeal, the Judge of Bancoorah reversed that decree. He says that the suit has not been properly laid; that it is a question of boundary; that the plaintiff has had no possession and could not be ousted; that the sale certificate does not prove the boundary; and that the plaintiff has not proved the boundary. Therefore, the Judge dismissed the plaintiff's suit.

We think that the decision of the Judge is wrong. It is admitted that the plaintiff has purchased a 4-anna share of *mouzah* Bykuntpore in execution as against Mooroolee Chowdhry. It is also admitted that he is entitled to possession of that 4-anna share. The sale certificate sets forth what title passed by sale to the plaintiff, and it also sets forth the boundaries of *mouzah* Bykuntpore. Therefore, it was the duty of the Judge to have done what the first Court did, namely, to enquire whether these boundaries as stated in the sale certificate included any land other than that of Bykuntpore; because if they do not include any such land, the plaintiff is entitled to a decree. If, on enquiry it is found that any lands belonging to another *mouzah* are included in those boundaries, the plaintiff would not be entitled to a decree for such lands.

The case will be remanded to the Judge for trial upon the proper issue between the parties. Costs to follow the result.

The 1st March 1872.

Present:

The Hon'ble G. Loch and W. Ainslie, *Judges.*

Limitation—Act XX of 1866 *s.* 51*—Bond-debt—Registration (Act XVI of* 1864)*—Jurisdiction—Place of Payment.*

Case No. 885 of 1871.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 9th June 1871*, affirming a decision of the Subordinate Judge of that district, dated the 14th March* 1871.

Nirbhun Singh (Defendant) *Appellant,*

versus

Kumla Sahoy (Plaintiff) *Respondent.*

Mr. R. E. Twidale for Appellant.

Baboos Romesh Chunder Mitter and *Aubinash Chunder Banerjee* for Respondent.

Under Act XX of 1866 s. 51, the time for bringing a suit for money lent under a bond registered under Act XVI of 1864, is six years.

In this case the bond was executed at Arrah, and provided that payment should be made to plaintiff in person; and though it described plaintiff and defendant as inhabitants of Patna, yet the plaintiff having been admittedly a resident at Arrah at the time the bond was executed and for some years previously, HELD that the intention of the parties was to make the money payable at Arrah, and that consequently the Judge of Shahabad had jurisdiction.

Loch, J.—In special appeal three points have been taken up by the pleader for the appellant.

First,—Limitation.

Second,—Want of jurisdiction.

And Third,—Defect of investigation.

On all three points he has failed to make out his case.

On the first point, he urged that the suit ought to have been brought within three years, three years limitation applying to the suit, under Clause 16 Section 1 Act XIV of 1859. We find that the bond was registered on the 18th August 1865, under the provisions of the Registration Law then in existence (Act XVI of 1864). By Section 3 Act XX of 1866, which repealed Act XVI of 1864, it is provided that all things duly done under the Act repealed shall be considered as having been done under this Act. And under the provisions of Section 51 of Act XX of 1866, all "suits to recover money lent or interest, "or for the breach of any contract, may be "brought within six years from the time "when the cause of suit arose, in every case "in which there is an engagement or con- "tract in writing, provided that such engage- "ment or contract be duly registered under "this Act."

We think, therefore, that under the provisions of Act XX of 1866, the time for bringing this suit is six years, and therefore, it is not barred by limitation.

With regard to the question of jurisdiction, it appears that the bond was executed at Arrah, that it was agreed that the payment should be made to the plaintiff in person, and that in the bond both the plaintiff and the defendant are described as inhabitants of Patna. But it is admitted that at the time the bond was executed, the plaintiff was a resident at Arrah and there holding office, which he apparently had held for some time previously. Under such circumstances, it is clear that the intention of the parties was not to make the money payable at Patna, where the plaintiff was not then residing and had not resided for some time, but to make it payable to him where he was then residing, that is, at Arrah. Under these circumstances, we think that the Court had jurisdiction.

On the third point, it is urged that the plaintiff had, previous to the institution of the present suit, instituted another suit to get rid of the *mokururee* which the defendant stated that he held from the plaintiff; that in that suit he, the defendant, had filed certain *wassil-bakees* of 1271; that he filed copies of them in this case, but wishing to examine the plaintiff himself as to the genuineness of the *wassil-bakees*, he on the 28th February 1871 applied to the Subordinate Judge to send for the original *wassil-bakees* which were then in the other suit pending in the Gya Court; that the Subordinate Judge refused his prayer on the ground that those documents were irrelevant to the case before him. We are now informed, and it is admitted by the pleader for the special appellant, that the case in the Gya Court has been decreed in favour of the plaintiff, and that the *mokururee* has been set aside. Under such circumstances, the *wassil-bakees* on which he depends and which were founded on this *mokururee*, are useless.

We think that the present appeal must be dismissed with costs.

The 4th March 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Rent—Different Tenures—Distinct Jummas.

Case No. 750 of 1871.

Special appeal from a decision passed by the Judge of West Burdwan, dated the 21st March 1871, *reversing a decision of the Additional Moonsiff of Oundah, dated the 28th January* 1871.

Dabee Churn Dey (Defendant) *Appellant,*

versus

Sreeshtee Dhur Chuckerbutty and others (Plaintiffs) *Respondents.*

Baboo Anund Chunder Ghossal for Appellant.

Baboo Bhowanee Churn Dutt for Respondents.

Where the *jummas* of different tenures are distinct the tenures must be treated as distinct and the rent charged accordingly.

Kemp, J.—This was a suit for arrears of rent for the years 1275 and 1276. The plaintiffs' case was that the defendant paid him a consolidated *jumma* of 21 rupees 8 annas. The defendant admits tenancy with reference to two out of the three tenures claimed by the plaintiff, but he says that the tenure which was Bungshee's tenure and which pays a *jumma* of 6 rupees 2 annas is a distinct tenure; and that the rent of the tenure paying 1 rupee 1 anna of rent is not payable to the plaintiff but to another party. The Judge in his decision has found that it matters not how the defendant originally acquired these tenures, and all that was necessary to prove was that rent was due, and he therefore gave the plaintiff a decree reversing the decision of the first Court.

We think that this decision is wrong. If the *jummas* are distinct, they must be treated as such, or it may well be, as shown us by the pleader for the appellant, that the whole tenure might be sold for a small balance accruing upon one or other of these distinct tenures. The case must, therefore, be remanded for the Judge to try what the first Court has tried, namely, 1st whether the *jumma* payable on these three tenures is a distinct *jumma* for each tenure, or a consolidated *jumma* for the three tenures; as also what is the amount of that *jumma;* and to try whether the tenure paying a *jumma* of 1 rupee 1 anna is in the plaintiff's zemindaree or not and whether the rent is payable to him or to a third party.

The 5th March 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Evidence—Old Documents—Proper Custody—Witnesses—Attendance of Parties.

Case No. 914 of 1871.

Special Appeal from a decision passed by the Second Subordinate Judge of Hooghly, dated the 6th May 1871, *reversing a decision of the Moonsiff of Ghattal, dated the 31st January* 1871.

Ramdhun Ghose and others (Plaintiffs) *Appellants,*

versus

Eshan Chunder Ghose and others, (Defendants) *Respondents.*

Baboo Bama Churn Banerjee for Appellants.

Baboos Ashootosh Dhur and *Taruck Nath Sein* for Respondents.

Held that the Subordinate Judge was bound to consider the plaintiff's *pottah* and *amulnamah* as evidence in this case, they being both very old documents, and found in the possession of the party who, in the natural course of things, would be their custodian; and that he ought, before *deciding* against the plaintiff's evidence, to have insisted upon the attendance of one of the parties, who had been cited by them as witnesses, but who had refused to attend.

Glover, J.—We think this case must be remanded to the Court below, inasmuch as the Judge has committed an error in law, which has very probably affected the merits of the case in the way he has looked upon the evidence. The plaintiff, coming in to prove his title, produced amongst other evidence a *pottah* and an *amulnamah*, the one dated 1161, and the other of the year 1216. The Subordinate Judge admits that, from the age of these documents, it was impossible to procure direct evidence of their authenticity; but he rejects them on the ground that they have not been shown to have come from proper custody. Now these documents were filed by the plaintiff with his plaint in the usual way, and it cannot be denied that the proper custody of these documents was with the plaintiff. The point has been more than once ruled in this sense by their Lordships of the Privy Council, and notably so in two cases quoted by the pleader for the special appellant, namely, in the case of Desaji Goyaji and others *v.* Godabhai Godbhai and another, to be found in Volume XI, Weekly Reporter, page 35, in which it is said, with reference to a document which was filed in very much the same way as the *pottah* and *amulnamah* were filed in this case:—"With respect to the custody of the bond, it is in their Lordships' opinion sufficient to state that the bond was produced in the usual manner by the persons who claimed title under the provisions of it, and who therefore were entitled to the possession of it, so that it must be held to have come from proper custody." And also in the case of Vencataswara Naicker, zemindar of Sethapooram, *v.* Alagoo Moohoo Servacarem, to be found in the 4th Volume, Weekly Reporter, page 73, where their Lordships say with regard to certain papers filed:—"They are all of dates which exclude the possibility of direct proof; but they are proved by the production itself to come from the possession of the plaintiff, and the want of formal proof that they were found in his muniment-room cannot be regarded as of any importance in a suit of this description."

It appears, therefore, that the only thing which the plaintiff could do, that is to append the *pottah* and *amulnamah* to his verified written statement, was done, and that this was all that the law required to be done. We may remark, moreover, that no objection on this head was ever taken in the Court below, nor was any slur cast upon their authenticity in consequence of the way in which they were produced in Court, and we think that the Subordinate Judge was not right in rejecting them in the way that he has done. They were very old documents, they were found in the possession of the person who in the natural course of things would be their custodian, and the Subordinate Judge was bound to consider them as evidence. The same remarks apply to a great extent to the *dakhilahs;* many of them are of a very old date, so old that no body could be found alive, able to testify to their genuineness. No doubt there are *dakhilahs* of a later date which could have been proved by the production of the defendant's *Gomastah* or of some other village officials as witnesses; but granting that there has been some want of direct proof on this particular part of the case, it is clear that, with regard to the *dakhilahs* generally and to the *pottah* and *amulnamah*, no objection on the score that they had not come from proper custody was ever taken in the Court below. Now as the ground of the Subordinate Judge's decision adverse to the plaintiff was the fact that his muniment of title and the supporting evidence in the shape of *dakhilahs* was not receivable in evidence, it is impossible to say what his decision might have been had he considered these *dakhilahs* and the *pottah* and *amulnamah* as evidence, for there can be no doubt that they must have influenced in the strongest manner the decision of the case. At all events, we are of opinion that the plaintiff had an absolute right to have the Subordinate Judge's opinion upon them taken as evidence.

Another objection raised by the special appellants was that one of the defendants, Eshan Chunder Ghose, was cited by them as a witness, but refused to attend. The Court of first instance remarked upon his absence in the course of its judgment; and though it is perhaps too much to say that Eshan's recusancy was a sufficient ground for the Subordinate Judge to come to a different judgment, still as the Moonsiff was of opinion that the reasons given by Eshan for his disobedience to the orders of the Court were not sufficient or satisfactory, we think the Subordinate Judge ought to have insisted upon that party's attendance before deciding against the plaintiff's evidence. It is quite clear that, from his position, Eshan must have been able to answer almost every question which the plaintiffs said he could answer. In remanding, therefore, this case to the Court below, we desire that the Subordinate Judge, when considering the whole question of the plaintiff's evidence, will likewise summon and take the deposition of this defendant, Eshan Chunder Ghose, and pass a fresh decision in accordance with the evidence oral and documentary which will then be before him.

The 6th March 1872.

Present :

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Mesne Profits—Mode of Assessment in the case of cultivating Ryots recovering Possession after Ejectment.

Case No. 317 of 1871.

Miscellaneous Appeal from an order passed by the Officiating Judge of Jessore, dated the 13th July 1871, *modifying an order of the Moonsiff of Magoorah, dated the 31st January* 1871.

Shistee Pershad Chuckerbutty and others (Judgment-debtors) *Appellants,*

versus

Kumla Kant Roy (Decree-holder) *Respondent.*

Baboo Woomesh Chunder Banerjee for Appellants.

No one for Respondent.

An ordinary cultivating ryot, recovering possession after ejectment, is entitled to get as mesne profits the net amount that he himself would have got from the land had it remained in his own cultivation.

Glover J.—THIS was a suit for *wassilat* by a cultivating ryot, and the only question involved is the principle on which the mesne profits ought to be calculated.

The Courts below have held that the plaintiff is entitled to recover what he himself would have made of the land, had not his occupation been illegally interfered with by the ousting defendant. The mesne profits were fixed by the Judge (who slightly modified the order of the Moonsiff) at Rs. 638.

In appeal to this Court, it is contended that the principle applicable to claims of this description is the one laid down in the Full Bench decision, Ranee Asmud Kooer *v.* Moharanee Indurjeet Kooer, IX Weekly Reporter, 445, and the plaintiff can only recover a sum equal to the rent of the lands.

I do not think that the Full Bench decision in any way applies to this case. That decision had reference to a very peculiar state of circumstances, when the plaintiff sought to recover the value of an exceptionally risky though valuable crop (indigo), and the Full Bench ruled that she was not entitled to get it.

No general principle was, as I understand the judgment, laid down or anything more enunciated than that, in the peculiar case before the Court, the plaintiff could only measure her mesne profits by the rents collected or that might have been collected by the opposite party. And I think that in Madhub Chunder Dutt *v.* Haradhun Paul, XIV Weekly Reporter, 294, the learned Judges were mistaken in their estimate of the Full Bench decision. One of the Judges who gave that decision (Mr. Justice Seton-Karr) expressly limits the judgment to the particular case before the Bench, and says, "I would carefully "guard myself from expressing an opinion "as to what the principle should be where "a cultivating ryot, holding *jummai* or other "lands which he has cultivated himself for "a considerable time, has been dispossessed "by a wrong-doer." And this was in fact, I think, the meaning of all the Judges.

The proper course to be pursued is, I think, that laid down in Soundaminee Debee *v.* Anund Chunder Holder, XIII Weekly Reporter, 37, and I hold, that an ordinary cultivating ryot, recovering possession after ejectment, is entitled to get as mesne profits the net amount that he himself would have got from the land had it remained in his own cultivation. Care would have of course to be taken that, in making the calculation, the decree-holder was not unduly pressed but was made to bear his fair share of the risks of cultivation. But as to the general principle I have no doubt. If it were otherwise, the party illegally ousting a cultivating ryot might make a very handsome profit, by refunding the rents only, and appropriating the balance over and above, and be a gainer rather than a loser by his illegal acts.

In this case, however, the rates fixed by the Moonsiff are higher than those claimed by the plaintiff, who can hardly be supposed to have under-estimated his losses; and although this error has been rectified by the Judge on appeal, the rates still seem unreasonably high. The net profits decreed to the plaintiff amount to no less than 16 rupees per beegah, a rate, which my experience tells me, is rarely if ever reached even in the very best and most highly cultivated lands on crops of paddy and peas. At the same time there are no data on which we can ourselves make a calculation.

To avoid further litigation, however, I think we might, whilst declaring the principle on which mesne profits in cases like the present ought to be calculated, assess a lump sum as the amount to be paid. And taking all the circumstances into consideration, and especially the low rate which the Moonsiff allowed for expenses of cultivation, I think that we might declare the plaintiff entitled to Rs 500 and give him costs in proportion.

Mitter, J.—I am of the same opinion.

I do not think that the principle laid down in the Full Bench decision, referred to by my learned colleague, is applicable to all cases for mesne profits. The plaintiff in the present case is himself a cultivating ryot, and it is therefore clear that the rent for which the lands for the mesne profits of which this suit is brought could have been let for the years in question, would not be a proper measure of the damages sustained by him; for that or at least something nearly equal to it is the amount which he had to pay to his landlord for those years. The amount of profits which he could have derived from those lands, if he had not been wrongfully ejected by the defendants, is the true measure of his loss; but as this is a question of fact, it is impossible to lay down any definite rule as to the nature of the evidence by which it is to be determined. Looking, however, to the mode of calculation adopted by the Lower Courts, I am unable to say that it is wrong in law, except on one particular point, namely, the omission of the element of risk. I do not think, however, that the case ought to be remanded for the purpose of supplying this omission; and taking the other facts as found by the Lower Courts, I am inclined to think that the amount proposed by my learned colleague would be just and equitable under all the circumstances of the case.

The 6th March 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble Louis S. Jackson, *Judge*.

Presumption of uniform Rent—Act VIII of 1869, *B. C., s.* 4.

Cases Nos. 1353 and 1354 of 1871.

Special Appeal from a decision passed by the Officiating Subordinate Judge of Chittagong, dated the 24th July 1871, *reversing a decision of the Moonsiff of Sitakoond, dated the 21st December* 1870.

Mahomed Manoo Bhooyah (Plaintiff in No. 1353 and Defendant in No. 1354) *Appellant*.

versus

Shaikh Mahomed Asanoollah Chowdhry (Defendant in No. 1353 and Plaintiff in No. 1354) *Respondent*.

Baboo Hem Chunder Banerjee for Appellant.

Baboo Ankhil Chunder Sein for Respondent.

The Subordinate Judge had before him the fact of a *kubooleut* having been given in the year 1200 at a certain rent; and being the Judge who had to decide upon the evidence in the case and what inference was to be drawn from it, he said that it appeared to him that the tenure originated at that time, and that consequently the case did not come under the presumption (provided by Section 4 Act VIII of 1869, B. C.) of uniform rent from the time of the Permanent Settlement, so as to bring the ryot within Section 3 which entitles ryots holding at uniform rent from the time of the Permanent Settlement to receive *pottahs* at those rates. The HIGH COURT sitting in Special Appeal could not say that the Judge was wrong in law in coming to that conclusion.

Couch, C.J.—THE question in this case arises upon Section 4 Act VIII of 1869 Bengal Council. It is to be observed that this Section relates to the mode in which cases may be proved. The defence which the ryot has is given by Section 3 which says that ryots who hold lands at fixed rates of rent, which shall not have been changed from the time of the Permanent Settlement, are entitled to receive *pottahs* at those rates; and then Section 4 for the benefit of the ryot provides that if it shall be proved that the rent has not been changed for a period of twenty years before the commencement of the suit, it shall be presumed that the land has been held at that rent from the time of the Permanent Settlement so as to bring him within the 3rd Section, unless the contrary be shown or unless it be proved that such rent was fixed at some later period.

The Judge says that, "although it is "patent from the proceedings of the suit, "that plaintiff held possession as the owner "of the *tuppah* for upwards of twelve "years"—so far being with the plaintiff— "there is nothing in the case to prove what "is required by Section 4, Act VIII of "1869, B. C., that it has been held at an uni- "form rate of rent from the Permanent "Settlement, and by the plaintiff's *own* show- "ing and the copy of the decision dated "24th December 1849, it appears that the "*tuppah* originated in the year 1200;—conse- "quently, the case does not come under the "presumption provided by Section 4 of the "Rent Law." By that I understand him to mean that it appeared to him from the decision of the 24th of December 1849 that the rent of 53 rupees was fixed in the year 1200.

I think this was an inference which he might draw from that decision; and unless we come to the conclusion, not merely that he was not at liberty to draw it, but that he was bound to infer from what appeared in that decision that the rent had been the same previously to the giving of the *kubooleut*, there is no error in law in his finding that the rent was fixed in the year 1200. There was before him the fact of a *kubooleut* being given at that time at a rent of 53 rupees. Being the Judge who had to decide upon the evidence in the case, and what inference was to be drawn from it, he says that it appeared to him that the tenure originated at that time. We cannot say that he was wrong in law in coming to that conclusion. The question is not whether, if we were sitting in his place and trying the case as a Regular Appeal, we should come to the same conclusion, but whether he was bound to come to a different one. I think he was not, and therefore we cannot see that any ground has been shown in this case for disturbing his finding.

And then he afterwards finds as a matter of fact that besides the *dakhilahs* for seven years and certain decisions dated subsequently to the year 1200 *Mughee*, which seems to be the origin of the plaintiff's title, there is no other evidence of a satisfactory nature. That is the same kind of finding that he had made in the previous part of his decision. I think his decision must be affirmed in both cases, with costs.

Jackson, J.—I am of the same opinion.

The 6th March 1872.

Present:

The Hon'ble A. G. Macpherson and Dwarkanath Mitter, *Judges.*

Estoppel—Plea and Decree in former Suit.

Case No. 810 of 1871.

Special Appeal from a decision passed by the Judge of Cuttack, dated the 21st March 1871, *affirming a decision of the Subordinate Judge of that district, dated the 2nd August* 1870.

Moonshee Abdool Gunee and another (Defendants) *Appellants,*

versus

Kishanund Doss, *alias* Kebul Ram Doss (Plaintiff) *Respondent.*

Mr. C. Gregory and *Baboos Romesh Chunder Mitter* and *Bhowanee Churn Dutt* for Appellants.

Baboos Unnoda Pershad Banerjee and *Mohesh Chunder Chowdhry* for Respondent.

In a former suit A. G. (appellant) sought to establish his right, in execution of his decree against R. R., to have a talook sold as belonging to R. R. D. S., a defendant in that suit, pleaded that the whole talook had been conveyed to him absolutely by his father R. R., under a *hibbanamah*. An issue was raised and tried whether the talook belonged to D. S. or not; and it was expressly decided that it did not, and that the zemindaree was liable to be attached and sold in execution of A. G.'s decree as belonging to R. R. HELD that it was not open to D. S. or to plaintiff claiming under him now to come into Court and ask for a declaration of his right to a half share of the talook as against A. G.

Macpherson, J.—IN this case, the Subordinate Judge gave a decree declaring that the defendant, Dribo Singh, is the proprietor of a moiety of Talook Ejapore, and he ordered the present appellants, who are the third and fourth defendants in the case, to pay the costs of the suit.

On appeal that order was affirmed with costs.

It appears to us that the order was wrong and ought to be reversed, and that the plaintiff's suit should be dismissed with costs.

The object of the suit is to obtain a declaration that the plaintiff is entitled to attach and sell an eight annas share of Talook Ejapore as being the property of Dribo Singh. The other defendant Chowdhry Rajah Ram is the father of Dribo Singh: and the interest, if any, of Dribo Sing in this property, is a joint and undivided interest, no partition having taken place, it is alleged, between Dribo Singh and his father Rajah Ram.

It appears that the appellants purchased this Talook Ejapore at a sale held in August 1863 in execution of certain decrees which had been obtained against Chowdhry Rajah Ram, the father of Dribo Singh. The first of these decrees is dated the 6th August 1844; and the other decrees are dated respectively in May, June, and July 1859. Considerable litigation took place as to the right to Talook Ejapore, and the nature of Chowdhry Rajah Ram's interest in it, and the sale did not take place till August 1863 when the present appellants were declared the purchasers. The appellant Abdool Gunee, before the purchase, was the holder of the decrees in execution of which the property was sold.

Prior to 1858, Abdool Gunee had attempted to execute the decree of the 6th August 1844 against Chowdhry Rajah Ram and had attached this Talook Ejapore. He was opposed by Dribo Singh, and in the summary proceedings which were held in consequence, the Court decided in favour of Dribo Singh, and released the property from attachment.

The property being released, Abdool Gunee brought a regular suit to establish his right to have the Talook sold in execution of his decree as being the property of Chowdhry Rajah Ram. In that suit, Dribo Singh was a defendant; and he pleaded that the Talook (the whole sixteen annas of it) had been conveyed to him absolutely by his father under a certain *hibbanamah*. He did not plead that he was entitled to an eight annas share in the property, it being ancestral. The suit went to trial on that issue, and it was decided that the *hibbanamah* was not genuine, and that the property had never been conveyed by his father to Dribo Singh, and the decree was that the disputed zemindaree should be attached and sold in execution of the decree of which Abdool Gunee was the holder.

Thereupon there was an appeal and some further litigation on the details of which we need not enter. The decree which declared Abdool Gunee's right to have the property sold is dated the 30th March 1858. The plaintiff now before us instituted proceedings against Dribo Singh on a bond alleged to have been executed by him on the 11th December 1861. Having got a decree on that bond, he instituted the present suit seeking a declaration that Dribo Sing is still entitled to an eight annas share of this Talook, so that he may proceed to execute his decree against that undivided share.

There are various objections to the case made for the plaintiff which might be taken by the appellants: but one beyond which it is not necessary for us now to go, will be found in the decree of the 30th March 1858 in which it was declared as against Dribo Singh that the property was not the property of Dribo Singh, but belonged to Rajah Ram, his father, and was liable to be sold in execution of the decree of Abdool Gunee.

Both the Lower Courts have held that that decree is not admissible as evidence in this suit. It appears to us not only that it is evidence, but that it puts the plaintiff entirely out of Court.

In that suit the issue was raised and tried whether Talook Ejapore belonged to Dribo Singh or not; and the Court expressly decided that it did not, and that the zemindaree was liable to be attached and sold in execution of Abdool Gunee's decree as belonging to Rajah Ram. It appears to us that it is not open to Dribo Singh now to come into Court and ask for a declaration of his right to an eight annas share as against Abdool Gunee when he failed wholly in the suit in 1858. If he had a title to one-half of the whole property which he chose to keep back when the suit of 1858 was pending, he cannot now set up that title, and ask the Court to give him a decree establishing it. And if Dribo Singh cannot claim this eight annas of the estate as against the appellants, no more can the present plaintiff, who has no *locus standi* in Court at all except through and under Dribo Singh. If Dribo Singh had now any right or interest in the property, possibly the plaintiff's suit might lie. But if Dribo Singh has no title, we fail to see how the present plaintiff can have any.

The plaintiff's suit ought to be dismissed on the ground that the decree of the 30th March 1858 has expressly decided that this Talook Ejapore did not belong to Dribo Singh but belonged to Chowdhry Rajah Ram.

The decree of the Lower Courts must be reversed and the plaintiff's suit dismissed with all costs.

The 21st February 1872.

Present:

The Hon'ble Louis S. Jackson and F. A. Glover, *Judges.*

Estoppel—Cause of Action—Putnee and Mowrosee Titles.

Case No. 1242 of 1871.

Special Appeal from a decision passed by the Additional Judge of Jessore, dated the 4th July 1871, *reversing a decision of the Moonsiff of Magoorah, dated the 22nd August* 1870.

Aunungo Mohun Deb Roy (one of the Defendants) *Appellant,*

versus

Unnoda Dossee and others (Plaintiffs) *Respondents.*

Baboo Doorga Mohun Doss for Appellant.

Baboo Gopal Lall Mitter for Respondents.

Plaintiff, after failing in a former suit to establish her right to certain land as belonging to her *putnee talook*, was not allowed to fall back on a different title and bring a second suit claiming the same land as belonging to her *mowrosee*, the cause of action in both cases being really the same.

Jackson, J.—It appears to us that in this case the decision of the Moonsiff was right and that the Judge erroneously reversed that decision.

The plaintiff had brought a former suit against the very same parties to establish the rights of a proprietor over the land which is now again in dispute, alleging that land to belong to the *putnee talook* which the plaintiff held. This suit was dismissed. The plaintiff then brought this second suit, alleging that the land belonged to a *mowrosee* held by her in the same *mousah;* and it is alleged that this suit was caused and justified by the allegation of the defendant in the first suit.

Now, the cause of action in both cases was really the same, namely, the infringement of the plaintiff's right to the rents of that land by whatever title the plaintiff was entitled to those rents. If the plaintiff had a double title as *putneedar* and as *mowroseedar* which he now speaks of, it was his business to allege both titles in the first suit. He cannot, after failing in his original allegation, fall back on a different title in order to the recovery of the same land. The cause of action is the infringement of the plaintiff's right and not the assertion of any given right by the defendant.

The judgment of the Lower Appellate Court must be set aside and that of the Moonsiff dismissing the suit must be restored with costs.

The 21st February 1872.

Present:

The Hon'ble Louis S. Jackson and F. A. Glover, *Judges.*

Arbitration—Judgment according to Award—Act VIII of 1859 *s.* 325*—Language of Decision.*

Case No. 1203 of 1871.

Special Appeal from a decision passed by the Judge of Twenty-four Pergunnahs, dated the 7th July 1871, *affirming a decision of the Additional Moonsiff of Alipore, dated the 13th January* 1871.

Huro Soonduree Debee and others (Defendants) *Appellants,*

versus

Sreedhur Bhuttacharjee and others (Plaintiffs) *Respondents.*

Baboo Nil Madhub Sein for Appellants.

Baboo Kalee Prosunno Dutt for Respondents.

The addition, in a judgment according to an award, of a trifling direction upon a matter not referred to the arbitrators, which was quite separable from the other parts of the award, and did not affect the decision on the matter referred, was held to come within the concluding part of Act VIII of 1859 s. 325, and not to affect the finality of the judgment.

A Judge whose vernacular language is English, ought to write his decision in his own language.

Jackson, J.—The decision of the Moonsiff appears to have been given substantially in accordance with the award, merely a trifling direction upon a matter which had not been referred to the arbitrators being superadded. That, however, it appears, was quite separable from the other parts of the award, and did not affect the decision on the matter referred. That being so, we think the case comes within the concluding part of Section 325, and the judgment being according to the award, it was final.

The Judge appears to have rejected the appeal to his Court on the same ground, so far as we can discover from the vernacular note of his order, which is the only decision to be found. The Judge ought to have written the decision in his own language, but that does not affect the validity of his decision, and the special appeal must be dismissed with costs.

The 22nd February 1862.

Present:

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Act X of 1859 *ss* 108-110*—Sale in Revenue Court—Sale in Civil Court—Sale at instance of Sharers—Sale of whole Tenure.*

Case No. 1247 of 1871.

Special Appeal from a decision passed by the Judge of Twenty-four Pergunnahs, dated the 27th June 1871, *reversing a decision of the Moonsiff of Alipore, dated the 13th August* 1870.

Grish Chunder Mitter (Plaintiff) *Appellant,*

versus

Shaikh Jhakoo and another (Defendants) and another (Intervenor) *Respondents.*

Baboo Taruck Nath Dutt for Appellant.

Baboos Bhowanee Churn Dutt and *Opendro Chunder Bose* for Respondents.

A sale in the Revenue Court upon a decree for rent obtained at the instance of the *ijaradar* and *locum tenens* not of the sole owner or the whole body of owners, but of the owner of a fractional share of the estate, The special appeal must therefore be allowed and the case remanded for trial on the merits. Costs to follow the result.

The 7th March 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Limitation—Execution of Decree—Boná fide Proceeding to keep Decree alive—Arrest not carried out.

Case No. 25 of 1872.

Miscellaneous Appeal from an order passed by the Judge of Dacca, dated the 8th December 1871, *reversing an order of the Sudder Moonsiff of that district, dated the 29th August* 1871.

Joykishen Shaha and others (Judgment-debtors) *Appellants,*

versus

Bishokha Moyee Chowdhrain and others (Decree-holders) *Respondents.*

Baboo Doorga Mohun Doss for Appellants,

Baboos Unnoda Pershad Banerjee and *Huree Mohun Chuckerbutty* for Respondents.

An application to arrest which is not carried out is a *boná fide* proceeding taken with the intention of keeping the decree alive, only when the judgment-creditor can show that certain circumstances happened that rendered it unnecessary for him to proceed further against the judgment-debtor in execution of that process.

Kemp, J.—THIS is an appeal on behalf of the judgment-debtor, who contends that the decree was barred, that the judgment of the first Court is correct, and the judgment of the Appellate Court, the Judge of Dacca, wrong. The decree was passed on the 26th of January 1866. The first step taken was on the 15th of June 1867, notice was served on the 22nd of June of that year, and the case was struck off on the 3rd August 1867. The next application was made on the 20th of January 1868, the record appears to have been sent for, and an order passed that the execution was to proceed. The decree-holder put in *talubanah* on the 7th of March 1868, and on the 9th of April of that year a writ of arrest was issued. The Mookhtear of the decree-holder then applied stating that he would not take out a writ of arrest, and the case was struck off on the 20th of June 1868. A third and last application was made on the 3rd June 1871. The question, therefore, is whether the proceedings of April 1868 was a *boná fide* proceeding taken with the intention of keeping the decree alive.

The first Court has held that it was not so, and has given its reasons for that opinion. The Judge, without trying that point which was really the only point he had to try, has considered by analogy that an application to arrest which is not carried out is analogous to an application to send a certificate to another district, and therefore the proceeding of the decree-holder was *boná fide.*

We think, there can be no analogy whatever between the two proceedings, as the proceedings on an application for a certificate are matters entirely in the hands of the Court, and carried out by the Court itself. But in this case, we think, the Judge ought to have found whether the proceeding of the 23rd of April 1868 was a *boná fide* proceeding or not. A person may make an application to take out process of arrest as has been done in this case, and he may be able to show that certain circumstances happened that rendered it unnecessary for him to proceed further against the judgment-debtor in execution of that process; and if the decree-holder in this case can show some good reason why that process was not carried on to the point of execution, then the judgment of the Judge may stand. But as there has been no enquiry into that point, we think that the case must go back to the Judge for him to try whether that proceeding, looking to all the circumstances in the case and after calling upon the judgment-creditor to show why it was not carried to the point of execution, was *boná fide* and pass a fresh decision.

We refer the Judge to a case reported in Volume XIV, Weekly Reporter, page 112.

The 7th March 1872.

Present:

The Hon'ble A. G. Macpherson and Dwarkanath Mitter, *Judges.*

Notice of Enhancement—Act X of 1859 *s.* 17 *—First ground.*

Case No. 844 of 1871 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Cuttack, dated the 20th March 1871, *affirming a decision of the Assistant Collector of that district, dated the 15th February* 1871.

Shib Narain Dutt (Defendant) *Appellant*,

versus

Ekramoonissa Begum (Plaintiff) *Respondent.*

Baboos Amarendro Nath Chatterjee and *Kumla Kant Sein* for Appellant.

Baboo Bhowanee Churn Dutt for Respondent.

In enhancing rents on the first of the grounds specified in Section 17 Act X of 1859, not only must the amount of rent paid by neighbouring ryots be considered, but also the class of the ryots and whether the lands in question are similar to the lands held by the neighbouring ryots and enjoying similar advantages.

In this case a notice based on that ground and specifying "that the rates paid are below those paid for similar lands in adjacent places" was held to be bad.

Macpherson, J.—THIS was a suit for enhancement of rent. The notice of enhancement is not on the record; but the Judge, in his judgment, says that the grounds were, "1st, that the productive power of the lands has increased otherwise than by the agency of the ryot; 2nd, that the quantity of land held is in excess of that for which rent has been paid; and 3rd, that the rates paid are below those paid for similar lands in adjacent places."

The parties having subsequently given up all questions as to the quantity of land being in excess, nothing turns upon that issue.

As regards the third ground, it is to be remarked that if the actual notice is as general in its terms as is the statement given of it by the Judge, the notice is bad, because it is not according to Section 17 Act X of 1859.

The defendant chiefly relied on a pottah under which he had held the land for many years, and under which he contended he was not liable to enhancement at all; but he also urged that the productive powers of the land had been increased by his agency and at his expense, and not otherwise.

The Judge remanded the case in order that the Lower Court might decide whether or not the productive powers of the land had been increased otherwise than by the agency or at the expense of the ryot: and that Court held that the productive powers of the land had been increased otherwise than by the agency or at the expense of the ryot. But on the case coming back before the Judge, he found as a fact that the "plaintiff failed to show that the value of the productive powers of the land had increased otherwise than at the ryot's expense."

The Judge, thereupon, abandoning that ground, says that it is right to take the average of payments made by neighbouring ryots as showing the prevailing rate; and on the ground that the rent paid by the defendant was lower than that paid by neighbouring ryots, holds that he is liable to enhancement and gives the plaintiff a decree according to the average rate paid by neighbouring ryots.

Upon the facts as found by the Judge, the plaintiff is now reduced to rely on the first only of the grounds given in Section 17 of Act X of 1859; and the facts found by the Judge do not bring the case within the provisions of that first ground. There is nothing whatever to show that the rents, which have been taken into consideration by the Judge in fixing the average, are rents payable by ryots of the same class as the defendant for lands of similar description and enjoying similar advantages.

It is quite insufficient in enhancing rents on the first of the ground specified in Section 17 merely to consider the amount of rent paid by neighbouring ryots. It is necessary to consider the class of the ryot, and also whether the lands are similar to the lands held by the neighbouring ryots, and enjoying similar advantages.

In the case before us, for instance, we have a man who has held for very many years under a lease, the land which he took being jungly when he entered on it: and he having brought certain portions of it into cultivation. Before his rent can be enhanced on the ground that it is less than that paid by other persons in places adjacent, it is necessary to find if those other persons are ryots of the same class holding land of a similar description and with similar advantages. It is clear that no fair comparison can be made between the defendant and other persons in his neighbourhood unless the position of those others is substantially similar to that of the defendant.

In short, the case of the plaintiff, before it can succeed, must be one in which each item of the ground relied on is made out; and without each item being made out, the suit for enhancement fails.

Under these circumstances, we dismiss the plaintiff's suit, such a state of facts not having been proved as entitles him to an enhanced rent. If the plaintiff still thinks that he can prove his right he can bring a fresh suit to establish it.

The judgment of the Lower Appellate Court is reversed and the plaintiff's suit dismissed with all costs.

The 7th March 1872.

Present :

The Hon'ble A. G. Macpherson and Dwarkanath Mitter, *Judges.*

Resumption—Lakheraj—Service of Summons on house of deceased Defendant—Effect of Decree (on defendant not served).

Case No. 857 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Burdwan, dated the 5th April 1871, *reversing a decision of the Moonsiff of Memaree, dated the* 31*st December* 1870.

Mohesh Chunder Sein Goopta (Plaintiff) *Appellant,*

versus

Dhun Monee Dossee and others (Defendants) *Respondents.*

Baboos Mohesh Chunder Chowdhry and *Nund Lall Ghose* for Appellant.

Baboos Hem Chunder Banerjee and *Juggut Doollub Bysack* for Respondents.

A suit for resumption was instituted against A, B, and C. The summons was not served on A, he being dead at the time it was issued, and, as B could not be found, the summons was served by being affixed to the *sudder* gate of A's and B's house. An *exparte* decree was passed as against A and B, declaring that the tenure was invalid *lakheraj*, and that the land was the plaintiff's *mâl* land. HELD that there was no decree declaring the *lakheraj* invalid, which was a good and binding decree against C and those claiming under him; and that, as the summons was not served on A, nor his representatives made parties to the suit, the whole of the proceedings in the suit were utterly infructuous except as concerned B, there having been great irregularity and carelessness on the part of the Court in allowing the suit to proceed at all against A under such circumstances.

Macpherson, J.—WITHOUT going into the questions that have been raised by Baboo Moshesh Chunder Chowdhry in this special appeal, and without touching upon the grounds taken by the Lower Courts, it appears to us that the suit of the plaintiff has been rightly dismissed, and therefore that we ought not to interfere with the decree which has been made.

The suit is for a *kabooleut* and to determine the rate of rent to be assessed on certain land which was resumed in 1863, when an *exparte* decree was passed declaring that the tenure was invalid *lakheraj*, and that the land was the *mâl* land of the plaintiff. The suit for resumption was instituted against three persons, Sadoo Churn, Brijo Bullub, and Nowruttun. It appears that the summons in that suit was never served on Sadoo Churn who was dead at the time when it was issued. The return of the peon is to the effect that Sadoo Churn was dead; that the second defendant Brijo Bullub could not be found; and that therefore he had served the summons by affixing it to the *sudder* gate of the dead man's and Brojo Bullub's house. As regards Nowruttun, it is immaterial whether he was served or not, because the decree was against Sadoo Churn and Brojo Bullub only, it being expressly stated that Nowruttun was released, that is, that there was no decree whatever against him.

The principal respondent, Dhun Monee Dossee, represented by her pleader Baboo Hem Chunder Banerjee, claims through a conveyance of the property made to her by Nowruttun's widow; and Baboo Hem Chunder argues, and argues properly, that so far as Nowruttun and those claiming under Nowruttun are concerned, this land has never been legally resumed, that is to say, that there is no decree declaring the *lakheraj* invalid which is a good and binding decree against Nowruttun and those claiming under him.

It seems to us that this objection is good, and that there is nothing in that decree of 1863 which is binding on Nowruttun and those claiming under him. Moreover, the whole proceedings in that suit seem to have been utterly infructuous except so far as Brojo Bullub is concerned, because the summons was not served on Sadoo Churn he being dead, and his representatives were not made parties to the suit.

There was great irregularity and carelessness on the part of the Court in allowing the suit to proceed against Sadoo Churn at all, under such circumstances.

We affirm so much of the decree of the Lower Court as dismisses the plaintiff's suit with costs, and therefore we dismiss this appeal with costs.

The 8th March 1872.

Present :

The Hon'ble A. G. Macpherson and Dwarkanath Mitter, *Judges.*

Appellate Court—Reversal of decision on important questions of fact (Reasons for)—Right of occupancy—Khas possession—Enhancement.

Case No. 1397 of 1871.

Special Appeal from a decision passed by the Additional Subordinate Judge of Chittagong, dated the 13*th September* 1871, *modifying a decision of the Moonsiff of Hathasaree, dated the* 29*th December* 1870.

Munsoob Bibee (one of the Defendants)
Appellant,

versus

Ali Meah (Plaintiff) and another (Defendant)
Respondents.

Baboo Preonath Banerjee for Appellant.

Baboo Bhowanee Churn Dutt for Respondents.

An Appellate Court is not justified in reversing a decision on an important question of fact without showing distinctly the grounds on which it acts.

Proof of defendant's right of occupancy by her possession for more than 12 years, even though she might have failed to prove her *pottah* was a sufficient answer to plaintiff's claim to *khas* possession of the land in question; and the Subordinate Judge was held to have gone quite out of his way to declare that the plaintiff could enhance defendant's rent.

Macpherson, J.—THE Lower Appellate Court was satisfied that the defendant, who is now appellant before us, proved that she had held possession for more than 12 years: and this was in itself a sufficient reason for dismissing the suit of the plaintiff. As to the genuineness of the *pottah* pleaded by this defendant, the Subordinate Judge reversed the decision of the Moonsiff without giving any reason for doing so.

An Appellate Court is not justified in reversing a decision on an important question of fact, without showing distinctly the grounds on which it acts. Moreover, in the present case, the Subordinate Judge has gone out of his way to declare that the plaintiff can enhance the defendant's rent—a most unnecessary proceeding on the part of the Subordinate Judge inasmuch as the only issue to be determined in the suit was whether the plaintiff was entitled to *khas* possession: and to *khas* possession he could not be entitled if the defendant had acquired a right of occupancy, even although she might have failed to prove her *pottah.*

As the judgment of the Subordinate Judge as to the *pottah*, is most insufficient and unsatisfactory, and as on proof of the defendant's possession the plaintiff's suit ought simply to have been dismissed, we shall set aside the decisions both of the Lower Appellate Court and of the Court of first instance as to the *pottah* and shall merely order and decree that the plaintiff's suit be dismissed. We also set aside so much of the judgment of the Subordinate Judge as says that the plaintiff can enhance the rent of the appellant's tenure. We thus leave all questions as to whether the *pottah* is genuine, and whether the plaintiff has a right to enhance, open questions not decided in this suit. The only thing finally decided now is that the appellant has proved her possession for more than 12 years, and that therefore the plaintiff cannot have the particular remedy which he seeks, namely, *khas* possession of these lands. The appellant will get her costs in this Court and in the Lower Appellate Court.

The 11th March 1872.

Present:

The Hon'ble H. V. Bayley, and A. G. Macpherson, *Judges.*

Costs of Remands—Amendment of Decree—Delay.

Case No. 250 of 1871.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Mymensingh, dated the 13*th May* 1871, *modifying an order of the Sudder Moonsiff of that district, dated the 2nd December* 1869.

Oodoy Tara Chowdhrain (Decree-holder)
Appellant,

versus

Syud Jonab Ali Chowdhry (Judgment-debtor) *Respondent.*

Baboo Gopal Lall Mitter for Appellant.

Baboos Nullit Chunder Sein and *Doorga Mohun Doss* for Respondent.

Where a decree-holder came in, after the lapse of some 8½ years and when one of the Judges who made the order had ceased to be a Judge of the Court, to ask for an amendment of the decree by allowing her the costs of all the remands that took place in the case—HELD that after such a delay the Court could not make such an order or even say whether the decree-holder was entitled to these costs.

Macpherson, J.—IT appears to us that this appeal ought to be dismissed with costs.

The Lower Court has carried out the order contained in the decree of 12th February 1868, that is, the Lower Court has given the appellant the costs incurred by her in the Lower Court in the proceeding which led to the appeal in which the decree of 12th February 1868 was passed.

It now appears that, prior to the appeal on which that decree was made, there had been several other appeals to this Court and several remands to the Lower Court and the contention of the present appellant is that the costs incurred by her in the Lower Court and referred to in the decree of February 1868, ought to include all costs incurred in the course of the several remands. The appellant in fact comes in now after the lapse of 3½ years, and when one of the Judges who made the order has for some years ceased to be Judge of this Court, to ask us to amend the decree of February 1868, by adding that she is to get the costs of all the remands. It seems to us that after such delay, we cannot make such an order; and it is perfectly impossible for us to say now whether the appellant has any good ground for the contention which she now makes that she ought to have had these costs. If the appellant considered that she was entitled to them, it was her duty, or that of her pleader, to see that they were expressly provided for by the decree, or to come in within a reasonable time and ask to have the decree amended.

The 11th March 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Cutting of Bunds—Injunction—Cause of Action—Property—User—Injury to Neighbour's Property.

Case No. 989 of 1871.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 26th June 1871, affirming a decision of the Moonsiff of Bishenpore, dated the 24th February 1871.

Nund Kishore Singh and others (Defendants) *Appellants,*

versus

Hakim Ram Kishore Singh Deb (Plaintiff) *Respondent.*

Baboo Chunder Madhub Ghose for Appellants.

Baboo Nil Madhub Sein for Respondent.

In a suit to have the portion of a bund cut by the plaintiff closed up, and for an injunction restraining the defendant from so cutting the bund in future as to injure the plaintiff, HELD that it was material to try the question whether the plaintiff had a cause of action, and also the question as to the property in the bund, because, if the bund belonged exclusively to the plaintiff, the defendant, unless he could prove a right of user, was a trespasser, and on the other hand, if it belonged exclusively to the defendant, it would be necessary to enquire whether the defendant had so used his own property as to injure the property of his neighbour.

Kemp, J.—THE plaintiff, special respondent before us, sued alleging that a *jolashoy* or sheet of a water called Lâlband was in the possession of his father, who by a deed of gift gave it to the mother of the plaintiff, who by a will devised it to the plaintiff's wife; and that, upon her death, the plaintiff for himself and as guardian of his minor sons is in possession; that on the southern *pakar* of the Lâlband tank or northern *pakar* of the defendant's Chowgond *jolashoy*, the defendant has cut 20 haths of that *pakar* from east to west, 15 haths from north to south, and 5 haths in depth. The plaintiff does not say that he has sustained any injury by this act of the defendant, but he brings his suit with the object of having the portion of the bund cut by the defendant closed up, and for an injunction upon the defendant to prevent him in future from cutting these *pakars* so as to injure the plaintiff.

Several objections were taken to the plaintiff's suit: 1st, as to undervaluation; 2nd, that he had no cause of action; and, 3rd, that he had no title whatever in the bund, inasmuch as the right, title, and interest of his father had been previously sold in execution of a decree, and had passed to a third party. Then on the merits it is contended that the bund in dispute is on the defendant's land, and that it has not been shown that the bund in dispute is on the defendant's land, and that it has not been shown that the defendant has cut the bund so as to injure the plaintiff; that the defendant has a perfect right to use his property in such a way as he deems proper, so long as he does not injure the plaintiff.

The Judge appears to have decided this case in a most perfunctory manner. He says that it is perfectly immaterial in whom the title rests, and that the question as to the property in the bank does not arise. Now in this case it is very material to decide that question, because, if the bund in dispute belongs exclusively to the plaintiff, the defendant, unless he can prove a right of user is a trespaser, and on the other hand, if it belongs, as found by the first Court, exclusively to the defendant, the Judge ought to enquire whether the defendant has so used his own property as to injure the property of his neighbour, under the maxim "*sic utere tuo ut alienum non lædas,*" that is to say, "use your own property in such a way as not to injure other persons." The Judge has entirely lost sight of this maxim of law in deciding this case. He also has come to no decision whatever as to whether the plaintiff has any cause of action in this case. It appears from the plaintiff's own plaint, that what the defendant has done, has in no way injured him, and the decree of the Court below seems to be to the effect that the defendant is to be restricted from any interference whatever with his own property.

With reference to the question as to the plaintiff's title in the property, we observe that the third party to whom it is alleged that this property has passed by sale was made a party and has not objected. That question, therefore, is, we think, not material.

The case will go back for the Judge to decide, 1st, whether the plaintiff has made out any cause of action; 2ndly, to find whether the title in the disputed bank is with the defendant or with the plaintiff; and if he finds that the title is with the defendant, he will then proceed to try the question of law whether the defendant has used his property so as to injure the plaintiff, and he will pass a fresh decision accordingly.

Costs to follow the result.

The 11th March 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble Dwarkanath Mitter, *Judge.*

Fishery—Right—Damages—Mesne Profits—Limitation—Decision on Merits.

Application forwarded by the Judge of Shahabad, pursuant to the Rule annexed to Circular Order No 13, dated the 4th June 1870.

Shaikh Elahee Buksh, *Petitioner,*

versus

Baboo Sheo Narain Singh and others, *Opposite party.*

Mr. C. Gregory for Petitioner.

No one for Opposite party.

Plaintiff brought a suit to establish his right to a fishery which was finally decided in his favor. Whilst that suit was pending, he sued in the Small Cause Court to recover damages from defendants for obstructing him from fishing, and his suit was dismissed as premature. After the final determination of the suit in which his title to the fishery was tried, he brought the present suit to recover damages, and the Small Cause Court decided that the suit being for damages to personal property ought to have been brought within a year from the time of the injury having been committed, and that the case was barred by the former decision as being a decision on the merits. HELD that the suit was not one for damages for injury to personal property, but for mesne profits, and that the six years' limitation was applicable to it.

Couch, C. J.—THE plaintiff in this case sued in the Small Cause Court to recover damages from the defendants which had been occasioned by their obstructing him from fishing in the river Ganges.

It appears that the right of the plaintiff so to fish was the subject of another suit which was finally decided in his favor, and that he having, whilst that suit was pending, brought a suit in the Small Cause Court of a similar nature to the present, it was dismissed as being premature. The present suit was brought very soon after the final determination of the suit in which the title to the fishery was tried.

The Judge of the Small Cause Court held that the present suit was a suit for damages to personal property, and ought therefore to be brought within a year from the time of the injury being committed. He also said that the case was clearly barred by the previous decision which, he says, was a decision on the merits.

We think he is wrong in both these opinions. This is not a suit for damages for injury to personal property. It is in fact a suit to obtain from the defendant the profits which he might have gained from the fishery, which he is entitled to, and which he had been prevented by the act of the defendant from obtaining. It is really in the nature of a suit for the mesne profits of the fishery during the period for which he was kept out of the enjoyment of it by the defendant, and the period not of one year but of six years is applicable to such a suit.

The Judge of the Small Cause Court, therefore, was wrong in that part of his decision. He seems also to have been wrong in treating the previous decision as a decision on the merits. It is stated, expressly, in the judgment of the Court, that the reason why the first suit was dismissed was that it was prematurely brought; and it was prematurely brought, because at that time the question of title was not determined, and it was impossible to say whether the plaintiff would be entitled to recover at all in any such suit. This suit has been treated improperly by the

Small Cause Court. It should have been looked upon, as we have stated, as in the nature of a suit for mesne profits, and the law of limitation applicable to such a suit ought to have been applied to it.

The judgment of the Small Cause Court must be reversed, and the suit sent back to that Court for retrial.

The 11th March 1872.

Present :

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Appellate Court—New Issues—Evidence.

Case No. 56 of 1872.

Special Appeal from a decision passed by the First Subordinate Judge of 24 Pergunnahs, dated the 12th September 1871, reversing, a decision of the Moonsiff of Barasat, dated the 31st October 1872.

Latoo Mundul (Plaintiff) *Appellant*,

versus

Bhoobun Mohun Chatterjee and others (Defendants) *Respondents.*

Baboo Hem Chunder Banerjee for Appellant.

Baboo Preonath Banerjee for Respondents.

Where a quite new and different issue is raised in the Appellate Court, it ought to be done in such a way as to give the parties the fullest opportunity of producing evidence upon it, because if it is at all likely that, in consequence of the issues framed in the first Court, the parties were induced to abstain from giving evidence, it would not be right to decide the issues against them on account of the absence of evidence.

Couch, C. J.—In this case it appears that the substantial defence raised by the defendant, Bhoobun Mohun Chatterjee, was, that the lands which were the subject of the suit belonged to Noor Mahomed, and that the debtors, whose right and interest had been purchased by Rowshun Ali, had not any right and interest in the lands. It is true that the defence went on to state, in another paragraph, that the plaintiff had not possession, but that allegation appears to have been made not so much as a distinct defence as the conclusion drawn from the previous statements, which really set up the substantial defence. It was so treated by the Moonsiff, because he framed two issues, the first being whether the law of limitation applied to the plaintiff's claim; and the second, as an issue of fact, whether the lands in dispute belonged to the debtors, Dusrutoollah Mundul, and others, whose rights and interests have been purchased by Rowshun Ali, and others, landlords of the plaintiff, or to Noor Mahomed, whose heirs have sold their interests to Bhoobun Mohun Chatterjee. That was an issue upon the substantial defence which was set up.

Then the Moonsiff having tried the case upon that issue and decided it in favor of the plaintiff, the defendant Bhoobun Mohun Chatterjee appealed, and the Judge, according to his judgment, does not lay down a fresh issue which he might have done, but he says that the points which arise for determination in this appeal are, *first*, whether it is true that the plaintiff having been in possession of the disputed land as a tenant, was dispossessed therefrom by any of the defendants, and *second*, whether it is true that the defendants misappropriated the paddy crops prepared by the plaintiff, on the said land. This was framing an entirely new issue which, no doubt, he might do if he thought it right, but then Section 354 Act VIII of 1859 points out what course ought to be adopted when a new issue is framed. It says, if the Lower Court shall have omitted to raise or try any issue which shall appear to the Appellate Court essential to the right determination of the suit upon the merits, and the evidence upon the record is not sufficient to enable the Appellate Court to determine such issue, the Appellate Court may frame an issue for trial by the Lower Court, and may refer the same to the Lower Court for trial. Now, here, it could not be said that the evidence on the record was sufficient to enable the Appellate Court to determine such an issue as that, because the parties, not having had their attention directed to that question in the Moonsiff's Court, would not have thought it necessary to give evidence upon it. It would not be right for them to do so, and it would be superfluous upon the issues raised in the Moonsiff's Court. And even before the Subordinate Judge, the parties appear to have had no opportunity afforded them of giving any such evidence, because the Subordinate Judge, apparently, raised the question for the first time in his judgment, and then, after stating that the points are so and so, he proceeds to decide those points upon such evidence as was upon the record. This distinguishes the present case from the one reported in XI Weekly Reporter, page 61, where the learned Judges appear to assume that the issues had been laid down at the proper time, and if the plaintiff had thought fit to produce evidence on them, he might have done so. Whether that assumption was right or not is another matter, but that was the ground upon which the judgment of the Court proceeded.

We are not prepared to say that we altogether concur in that judgment. We think in such a case as the present, where quite a new and different issue is raised in the Appellate Court, it ought to be done in such a way as to give the parties the fullest opportunity of producing evidence upon it, because if it is at all likely that in consequence of the issues framed in the first Court, the parties were induced to abstain from giving evidence, it would not be right to decide the issues against them on account of the absence of evidence. This is the case here. The complaint is that the issues have been found against the plaintiff on account of the absence of evidence, which in all probability would have been produced if the question had been raised in the Moonsiff's Court.

We think that this proceeding of the Subordinate Judge was wrong, and that the decree which he has made must be reversed and the case remanded to him for rehearing. We have not the power to prevent the Appellate Court from raising such an issue, but we think we should express our opinion that, looking to the conduct of the case in the Moonsiff's Court, it would not be right in the Appellate Court to frame this issue, and that the suit should be tried on the issues raised in the Moonsiff's Court. Costs will follow the result.

The 12th March 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Service of Summons (on the outer door of Defendant's Dwelling-house)—Evidence.

Case No. 942 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Hooghly, dated the 30th May 1871, *reversing a decision of the Moonsiff of Sulkeah, dated the 9th March* 1871.

Ramcoomar Singh (Plaintiff) *Appellant,*

versus

Ramsoondur Singh (Defendant) *Respondent.*

Baboo Juggut Chunder Banerjee for Appellant.

Baboo Bungshee Dhur Sein for Respondent.

The evidence of the serving peon that he endeavored to serve the summons on the defendants, and that, not being able to serve them personally, he affixed a copy of the summons on the outer door of their dwelling-house, if believed by the Judge, is perfectly legal evidence of the fact that these defendants were *served.*

Glover, J.—This was a suit by the plaintiff for possession of a certain share of land by partition. He sued also for the value of some bricks according to his share. The question between the parties was the amount of the share, the plaintiffs claiming one-sixth, and the defendant saying that their share only amounted to one-eighth. The reason of this difference was said by the plaintiffs to be that the heirs of one of the shareholders had taken other lands in exchange for their share, and had gone to live in another village, when their share being divided amongst the other shareholders, brought the plaintiff's share up to one-sixth.

The first Court gave a decision in favor of the plaintiff, but the Subordinate Judge, on the appeal of one of the defendants, Ram Soondur Singh, held that the case had not been properly tried, inasmuch as no notice or summons had been served upon the grandsons of Manick Chunder, one of the original shareholders.

It appears to us, on looking at the record, that the decision of the Subordinate Judge proceeded upon a mistake of fact. He says that the plaintiff himself "admitted that the "heirs of Manick Chunder had left their "residence at Bally, and had been residing "elsewhere for a long time." Now this is not the fact. The plaintiff's statement on the contrary shows that these heirs of Manick Chunder had never left Bally. What the plaintiff alleged was that they, the heirs of Manick, had gone to reside in a house close to the disputed land, and which, in fact, formed one of the boundaries of that land. As to the notice, we find that there is on the record the evidence of the serving peon who swears to the fact that he endeavored to serve the notice on these particular defendants, as well as upon the others, and that not being able to serve them personally, he, in the terms of the law, affixed a copy of the summons on the outer door of their dwelling-house. It has been argued by the pleader for the special respondent that this was no legal service of the summons; that it ought to have been proved that the parties on whom summons were served were actually at that time *living* in the house on which a copy of the summons was fixed. But the peon whose evidence has been taken does undoubtedly depose to the fact that the defendants were living in the house, the word used is "batee," which means dwelling-house. The peon has described in detail the search which he made for these parties, and says that he was unable to serve them personally. Of course, it should be for the Judge to say whether he believes or not the evidence of this peon; but if he does believe it, it is perfectly legal evidence of the fact that these defendants *were* served, in which case there would be no necessity for remanding the case to the first Court for a rehearing, as there would be all the materials at hand for the Subordinate Judge to try the case himself.

We think, therefore, that the order of the Subordinate Judge remanding the case to the first Court should be set aside, and we direct the Subordinate Judge to try the case himself with reference to the above remarks.

The 12th March 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Suit for Kuboolcut—Mal Lands—Lakheraj.

Case No. 808 of 1871.

Special Appeal from a decision passed by the Additional Judge of Hooghly, dated the 22nd April 1871, *affirming a decision of the Moonsiff of Hurreepal, dated the 20th February* 1871.

Sowdaminee Debee and another (Plaintiffs) *Appellants,*

versus

Suroop Chunder Roy and others (Defendants) *Respondents.*

Baboos Romesh Chunder Mitter and *Hem Chunder Banerjee* for Appellants.

Baboo Beeharam Mookerjee for Respondents.

A suit for a *kuboolcut* will lie under Act X of 1859 fixing the rate of rent to be paid in respect of lands which a competent Court has found to be the *mal* lands of the plaintiffs, and which the defendant has no right to hold as *lakheraj.*

Kemp, J.—THE plaintiff in this suit, special appellant before us, sued the defendant, special respondent, for a *kuboolcut* for three years, namely, from the year 1277 to 1279 at a jumma of Rs. 66-12. The plaint sets forth that the plaintiff had obtained a decree in the Civil Court declaring that the land of the defendant, which the defendant alleged to be rent-free land, formed part of the plaintiff's *mal* land; that the decree of the Court declared them liable to pay rent to the plaintiff; and that the defendant was entitled to keep these lands only on the footing that he paid rent to the plaintiff.

The answer of the defendant was, 1*st*, that the relationship of landlord and tenant did not exist between the plaintiff and defendant in this suit; and with the written statement of the defendant, a Bengalee translation of a decision of this Court dated 25th of December 1869, to be found in Volume XII, Weekly Reporter, page 448, is put in. The 2*nd* and *last* ground of the written statement is that the lands in dispute are sandy and *puteet,* and that the rates claimed are, with reference to the quality and circumstances of the land, excessive.

The first Court, the Moonsiff of Hurreepal, holds that the decision of the High Court, dated 25th December 1869, that is to say, the decision to be found in Volume XII, Weekly Reporter, page 448, is in point, and that the relationship of landlord and tenant does not exist between the plaintiff and defendant. He therefore dismissed the plaintiffs' suit.

On appeal, the Additional Judge of Hooghly, Mr. Wauchope, says that it has been ruled that a suit for a *kuboolcut* will not lie against a ryot unless he has a right of occupancy, that the defendant in this case is the holder of resumed rent-free lands, and it is not pretended that he ever paid rent. The judgment of the Lower Court was therefore affirmed, and the plaintiffs' appeal dismissed.

In special appeal, it is contended that it having been declared by a competent Court that the lands in dispute are *mal,* and that the defendant has no right to hold them as *lakheraj,* a suit for a *kuboolcut* fixing the rate of rent at which defendant is to hold will lie. The Courts below are in error in holding that such a suit will not lie.

Baboo Hem Chunder Banerjee, who appears for the special appellant, has called our attention to several decisions of this Court to be found at page 474, Volume XV, Weekly Reporter, by Justices Norman and Loch, at page 440 of the same volume by Justices Ainslie and Paul, and at page 345 of the same volume by Justices Kemp and Glover.

The only decision that at all militates against these decisions is the decision upon which the Lower Courts have relied. That decision was passed by Justices Loch and Mitter. Now, one of those learned Judges in a decision subsequently passed by him, to be found at page 474, Volume XV, Weekly Reporter, in which he sat with the late Mr. Justice Norman, thought proper in recording a separate judgment to mention that the case then before the Court, that is to say, the case heard by Justices Norman and Loch, was not on all fours with the judgment passed by Justices Loch and Mitter, reported in Volume XII, page 442. The learned Judge says that he agrees with the special appellant's pleader that it is not on all fours with that judgment, and he goes on to say that in that case there could be no doubt from the form of the plaint that the plaintiff distinctly claimed the land as part of his talook, and that the defendant was holding under an invalid *lakheraj* title, and he prayed to be allowed to assess it as part of his talook, and obtained a decree to assess it as such, and it is therefore clear that it was not a case which came under Section 30, Regulation II of 1819, but was one which could be tried by the Civil Courts, or under Section 28 of Act X of 1859. Now, in the present case before us, it is very clear that, although there is mention in the plaint in the resumption suit of Section 30 Regulation II of 1819 as well as of Section 10 Regulation XIX of 1793, the prayer of the plaint and the object of the suit were to have it declared that these lands were the *mal* lands of the plaintiff's zemindaree, and that the allegation of the defendant that they were *lakheraj* lands was false. The suit was in substance for a declaration that the lands were *mal*, that the plaintiff, the zemindar, was entitled to assess these lands, and that the defendants' allegation that they were rent-free lands was false. The first Court found, and the Judge on appeal has confirmed that finding, that the defendant had wholly failed to prove that these lands were held by him under a grant created before the 1st of December 1790. The lands were, therefore, declared to be *mal*, and liable to assessment. In the decision passed by Justices Norman and Loch, which was subsequent to the decision to be found in Volume XII above referred to, and in which Mr. Justice Loch took a part, it is said that a decree in a suit declaring the right of the zemindar to assess rent on land held under a grant subsequent to the 1st of December 1790 establishes between the zemindar and the holder of the land the relationship of landlord and the person liable to pay rent to such landlord. We have already shown above that, in the resumption suit, the land was adjudged liable to be assessed with the payment of rent. The decree on the face of it shows that the lands were adjudged to be *mal* lands of the plaintiff, special appellant, and that the defendant is only entitled to occupy these lands on payment of rent to the zemindar. The present suit is brought to have that rent assessed, and for a *kubooleut* for a period of three years. We think that, under the rulings to be found in Volume XV of the Weekly Reporter, page 474, page 440, and page 345, such a suit will lie under the provisions of Act X of 1859.

We, therefore, reverse the decision of the Lower Court, and remand this case to be tried on the merits. Costs to follow the result.

The 12th March 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble W. Markby, *Judge*.

Appeal—Order for Issue of Mandamus—Letters Patent, 1865, *Cl.* 15—"*Judgment*" (*meaning of*)—*Power of High Court.*

The Justices of the Peace for the Town of Calcutta,

versus

The Oriental Gas Company, 'Limited.'

The order for the issuing of a *mandamus* is not a "judgment" within the meaning of Clause 15 of the Letters Patent of 1865, and is not therefore open to appeal.

That word "judgment" in Clause 15 means a decision which affects the merits of the question between the parties determining some right or liability, and which may be either final or preliminary or interlocutory.

The High Court has still the power, which the Supreme Court had, to issue a writ of *mandamus* in such cases as the present.

THIS was an appeal from a decision of Mr. Justice Phear, delivered on the 18th of December last, making absolute a rule obtained on the 22nd of September last by Mr. Woodroffe, on behalf of the Oriental Gas Company, 'Limited,' calling on the Justices to show cause why a *mandamus* should not issue directed to them commanding them to join with the Gas Company in referring the case to a Judge of the Calcutta Court of Small Causes to ascertain and determine the amount payable to the Gas Company as compensation for damages occasioned to them by the drainage-works and water-works carried on by the Justices under the provisions of Act VI of 1868 of the Bengal Council. The Gas Company was a company incorporated under the English Companies' Act of 1862, and carried on business in Calcutta, and had, under the powers conferred by Act V of 1857, laid down pipes under the streets of Calcutta. "The Justices of the Peace for the Town of Calcutta" were by Act VI of 1868 constituted a body corporate with power to sue, and be sued; and the same Act vests in the Justices the streets of Calcutta, and empowers them to carry sewers under any of the streets and under enclosed lands after due notice, making full compensation for any damages done thereby. The Act further empowers the Justices to compensate persons sustaining damages by reason of the exercise of the powers vested in the Justices; and provides that, when damages are by the Act directed to be paid, the amount, if in dispute, shall be ascertained and determined by a Judge of the Calcutta Court of Small Causes. By Act IX of 1867 of the Bengal Council, which is to be read with and taken as part of Act VI of 1863 and Act V of 1866, the Justices were directed to provide a full supply of water within the town, and for that purpose to cause the necessary mains and pipes to be laid and other works to be made. Mr. Blackburn, in an affidavit, when the rule was obtained, stated that the Justices, in exercise of these powers, have commenced and are carrying on works for the drainage of the town and for the supply of water. In paragraph 17 of his affidavit, he stated that the Company had sustained heavy loss by reason of such drainage-works and water-works so carried on by the said Justices, by breakage of their mains and pipes, and by leakage of gas caused by the breakage of their mains and pipes, and that such loss was occasioned by the proceedings taken, and the works done, by the said Justices, in and about the drainage-works and water-works made by them in exercise of the powers vested in them by Act VI of 1868 of the Bengal Council; and that a great portion of the said loss was caused by the subsidence of the soil, and in consequence of the sinking and shifting of their mains and pipes, being a necessary and natural consequence of opening the streets and lanes of the towns for the purpose of constructing such sewers and drains, and the necessary and gradual sinking of the soil after the trenches and other openings made in the course of such sewers and drains, have been filled up.

The Advocate-General and *Mr. Marindin* for the appellants.

Mr. Woodroffe and *Mr. Evans* for the respondents.

The Advocate-General. — This is an appeal from the order of Mr. Justice Phear making absolute a rule for a ***mandamus*** directed to the Justices of the Peace for the Town of Calcutta, commanding them to join with the Oriental Gas Company in referring a case to the Judge of the Calcutta Court of Small Causes to assess the amount of compensation to be paid to the Gas Company for the alleged damage done to their pipes by the drainage and water-works of the appellants. On this reference the Judge of the Small Cause Court can only assess the amount of compensation; he cannot enter upon any question of liability. We deny the liability of the Justices for any damage, if any has been suffered by the respondents; and this order granting the ***mandamus*** precludes us from denying our liability before the Judge of the Small Cause Court, and this virtually decides the question of liability.

Mr. Evans.—Before the learned Advocate-General enters upon his case, I should state that we have a preliminary objection to the hearing of this appeal being proceeded with, and that is that no appeal lies from the order of Mr. Justice Phear, inasmuch as that order is one passed in the course of a suit, and no decree has yet been passed.

The Chief Justice.—We had better hear the objection first.

Mr. Evans.—It is apparent that, if there is any appeal, it must lie under Section 15 of the Charter of 1865, which provides "that an appeal shall lie to the said High Court of Judicature at Fort William in Bengal from the judgment (not being a sentence or order passed or made in any criminal trial) of one Judge of the said High Court." The question then is whether the order issuing the ***mandamus*** is a judgment. In England, under the old procedure with regard to writs of ***mandamus***, no writ of error would lie from the decision of the Court of Queen's Bench for an award of a peremptory writ of ***mandamus***, and until the Wm. IV., c. 21, extending the 9 Ann., c. 20, the return to the writ must be taken, and it was not lawful for the prosecution to plead or to traverse all or any of the material facts contained within such return; but since the passing of those Acts, the Court has power, on the return to a writ of ***mandamus***, to raise an issue to try the truth of the facts set forth in that return. These Acts of Ann. and of William IV do not apply here, and have not been extended to this country.

The Chief Justice.—Does not the first Charter of this Court speak of the manner in which the practice of the Court should be regulated?

Mr. Evans.—By Section 37 of the Charter of 1862, it is provided "that the proceedings in all matters coming before the said High Court, in the exercise of its testamentary and intestate jurisdiction, shall be regulated by the rules relating to the granting of probates and letters of administration contained in the aforesaid Letters Patent of H. M. King George the Third, and by such further or other rules in respect thereof as are now in force; and that the proceedings in all matters coming before the said High Court in the exercise of its matrimonial jurisdiction shall be regulated as nearly as may be by the rules and proceedings of our Court for divorce and matrimonial causes in England; and that, as hereinbefore in this clause otherwise provided, the proceedings in civil suits of every description between party and party brought in the said High Court shall be regulated by the Code of Civil Procedure prescribed by an Act passed by the Governor-General in Council, and being Act No. VIII of 1859, and by such further or other enactments of the Governor-General in Council in relation to Civil Procedure as are now in force."

The Chief Justice.—That Section provides that except in matrimonial and probate, and testamentary and intestate matters, all proceedings in civil suits of every description shall be regulated by the Code of Civil Procedure.

Mr. Evans.—But this is not a proceeding in a civil suit between party and party; it is one of Crown practice.

The Chief Justice.—The later Charter of 1865 goes beyond the earlier one; it provides "that it shall be lawful for the said High Court from time to time to make rules and orders for the purpose of regulating *all proceedings in civil cases* which may be brought before the said High Court *including* proceedings in its Admiralty, Vice-Admiralty, &c., jurisdictions respectively." Was there no general rule made by this Court in pursuance of this authority?

Markby, J.—The third rule of the High Court passed in 1865 provides for this matter and is as follows:—"Until further rules shall be made by this Court in pursuance of the authority conferred by Section 37 of the Letters Patent dated the 28th day of December in the 29th year of the reign of H. M. Queen Victoria, all proceedings in civil cases which shall be brought before the Court, except proceedings in its Admiralty, Vice-Admiralty, and Matrimonial Jurisdiction, and in its Original Testamentary and Intestate Jurisdiction, shall be regulated by Act VIII of 1859 and Act XXIII of 1861, and by such other Acts and such rules and orders of the High Court as were in force, and regulated the procedure of the said Court at the time of the publication of the said Letters Patent, except so far as the same are at variance with the provisions of the said Letters Patent."

Mr. Evans.—That rule simply provides that the procedure in civil cases shall be regulated by Act VIII of 1859 and Act XXIII of 1861. There is no provision in these Acts for writs of ***mandamus***, and the procedure provided by these Acts is not applicable in this case. The procedure that we must look to is the practice of the Court of Queen's Bench, as it was anterior to the year 1726. In the case of ***Regina on the prosecution of Tulseedass Nundee* v. *The East India Railway Company*** (Indian Jurist, 244), Mr. Justice Phear ruled that the pleadings and demurrer must be struck off the file. There seems to have been no judgment delivered in that case. The marginal note to that case is:—"The prosecutor cannot in India both plead and demur to a return to a writ of ***mandamus*** without first obtaining leave of the Court." It was there argued as though the procedure applicable to writs of ***mandamus*** was the English procedure. But whether the proceedings in a case of ***mandamus*** are regulated by the Code of Civil Procedure, or by the English practice is immaterial to me, it does not interfere with my argument that there can be no appeal; for if the English procedure is to be followed in this case, no appeal lies; the prosecutor's remedy is an action for a false return. If under the Code of Civil Procedure the return would be received and an issue raised, and we should go to trial as in ordinary actions and an appeal would lie from the ruling on that issue; but there would be no appeal from the order granting the writ. The learned Counsel then referred to Tapping on Mandamus, p. 397; ***Rex* v. *The Dean and Chapter of Dublin*** (Strange's Rep., 536); ***The King* v. *The Dean and Chapter of Trinity Chapel in Dublin*** (8 Mod. Rep., 27); ***The Bishop of St. David* v. *Lucy*** (1 Ld. Raymond's Rep., 539) and the note at the end of that case, as authorities establishing that no writ of error would lie from a *mandamus*.

Then, again, if apart from the form of the writ, this matter is to be taken as a proceeding in a Civil suit between party and party within the meaning of the 37th Section of the Charter, it comes under Act VIII of 1859; and since it is an interlocutory order, there can be no appeal; for the 363rd Section of that Act provides that no appeal shall lie from any order passed in the course of a suit and relating thereto prior to decree. This appeal is from an order passed in the very earliest stage of the suit; it is in fact an initial proceeding instituting the suit.

The Advocate-General.—The argument of my learned friend against the hearing of this appeal is two-fold. If his first contention be correct, namely, that we are bound by the antiquated practice of the Court of Queen's Bench, it would be a monstrous state of things; but I submit that that contention is not correct. Whether or not a writ of error would lie from a peremptory writ of *mandamus*, is a question that does not arise in the present case. The 15th Section of the Charter of 1865 provides "that an appeal shall lie to the said High Court from the judgment (not being a sentence or order passed or made in any criminal trial) of one Judge of the said High Court. In the case of *De Sousa and another* v. *Coles*, 3 Mad. H. C. Rep., 387, Mr. Justice Bittleston, in alluding to the words of this Clause, said,—"Upon consideration we think that the word *judgment* there used, cannot be limited to the final judgment in a suit—nor indeed to a judgment in a suit at all—but must be held to have the more general meaning of any decision or determination affecting the rights of any suitor or applicant."

The Chief Justice.—Mr. Justice Bittleston scarcely meant that there might be an appeal from every order made in the course of a suit. In that case the appeal was from an order refusing to admit a plaint. That order was one of some finality and was a decision or determination affecting the rights or the interests of a suitor, but in this case the order granting the rule merely institutes the proceedings. It may just as well be said that an appeal will lie from admission of a plaint. There may be an appeal from the order rejecting a plaint, because such an order is in its nature a judgment, but there is no appeal from the admission of one; that is just the distinction between the cases in which an appeal will lie and those in which it will not lie.

The Advocate-General.—The 37th Section of the Charter of 1865, under the head of "Civil Procedure," merely authorises the High Court "from time to time to make rules "and orders for the purpose of regulating all "proceedings in Civil cases," and provides "that the High Court shall be guided in "making such rules and orders as far as "possible by the provisions of the Code of "Civil Procedure;" and under Act VIII of 1859 there is no such distinction as that referred to by his Lordship the Chief Justice. If all the proceedings in civil suits are regulated by Act VIII of 1859, it cannot be said that writs of *mandamus* can be granted; for there is no procedure provided for such writs, and the Court has nothing to guide it in dealing with such writs.

This order of the lower Court granting the rule does in fact decide the liability of the Justices to compensate for damages assumed to have been done by them in carrying out drainage works under the powers vested in them under the 151st Section of Act VI of 1863, B. C. And the only question the Judge of the Small Cause Court will be able to consider when the reference goes before him, will be the amount of compensation to be awarded, and we should not be at liberty to deny our liability. The reference under this Act is similar to the proceedings under the Metropolitan Sewers Act 1848, and in the case of *The Queen* v. *The Metropolitan Commissioners of Sewers*, 1 E. and B., 694, it was held that the power given under that Act to resort to arbitration was in those cases only where the mere amount of compensation is disputed; not in cases where the liability to make any compensation is denied.

The Chief Justice.—Do you ask us to reverse the order of Mr. Justice Phear because upon the affidavits you do not appear to be liable?

The Advocate-General.—What we ask for is to reverse the order because it appeared from the affidavits that there was a *bonâ fide* contention between the parties and a denial on one part of our liability.

The Chief Justice.—You can raise that on the return to the writ.

The Advocate-General.—Then that would not be a proceeding under Act VIII of 1859, and there is no authority for it. Moreover, I think, this is the time when we should come in and object to the order of the learned Judge. Supposing the writ were to issue and a return made to it, it has been said that all questions would then be raised upon it. Now there is no machinery for trying a case like that. Act VIII never contemplated such a form of issues as that.

The Chief Justice.—Your argument then would amount to this that this Court cannot issue a ***mandamus*** at all.

The Advocate-General.—What I mean to say is that an action is the only fair way to raise the contention between the parties; that there can be no ***mandamus*** in a case of estimating disputed compensation; and that it is a provision clearly for trying admitted liability. Sections 227, 229, and 230 of Act VI of 1863, B. C., were never intended to apply to a really disputed case of liability.

2ndly.—This is not a proceeding under Act VIII of 1859. It is a proceeding having for its object to preclude the Justices from raising in a proper suit the issues to be properly raised.

Mr. Marindin (on the same side).—This preliminary objection depends upon the construction to be put upon Section 15 of the Charter of 1865. That Section gives a positive right to appeal from any judgment of one Judge of the Court, and therefore it appears to me the only question is,—Is this or is this not a judgment? I submit that there is no limitation in that Section in regard to an interlocutory judgment or any other judgment. Your Lordship the Chief Justice, in the course of the argument of the learned Advocate-General, said that an appeal would lie against an order rejecting a plaint, but that the appeal would not lie against an order admitting a plaint. I submit that, upon the words of this Clause, it is not so.

The Chief Justice.—The appeal from an order rejecting a plaint is given by the Code of Civil Procedure. When a Judge refuses to admit a plaint, that is (as my brother Markby says) in the nature of a judgment upon demurrer.

Mr. Marindin.—If the order rejecting a plaint is in the nature of a judgment holding that the petition of plaint discloses no cause of action, it is equally a judgment when it holds that the plaint discloses a cause of action. The decision of Mr. Justice Bittleston in the Madras case cited by Mr. Evans, is a case in point.

Then Mr. Evans has pointed to several English cases to show that a writ of error does not lie against a peremptory writ of ***mandamus*** and he argues that therefore no appeal will lie in this country. Now, the issue of a peremptory writ of ***mandamus*** is undoubtedly a complete determination of the rights of the parties, and the difference between an interlocutory judgment and a final judgment would not at all apply to a case of that sort. Referring to Tydd's Practice, the learned Counsel proceeded to observe that a writ of error only arises upon matters appearing on the record, and is an entirely different procedure from the appeal which is given by the Charter from the judgment of one Judge of the High Court. The very words in the exception to Clause 15 "not being a sentence or order passed or made in any criminal trial" imply this. The fact that the Legislature thought it necessary to except from the meaning of the word ***judgment*** such matters as sentences or orders of a Criminal Court shows, I think, that they intended the word ***judgment*** to bear the extended sense which is given to it by Mr. Justice Bittleston, because, if they did not intend it to apply to orders at all, but only to what answers to a decree in the suit or the final disposal of the suit, there would be no need to except orders made in a criminal case.

Markby, J.—There are many orders of the Criminal Court which are not sentences, *e. g.*, orders for maintenance.

The Chief Justice.—A sentence is an order. What other order could a Criminal Court make than a sentence?

Mr. Evans (in reply).—The last objection taken by Mr. Marindin is frivolous. As to the judgment of Mr. Justice Bittleston, his words must be taken to be ***obscurum per obscurius.*** It would be simply ridiculous if an appeal were to lie from every order. Besides, if these enormous powers of appeal were given by the Charter, how comes the Court to cut them down? Or what right have the Court by their rule to make Act VIII of 1859 the rule of practice, enacting as it does that there shall not be an appeal from an interlocutory order?

The Advocate-General referred to the case of ***Bissonath Chunder*** v. ***Kantimoni Dasi,*** (6 B. L. R., 748).

Mr. Evans.—Then the learned Advocate-General said that no writ of ***mandamus*** can issue in this country. As to this, I will only refer to the cases in which such writs have in point of fact been issued—***Regina on the prosecution of Toolsee Doss Nundy*** v. ***The E. I. Railway Co.*** (1 Indian Jurist, N. S., 244, 258); ***The Queen*** v. ***The Justices of the Peace for Calcutta*** (2 Indian Jurist, 182, 218); ***In re Toolsee Doss Seal*** (2 Indian Jurist, 183; 7 W. R., 228). I will also refer to the case of ***Broadbent*** v. ***The Imperial Gas Company*** (3 English Jurist, N. S., 221), which was a case in which the Court of Chancery granted a perpetual injunction to restrain a nuisance; and *Reg. on the prosecution of Hans Ringland* v. *The Burslem Board of Health*, (5 Jur. N. S., 1394 and 6 *Ibid*, 696). It is an undoubted fact that the remedy of *mandamus* is constantly in use, and no one has suggested that it ought to be refused.

The Chief Justice.—There may be cases in which it may be the most appropriate remedy; though in this case I am rather inclined to think that a suit might have been brought. The practice of the *mandamus* has been continued in this Court probably because it was the practice of the Supreme Court. The Supreme Court, as I understand it, had a common Law Side and an Equity Side, and kept up the distinction between Courts of Common Law and Courts of Equity. But that is not so in this Court. This is a Court of Equity with a very elastic procedure.

Mr. Evans.—Whatever the origin of *mandamus* proceedings in this country may have been, it is now too late to question the authority of this Court to issue the writ. The remedy by *mandamus* flourished in the time of the Supreme Court and has survived till the present time; and it is for the consideration of the Legislature how far it ought to be put upon a proper basis.

The judgment of the Appellate Bench was delivered as follows by—

Couch, C. J.—This was an appeal against an order of Mr. Justice Phear made upon the application of the Oriental Gas Company that a *mandamus* should issue directed to the Justices of the Peace for the Town of Calcutta commanding them to make compensation to the Gas Company for the damage occasioned to them by the drainage-works and water-works carried on by the Justices, and also commanding the Justices in case of dispute as to the amount of compensation to join with the Gas Company in a reference to a Judge of the Small Cause Court to ascertain and determine the same. The order for the *mandamus* to issue was made upon an affidavit filed on behalf of the Gas Company, which stated that the Company had sustained heavy loss by reason of the exercise by the Justices of their powers of carrying on works for the drainage of the town and the supply of water therein; the mains and pipes of the Gas Company having been thereby greatly injured.

The Justices by the affidavits of their officers denied that the damage complained of had been caused by them, except in some few instances for which they alleged that compensation had already been made. They also denied that they were in any manner liable for the damage in respect of which compensation was sought.

By Acts VI of 1863 and IX of 1867 of the Bengal Council, the Justices are empowered to execute various works in respect of the drainage, supply of water, and improvement of the Town of Calcutta, and are directed to defray certain costs and expenses, and to make compensation for damages in certain cases. It is also provided that the amount of such damages, costs, and expenses shall in case of dispute be settled by a Judge of the Small Cause Court.

A preliminary objection was taken to the hearing of the appeal on the ground that the order for the issuing of the *mandamus* was not a "judgment" within the meaning of Clause 15 of the Letters Patent of 1865, and was therefore not open to appeal. We think that this objection is well-founded. Clause 15 provides that an appeal to the High Court should lie "from the judgment (not being a sentence or order passed or made in any criminal trial) of one Judge of the said High Court." But the order of the learned Judge that the *mandamus* should issue is not a judgment. The *mandamus* which will be issued under it will not be a peremptory one, but merely to do certain things, or to show cause to the contrary; so that the order of the learned Judge does not determine any question whatever between the parties. It only initiates the proceedings by which the liability of the Justices to make compensation will be ascertained and determined. It was contended for the Justices in support of the appeal that the word "judgment" in Clause 15 included any order affecting the interests of the parties, as was shown by the special limitation to a judgment "not being a sentence or *order* passed or made in any criminal trial." But the orders in criminal cases here referred to are final orders, the alternative expression "sentence or order" being that which is almost invariably used in this country to describe the final result of a criminal trial, as may be seen in the Code of Criminal Procedure—particularly Sections 387, 401, 405, and 417.

A decision of the High Court of Madras was also referred to, in which it was held that the refusal of a Judge to give leave to institute a suit on the Original side of the Court under Clause 12 of the Charter was a judgment, and as such appealable under Section 15 (3 Madras H. C. Rep., 384). The Court there said that the word "judgment" in Section 15 could not be limited to the final judgment in a suit, nor indeed to a judgment in a suit at all, but must be held to have the more general meaning of any decision or determination affecting the right or the interest of any suitor or applicant. And again, "where the language giving the appeal is so general in its terms as that contained in the 15th clause of the Charter, it is, we think, impossible to prescribe any limits to the right of appeal founded upon the nature of the order or decree appealed from."

We are not, however, prepared to go to this extent. Such an interpretation would, as it seem to us, and as the learned Judges in that case seem to admit, put it in the power of a vexatious litigant to appeal against all the discretionary orders which the Judge of Original Jurisdiction may make in the course of the suit; and (as the learned Judges of the Madras High Court point out) with no result; as such orders would have to be, as a matter of course, confirmed. It would also give a far more extensive right of appeal against the orders of a Judge of original jurisdiction in this Court, than exists against the orders of a Judge of original jurisdiction in the Mofussil; which we do not think at all probable that Her Majesty intended.

We think that "judgment" in Clause 15 means a decision which affects the merits of the question between the parties determining some right or liability. It may be either final or preliminary or interlocutory, the difference between them being that a final judgment determines the whole cause or suit, and a preliminary or interlocutory judgment determines only a part of it leaving other matters to be determined. Both classes are provided for in Clauses 39 and 40 of the Charter. An order, such as that before us, which only authorizes a proceeding to be taken for the determination of the question between the parties, cannot be considered a judgment.

It is, however, said that this Court has already put a wider construction upon the word "judgment" in Clause 15 by entertaining appeals in cases where the plaint has been rejected as insufficient or as showing that the claim is barred by limitation, and also in cases where orders have been made in execution.

These, however, are both within the above definition of a judgment, and it by no means follows that because we hold the order in the present case not to be appealable, we should be bound to hold the same in the cases referred to. For example, there is an obvious difference between an order for the admission of a plaint and an order for its rejection. The former determines nothing, but is merely the first step towards putting the case in a shape for determination. The latter determines finally, so far as the Court which makes the order is concerned, that the suit, as brought, will not lie. The decision, therefore, is a judgment in the proper sense of the term. It is also to be observed that this Court, though not governed by the Code of Civil Procedure, in the sense that the Courts of the Mofussil are so, has nevertheless under the authority of the Charter declared "that all proceedings in Civil cases which shall be brought before the Court, except proceedings in its Admiralty, Vice-Admiralty and Matrimonial Jurisdiction and in its Original Testamentary and Intestate Jurisdiction, shall be regulated by Act VIII of 1859 and Act XXIII of 1861" (see rule of April 4, 1866); and we find that since this rule was made it has been the practice to enquire into and determine the right of appeal by reference to the provisions of these two enactments. Thus in the case of *Chittoo Sheik* v. *Kasee Mursum Hossein*, Hyde's Reports for 1864, p. 212, it was held by Norman and Levinge, JJ., that the refusal of a Judge to restrain the proceedings in a suit, on the ground that the costs of a previous suit had not been paid, was not open to appeal because the order was an interlocutory one and did not fall (as was contended) within Section 11 of Act XXIII of 1861 relating to the execution of a decree. So, in *Apcar* v. *Howah Bye*, 1 Ind. Jur. N. S., 237, it was held by Sir Barnes Peacock and Morgan, J., that an appeal lay against a decree, notwithstanding that it had been affirmed on review, inasmuch as Section 378 of the Code of Civil Procedure did not apply to judgments on review, but only to orders rejecting or admitting reviews. In *Koomara Woopendra Krishna Bahadoor* vs. *Nobin Krishna Bose*,* a party was added

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* The 8th April 1869.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble A. G. Macpherson, *Judge*.

Appeal from the decision of the Hon'ble J. B. Phear, exercising the Ordinary Original Civil Jurisdiction of the High Court.

Koomara Oopendra Krishna Deb Bahadoor

versus

Nobin Krishna Bose and another.

THIS was a suit for a declaration that a gift to the plaintiff of certain Government Promissory Notes was a valid gift and for an order on the defendant to endorse the same to the plaintiff.

When the suit came on for hearing, the appellant (plaintiff's elder brother) applied to be made a party (defendant) to the suit, but his application was refused. It afterwards appearing, however, that he was a necessary on his own application as defendant to a suit, but the learned Judge who did so refused to adjourn the case, in order that the party added might prepare his defence, thinking it unnecessary. After decree in favor of the plaintiff both defendants appealed; and, amongst other objections, the original defendant objected to the addition of a party, whilst the added defendant objected to the refusal to postpone. In disposing of their objections, Sir Barnes Peacock, sitting with Mr. Justice Macpherson, quotes, verbatim, Section 363 of the Code of Civil Procedure, and then holds, in accordance with the provisions of that Section, that the first objection could not be entertained because adding a party did not affect the merits of the suit, but that the second objection could, because the refusal to postpone, if erroneous or irregular, was a very important matter. These are the only cases we have been able to find in which the right of appeal on this side of the Court has been discussed, and in every case it has been determined with reference to the provisions of the Code of Civil Procedure. This seems to us to be a reasonable course, for though the Code of Civil Procedure was not by the second Charter made absolutely binding on this Court, it was clearly expected that, so far as possible, it would be adopted by it, and, as before pointed out, this has been done.

We think that the proceeding by way of *mandamus* is a "proceeding in a civil case" within the meaning of the rule of the 4th April 1866. It is classed by English commentators amongst the remedies for private wrongs or civil injuries. Blackstone says (3 Comm., 265) that in cases within the Statute 9 Ann. c. 20, it is in the nature of an action; and it has no place in the treatises on Pleas of the Crown by Sir Matthew Hale and Serjeant Hawkins. It is appended by modern English procedure to an ordinary civil action, and the ordinary Civil Procedure is (so far as may be) made expressly applicable to it (17 and 18 Vict., c. 125, s. 77); and we think it was intended by the rule of April 1866, already referred to, to make our own Civil Procedure (so far as may be) applicable to it also.

Reading therefore (as this Court always has read it) Clause 15 of the Charter in connection with the Code of Civil Procedure,

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party, he was made a defendant in the suit, but the suit was immediately proceeded with, notwithstanding his objection that he had had no time to prepare his defence; and the Judge made a decree against the intervenor defendant, as well as the other defendant in favor of plaintiff's right to the declaration prayed. From this decision the intervenor defendant appealed on the following preliminary grounds:—

1. That the appellant having applied, on the suit being called on for hearing, to be a party defendant thereto, and for a postponement to enable him to obtain copies of the plaint and written statement which he was not able up to that time to obtain, the learned Judge ought to have thereupon granted such application with such reasonable postponement as would have enabled the appellant to instruct Counsel for the defence.

2. That it having appeared subsequently, during the hearing of the cause, that the appellant ought to be made a party defendant, the Judge ought to have adjourned the hearing, and directed that a notice should be issued to the appellant in the manner provided by Section 73 Act VIII of 1859.

3. That the Judge ought not to have heard and determined the suit in the absence of the appellant, who never in fact appeared either in person or by Counsel, but only applied to be permitted to intervene and for an order for postponement.

The judgment of the Appellate Bench on the preliminary grounds of appeal was given as follows by—

Peacock, C.J.—The 363rd Section of the Code of Civil Procedure enacts that "no appeal shall lie from any order passed in the course of a suit and relating thereto prior to decree; but if the decree be appealed against, any error, defect, or irregularity in any such order affecting the merits of the case or the jurisdiction of the Court may be set forth as a ground of objection in the memorandum of appeal."

Mr. Piffard, on behalf of Nobin Krishna Bose, defendant, contended that the Judge was wrong in ordering the other defendant to be made a party to the suit. It appears to me, however, that that order, so far as it made him a party, is not an order affecting the merits of the case. If time had been given, it might have delayed the hearing of the suit, but that would not have made the order one which this Court on appeal could set aside as affecting the merits.

Another question then arises, which the making the other defendant a party, without ordering the case to be postponed for a reasonable time, is not an error or irregularity in the order.

The 73rd Section of the Act enacts that, "if it appear to the Court, at any hearing of a suit, that all the persons who may be entitled to, or who may claim some share or interest in the subject-matter of the suit, and who may be likely to be affected by the result, have not been made parties to the suit, the Court may adjourn the hearing of the suit to a future day to be fixed by the Court, and direct that such persons shall be made either plaintiffs or defendants in the suit as the case may be. In such case the Court shall issue a notice to such persons in the manner provided in this Act for the service of a summons on a defendant."

Now it appears to me that the adjournment of the hearing is a very important matter, although the service of a notice on the defendant in this case was not important, as he himself made the application to be made a party. If the applicant had wished to call witnesses, he could not have obtained *subpœnas* to compel their attendance before he was made a party, and he might therefore have been prejudiced, although he might have cross-examined the plaintiff's witnesses. He was not in the position of a defendant summoned for disposal of a case on the first hearing. As the defendant is now present in Court by his Counsel, it is unnecessary to serve him with notice; but it appears to me that the decree might be reversed, and the issue tried *de novo* whether the notes in question did or did not pass by a valid gift from the Rajah to the plaintiff as in the plaint alleged. We might possibly send that issue to the first Court to be tried. If we should do so, there is no guarantee that the parties will not again appeal from the decision, and under the circumstances we think that the issue had better be tried by this Court.

Order accordingly.

we consider that the order of Mr. Justice Phear that the *mandamus* do issue, is not a judgment against which an appeal will lie.

It is further contended by the Advocate-General that at least in regard to such cases as the present, where the party complaining might have a remedy by ordinary suit, the proceeding by way of writ of *mandamus* was obsolete, and that there was, in fact, no procedure by which the questions between the parties could be properly raised and tried; and possibly if this had been clear, it would have been proper for us to express our opinion that the present proceedings could not be maintained. But, without entering at all into the question whether the party in this case had any other remedy, we think it sufficient to say that there has never been any doubt that the High Court has still the power, which the Supreme Court certainly had, to issue a writ of *mandamus* in such cases as the present.

The judgment of the Court is that the appeal be dismissed, and that the appellants do pay the respondents their costs, to be taxed on Scale No. 2.

The 4th January 1872.

Present:

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Jurisdiction—Admission or Allegation of Parties—Etmamdar.

Case No. 239 of 1871.

Special Appeal from a decision passed by the Officiating Judge of Moorshedabad, dated the 8th December 1870, *affirming a decision of the Moonsiff of Jungeepore, dated the 6th September* 1870.

Bhugwan Chunder Dutt (Plaintiff) *Appellant,*

versus

Mechoo Lall Chuckerbutty (Defendant) *Respondent.*

Baboo Grish Chunder Ghose for Appellant.

Baboo Bhowanee Churn Dutt for Respondent.

Plaintiff sued in the Revenue Court for the recovery of rents fraudulently misappropriated by defendant, and upon defendant's allegation that plaintiff was *etmamdar* or *gomashta*, and not *ijaradar*, the Deputy Collector dismissed plaintiff's suit for want of jurisdiction. Plaintiff now sues in the Civil Court, and upon plaintiff again raising the plea of non-jurisdiction, the Moonsiff came to the conclusion that plaintiff's allegation that he had been *etmamdar* was false. HELD that any admission or allegation of the defendant in the former suit, put in evidence by the plaintiff, was amply sufficient to support the plaintiff's allegation in this suit that he had been *etmamdar*; and that the Moonsiff went out of his way to enquire into a fact which was not disputed by either of the parties.

Jackson, J.—THE plaintiff in this suit alleged that in the year 1274 he had been an *etmamdar*, which we are given to understand, in some parts of Moorshedabad, means a *gomashta*, or collector of rents under the owner; and that during that period, he, defendant, had been employed by him as sub-agent in the immediate collection of rents, and had fraudulently misappropriated a portion of the rents so coming into his hands, for the recovery of which the present suit is brought.

It appears that previously this plaintiff had brought a similar suit against this same defendant in respect of the same money in the Revenue Court. It seems to have come out that the plaintiff originally held the mehal in question as *ijaradar*, and subsequently became *etmamdar* of the mehal. The defendant distinctly alleged in that suit before the Deputy Collector that the plaintiff was such *etmamdar*, denying the fact of his being *ijaradar*; and on such allegation and denial, the defendant induced the Deputy Collector to dismiss the plaintiff's suit for want of jurisdiction.

In the present suit, the defendant has again raised the plea of non-jurisdiction, and the Moonsiff who tried the suit appears to have come to the conclusion that the plaintiff's allegation that he had been *etmamdar* was not true, and had been falsely made for the purpose of inducing the Moonsiff to exercise jurisdiction in the matter.

One of the deplorable consequences, I think, of the separation of jurisdiction by Act X of 1859 was to enable parties who were really liable in one shape or another to baffle the persons to whom they were liable by pleading want of jurisdiction alternately in the Revenue and in the Civil Court, and this plea was oftentimes taken with success.

In the present case, it appears to me that the Moonsiff had a very clear course before him, and the defendant ought not to have been allowed to recede from his contention in the first suit where he stated that the plaintiff was at that time *etmamdar*. That being so, the plaintiff is not a person coming within the terms of Section 24 Act X of 1859, and the suit, not being one cognizable by the Revenue Court, must be cognizable by the Civil Court.

The Moonsiff, instead of taking the plain course which was before him, has referred to Story's Jurisprudence, Sections 81 and 190, and has there learned that the plaint filed in this case in the Revenue Court is a "Bill of Discovery!" and he proceeds in a similar strain. It is sufficient to say that any admission or allegation of the defendant in the first suit, which was put in evidence by the plaintiff, is amply sufficient to support the plaintiff's allegation in this suit that he had been *etmamdar*; and it seems not to be denied by the defendant that he was employed under him. That being so, it was the duty of the first Court to go into the account between the parties, and ascertain if the defendant really owed any money to the plaintiff, and was liable to judgment.

The decision of both the Lower Courts must be reversed, and the case remanded to the first Court for trial on the merits.

Mitter, J.—I am of the same opinion. It was distinctly admitted by both parties in the Act X suit that the plaintiff was *etmamdar* or *gomashta*, and not *ijaradar* in 1274. The plaintiff has reiterated the same allegation in the present suit, and the defendant has not even ventured to deny it; nor could he safely do so after having deliberately admitted in the Act X case on oath that the plaintiff was not *ijaradar* but *etmamdar* or *gomashta*. Under these circumstances, the Moonsiff ought not to have gone out of his way to enquire into a fact which was not disputed by either of the parties.

The 4th January 1872.

Present:

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Contract—Interest—Penalty.

Case No. 887 of 1871.

Special Appeal from a decision passed by the Judge of Tipperah, dated the 20th April 1871, *modifying a decision of the Additional Moonsiff of that district, dated the 18th July* 1870.

Brojo Kishore Roy (Defendant) *Appellant,*

versus

Madhub Pershad Misser (Plaintiff) *Respondent.*

Baboo Bykunt Nath Dass for Appellant.

Baboo Kashee Kant Sen for Respondent.

Where parties distinctly stipulate that, in the event of a failure to repay the amount advanced with interest at a certain rate on a certain day, the lender was to be entitled to interest at a different rate, such stipulation cannot be regarded as a penalty, but the Court is bound to give effect to the contract entered into between the parties.

Jackson, J.—It appears to us that the defendant has no ground of special appeal in this case. We are bound to give effect to the contract entered into between the parties, and as the parties distinctly stipulated that in the event of a failure to repay the amount advanced with interest at a certain rate on a particular day, the lender was to be entitled to interest at a different rate, we are not authorized to say as a matter of law that such stipulation is to be regarded as a penalty. We are referred to a decision reported in the 4th Bengal Law Reports, page 94 of the Appendix, in which the particular facts of the case had induced the Court to deal with such stipulation in that way and to treat it as in the nature of a penalty; and looking to the conduct of the parties and having the matter before it in Regular Appeal, the Court intimated an opinion that an equitable decision had been come to by the Subordinate Judge and that it would not interfere. But in this case we cannot say as a matter of law that the Court below is wrong in allowing interest at the rate stipulated by the parties in their contract.

The special appeal is dismissed with costs.

The 4th January 1872.

Present:

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Special Appeal—(By one Defendant against another.)

Case No. 908 of 1871.

Special Appeal from a decision passed by the Additional Judge of Jessore, dated the 1st July 1871, *modifying a decision of the Sudder Moonsiff of that district, dated the 1st August* 1870.

Ramessur Ghose (one of the Defendants) *Appellant,*

versus

Azeem Joardar (the other Defendant) *Respondent.*

Baboo Bhugobutty Churn Ghose for Appellant.

No one for Respondent.

A Special Appeal cannot be entertained by one defendant against another.

Jackson, J.—We think that this special appeal cannot be supported. The suit was brought by a certain Lokenath Talee against Azeem Joardar and Ramessur Ghose. The plaintiff, who it seems holds under Ramessur, obtained a decree in the Court of first instance, and against that decree Azeem Joardar appealed. Upon this appeal, the Judge went into the question of title as between Ramessur and Azeem Joardar ; but finally he cut down his decree making a declaration as to the limited nature of the plaintiff's rights. Ramessur, one of the defendants, now appeals specially against his co-defendant Azeem Joardar. It is clear that on the one hand we cannot entertain a special appeal by one defendant against another, nor on the other hand can it be supposed that the decision of the Court below has decided anything as between the two defendants.

The appeal is dismissed.

The 8th January 1872.

Present :

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Suit against Guardian—Liability of Minor—Bona fides—Execution (by arrest of Minor's person).

Case No. 313 of 1871.

Miscellaneous Appeal from an order passed by the Judge of Tipperah, dated the 15th May 1871.

Sherafutoollah Chowdhry (Judgment-debtor) *Appellant,*

versus

Sreemutty Abedoonissa Bibee (Decree-holder) *Respondent.*

Mr. R. E. Twidale for Appellant.

Baboo Rebuttee Chunder Bannerjee for Respondent.

In a suit against a minor's father as the minor's guardian during the minor's minority, where the good faith of the parties is not impugned, the minor is liable.

In the absence of any valid reason to the contrary, execution may be taken out by means of a warrant for the arrest of the minor's person.

Jackson, J.—In this case, the appellant has had execution taken out against him on a decree obtained at the suit of his wife's mother against his father in the capacity of guardian to him, appellant.

On appeal before us, it is contended, first, that the appellant is not liable, and secondly, that the particular mode of execution by arrest of his person should not have been resorted to.

The decree was obtained against his father as his guardian during his minority, which is the usual form in the Indian Courts, while in England the infant or minor is sued though represented by his next friend. There is no doubt, that in a case of this nature, where the good faith of the parties is not impugned, the minor is liable.

Then as to whether it was or was not proper to take out execution by means of a warrant for his arrest, no cause was shewn before the Lower Court why this mode of execution should not have been adopted, nor is the appellant able here on appeal before us to urge any valid reason against it.

The appeal is dismissed with costs.

The 9th January 1872.

Present :

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Act X of 1859 *s.* 6—*Presumption of uniform payment of rent—Evidence.*

Case No. 959 of 1871.

Special Appeal from a decision passed by the Judge of Jessore, dated the 16th May 1871, *reversing a decision of the Moonsiff of that district, dated the 21st January* 1871.

Sreenath Bose (Plaintiff) *Appellant,*

versus

Poglian Mollah and others (Defendants) *Respondents.*

Mr J. S. Rockfort for Appellant.

Baboo Anund Chunder Ghosal for Respondents.

The presumption under Section 6 Act X of 1859 cannot be established by imperfect and unproved evidence.

Jackson, J.—It is quite clear in this case that the decision of the Lower Appellate Court cannot be sustained.

The plaintiff zemindar sued to enhance the defendant's rent. The defendant set up payment of uniform rent for twenty years and thereupon claimed exemption from enhancement. The Additional Moonsiff, Baboo Bistoo Beharee Mookerjee, who has also been a Deputy Collector of considerable experience, considered the defendant's plea not proved, and gave the plaintiff a decree, not exactly for the sum he claimed, but for a certain increase.

On appeal, the Judge took into consideration a number of *dakhillahs* which the defendant produced, and considering these *dakhillahs* genuine, and that they made out payment of rent at the rate specified by the defendant, he held that defendant was entitled to the benefit of the presumption arising from such proof, and he reversed the decision of the Moonsiff.

On special appeal, it is contended that the *dakhillahs* were entirely unproved, and that consequently the Judge's decree was based on that which was not evidence. The respondent's pleader is obliged to admit that this is so, and that the *dakhillahs* are not proved or attested in any way. Some of them appear to have been produced in a former suit, and the Judge professes himself satisfied with them. But this only applies to *some* of the *dakhillahs*.

The defendant cites a witness who had been a *naib* in the *mouzah* some years previously, but he stated that none of the *dakhillahs* were in his handwriting and he could not identify any of them. Other witnesses were cited, who did not however attend although every means was adopted to compel their attendance, and it is impossible to say what the effect of their evidence would have been. There is also very little oral testimony to corroborate the defendant's statement. But the evidence on which the Judge has relied as proving payment of rent at an uniform rate for twenty years has been read to us, and it only amounts to a dogmatical statement that the defendant had held the land for a long time and that his rent had never been changed.

It would be extremely unsafe if the presumption under Section 6 Act X of 1859 were to be set up by evidence of this description.

The defendant himself has not appeared and given his evidence, and it does not appear that the zemindar was summoned to produce his books to show the entries of payments by the defendant. It must be admitted that the evidence of the defendant is of a most imperfect character.

We cannot send back the case to be tried on that evidence, but we must hold that the defendant has not made out his plea of presumption.

The case must, however, go back to the Judge to try the other question as to the rate of rent which the defendant is liable to pay.

Costs will abide the event.

The 9th January 1872.

Present:

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Act VIII of 1859 *s.* 230—*Dispossession (under color and in Execution of Decree).*

Case No. 932 of 1871.

Special Appeal from a decision passed by the Officiating Judge of Jessore, dated the 27th April 1871, *reversing a decision of the Moonsiff of that district, dated the* 19*th December* 1870.

Judoo Kapalee (Plaintiff) *Appellant,*

versus

Issur Chunder Roy and another (Defendants) *Respondents.*

Mr. R. T. Allan and *Baboo Romanath Bose* for Appellant.

Baboo Chunder Madhub Ghose for *Respondents.*

Held that the Judge need not have gone into the question as to whether the petitioner was entitled to relief under Section 230 Act VIII of 1859, when the parties were agreed that the defendant had dispossessed the plaintiff under color and in execution of a decree which he had obtained; it being immaterial whether that dispossession was effected by a Court officer or not, and whether the land in question was comprised in the decree or not.

Jackson, J.—We think the Judge has erroneously set aside the order of the Moonsiff in this case.

The petitioner under Section 230 complained that he had been dispossessed of certain lands which were in his possession by the defendant in execution of a decree which the defendant had obtained against a third party, and he alleged at that time that the land in question was comprised in the decree which the opposite party had obtained. Afterwards he got leave to amend his petition by saying that the land was not comprised in the decree, but that the dispossession took place under color of that decree.

The defendant did not deny this allegation, and he asserted that he had got the land in question under the decree, that he was justly entitled to the land, and that the petitioner had no right to it.

No evidence appears to have been taken in the Court of the Moonsiff, but the Civil Court Ameen, who seems to have been the same officer who was employed in the execution of the decree, reported that he had not given the defendant possession of this land. The Moonsiff, however, finding that the plaintiff was in possession of the land, and was entitled to it, gave him a decree.

The Judge, relying upon the report of the Ameen, set aside the Moonsiff's order, holding that the petitioner was not entitled to relief under Section 230. Under the circumstances, the Judge need not have gone into that question when the parties were agreed that the defendant had dispossessed the plaintiff under color and in execution of a decree which he had obtained. Whether that dispossession was effected by an officer of Court or not, is not of importance, and it is of no consequence whether, as the plaintiff first stated, the land was comprised in the decree or not.

It is sufficient for us to say that the application under Section 230 was in order and was made in time.

The decree of the Judge must be set aside, and the case remanded to him to inquire whether the plaintiff was in *bonâ fide* possession of the land, and is entitled to it.

Costs will follow the result.

The 9th January 1872.

Present :

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Settlements (Temporary and Permanent)—Rights of Proprietor—Putneedar (Dispossession of).

Case No. 381 of 1871.

Special Appeal from a decision passed by the Officiating Judge, of Nuddea, dated the 29th November 1870, affirming a decision of the Subordinate Judge of that district, dated the 17th September 1869.

Messrs. R. Watson & Co : (some of the Defendants) *Appellants,*

versus

Ranee Brojo Soonduree Debia (Plaintiff) and another (Defendant) *Respondents.*

Baboo Mohinee Mohun Roy for Appellants.

Baboos Unnoda Pershad Banerjee and *Mohesh Chunder Chowdhry* for Respondents.

The Lower Appellate Court's order upon remand that plaintiff be declared entitled to the permanent settlement of the land in dispute instead of the defendants, and that she be substituted for the defendants as proprietor and declared liable to pay the rent of the estate instead of the defendants, was confirmed in special appeal subject to the proviso that the declaration of the plaintiff's rights now made will not entitle her to dispossess the defendants if they be in possession of the land as *putneedars.*

Jackson, J.—The facts of this case have already been stated at considerable length in the judgments of the Lower Courts, as well as in the order of this Court when the case was remanded on the former hearing in 1868. *

It is unnecessary now, we think, to do more than state briefly the questions which we have had to consider, and our determination of those questions.

By our order of remand, the Lower Appellate Court was directed to consider whether the plaintiff was the person entitled to a permanent settlement of the *chur* in question, and whether, if so, such right had been impaired by reason of a sale for arrears of Government Revenue during the pendency of the temporary settlement in 1850.

We have no manner of doubt that the Lower Appellate Court has rightly decided both that the plaintiff was the person entitled to the permanent settlement, and that the effect of the sale in 1850, whether that form of sale was correct or no, was nothing more than a sale of the right, title, and interest of the settlement holder under the temporary settlement of 1842. Consequently, when the time came for concluding the permanent settlement, the Rajah of Nattore, or the person representing the family, was the person entitled to the permanent settlement.

We should have supposed that, if the plaintiff had been properly advised, his plaint should have asked that the settlement granted by the Collector in 1862 to Messrs. Watson & Co. should be set aside, that not being the form of settlement to which they were entitled, and that a new settlement of that description should be entered into with the plaintiff. But as the plaintiff has not asked for that, in the circumstances of the case, we think that the Judge was right in granting the particular relief asked for ; that is to say, that the plaintiff should be declared entitled to the permanent settlement instead of the defendants, and that she should therefore be substituted for the defendants as proprietor, and declared liable to pay the rent of the estate instead of the defendants.

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* 10 W. R., 396.

Another question raised in special appeal was whether the plaintiff ought under the decree of Court to obtain possession of the land in dispute.

It does seem, with advertence to Section 4 Regulation XI of 1825, that the defendants assumed that, as they held a *putnee* of the parent *mehal*, they were entitled to possession of this land as against the zemindar, and the judgment of the Court of first instance appears to have contemplated merely such possession as a zemindar would be entitled to without raising any question as to the rights of other parties. But the declaration in that respect is somewhat vague, and it is impossible for us to avoid the supposition that the plaintiff in the suit did intend, as a portion of the relief sought, to ask for actual and immediate possession. We think that we ought to make the declaration precise in disposing of this appeal, and to say that the declaration of the plaintiff's rights now made will not entitle her to dispossess the defendants if they be in possession of the land as *putneedars*.

Lastly, as to the matter of costs, after giving it a good deal of consideration, regard being had to the circumstance that the defendants, contrary to the application of the Ranee of Nattore at the time of the settlement, obtained from the Collector a permanent settlement to which they were not entitled, and that the plaintiff must have been a good deal prejudiced by this act of theirs, we think we should not disturb the order of the Lower Courts on this point; and with regard to this appeal we direct that each party should pay his own costs.

The 9th January 1872.

Present:

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Limitation — Adverse Possession — Immoveable Property — Cause of Action — Transfer of Rights — Compromise — Dispossession — Ijaradar.

Case No. 954 of 1871.

Special Appeal from a decision passed by the Judge of 24-Pergunnahs, dated the 31st July 1871, reversing a decision of the Subordinate Judge of that District, dated the 24th November 1870.

Brindabun Chunder Sircar Chowdhry and another (two of the Defendants) *Appellants,*

versus

Bhoopal Chunder Biswas and others (Plaintiffs) *Respondents.*

Baboo Gopal Lall Mitter and *Nil Madhub Bose* for Appellants.

Baboo Chunder Madhub Ghose for Respondents.

After adverse possession of immoveable property for more than twelve years, a new period of limitation cannot commence to run by the mere circumstance of a transfer of rights or supposed rights.

A compromise by which a lessee relinquished the land, and to which the owner was no party, creates no cause of action on the part of the owner or of any person holding under him.

The zemindar or owner is bound by the dispossession suffered by his *ijaradar*.

Jackson, J.—In this suit which was for the recovery of possession of some beegahs of land alleged to belong to talook No. 884 which the plaintiff had purchased, the Court of first instance held that the adverse possession of the defendant had existed for so long a period of time as to bar the suit. The District Judge, on appeal, overruled this decision, holding that limitation did not apply upon the grounds which he has stated. The Judge says in the first place that, although the plaintiffs were not, as they contended, by reason of their purchase from Government, entitled to the benefit of the sixty years' rule, yet he conceived that their cause of action accrued on the day on which they purchased. It appears to us that there is no foundation for that opinion. It would be a very serious matter if, after adverse possession of immoveable property for a period of more than 12 years, by mere circumstance of a transfer of rights or supposed rights, a new period of limitation were to commence to run. The Judge then goes on to say:—"I think that "the suit is within time on other grounds, "as well as the period running from the date "of purchase, for a fresh cause of action may "rightly be said to have accrued to the own- "er of the talook from the date on which the "lessee by a compromise to which he was "not a party relinquished the land." Even if this were a correct statement of what occurred in the present case, we should be unable to agree with the Judge on this point. It appears to us that, under the circumstances, the compromise to which the owner was no party does not create any cause of action on his part, or on the part of any person holding under him.

Then it is contended that there is another ground on which the limitation may be avoided, that is to say, that the dispossession was alleged to have taken place while the mehal or lot was in the occupation of the *ijaradar*, and the zemindar or owner is not bound by the dispossession suffered by his *ijaradar*. We are referred to a case in the 10th Weekly Reporter, page 15, in which I was one of the Judges concerned. That case was very different from the present; there it was proved that, during the continuance of the *putnee* tenure, a trespasser had got into his hands certain lands comprised in that tenure; the zemindar afterwards came into possession of the mehal, having acquired the putneedar's rights by purchase at a sale for arrears of rent: and it was held that the putneedar being unable by law to create incumbrances, and the zemindar having a right to cause the land to be conveyed to a new purchaser in the same state as he had granted it, the trespasser stood in the position of an unauthorized incumbrancer; and it was also observed that it would be extremely hard to compel the landlord to bring a suit immediately a trespass is committed upon his tenant. We think that in the present case, the limitation was properly pleaded and established; and the Judge was wrong in overruling that plea. Then it is said that the plaintiff gave oral evidence to prove the fact of possession within twelve years. It is only necessary to say that such evidence is in direct contradiction of his own allegation in the plaint, an allegation which goes to show that the purchaser never got into possession of this land, but on going to take possession after his purchase was obstructed by the defendant. That argument was used and very properly used, we think, by the Subordinate Judge in disposing of this case. The Judge has not referred to the evidence, and we may assume that the plaintiff did not bring it to his notice. It is not, therefore, necessary for the ends of justice that we should remand this case to the Judge for a finding upon that evidence. Under these circumstances, all that we have to do is to reverse the judgment of the Judge, and restore that of the Court of first instance with costs.

The 9th January 1872.

Present:

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Evidence—Exclusion of Copies—Decrees.

Case No. 615 of 1871.

Special Appeal from a decision passed by the Officiating Judge of Chittagong, dated the 4th March 1871, reversing a decision of the Moonsiff of Seetakoond, dated the 22nd January 1870.

Sreemutty Lusina Bibee (Plaintiff), *Appellant,*

versus

Juggo Mohun Dutt (Defendant) *Respondent.*

Baboo Nullit Chunder Sein for Appellant.

Baboo Huree Mohun Chuckerbutty for Respondent.

The Judge was held to have been wrong in summarily excluding copies of a *kobala*, and of certain admissions from evidence merely because they were copies and not originals, when no objection was taken to them, and in having rested his decision against the plaintiff's title upon two decrees, one of which was not between the parties to this suit, and the other had been found by the first Court to have been fraudulently obtained, without any enquiry having been made into this matter by the Judge.

Jackson, J.—THIS case was remanded to the Lower Appellate Court for the trial of certain issues stated; and those issues have now been tried by the Judge who is of opinion that the plaintiff's suit is not made out, and who has therefore reversed the decision of the first Court.

It is shown to us on special appeal that the Judge has based his judgment, *first*, on the exclusion of certain evidence adduced by the plaintiff, and *secondly*, on certain decrees which he held to be conclusive against the plaintiff's title.

As to the first matter, namely, the exclusion of evidence, the Judge has applied to such evidence, that is to say, to a copy of a *kobala*, and a copy of certain admissions made by Abdool Ruzzaq, the strict rules of the English Law of Evidence. If, on such evidence being tendered at the trial, it had been objected to, and such objection had not been over-ruled, the Judge would have been quite right to decide the case in accordance with the English rule. But when we see that the evidence is of a kind which, if the objection had been taken, might have led to the production of primary evidence, and that no objection was made, and copies of the *kobala* and of the admissions were tendered and received, we think the Judge was not right in summarily excluding those documents merely because they were copies and not originals. Assuming that the judgment of the Court below has been affected by the exclusion of the evidence, it follows that the case must be remanded in order that the Judge should take it with the rest of the evidence into consideration and pronounce a decision upon it.

But it is said that the Judge rests his decision upon other grounds; namely, on certain decrees which he considered conclusive against the plaintiff's title. As to these decrees, one of them is shown not to have been between the parties to this suit; but the other, if obtained *bonâ fide*, would have the effect of concluding the plaintiff's title. But this decree has been found by the Moonsiff to have been obtained fraudulently. He says,—"It is no wonder that Aleema Bibee might "have held back the copy of the *kobala* "and other proofs in the above case (in "which the decree in question was obtained) "with the object of destroying the rights of "the mortgagee."

It will be necessary for the Judge to enquire into this matter, and if he finds the decree to have been fraudulently obtained, it cannot be held to prejudice the plaintiff in any way.

It is said, however, that the order of remand restrained the Judge from going into that question, and we are referred to these words in the order of the learned Judge remanding the case:—"The question of fraud "hardly enters into this case, because if "Aleema Bibee was the purchaser of the "property from Abdoor Ruzzaq, and had "mortgaged this property to the plaintiff, "the defendant cannot make a valid purchase "from Abdoor Ruzzaq."

It is quite clear that this passage refers not to any fraud on the part of Aleema Bibee, but to fraud on the part of Juggo Mohun, and it was not intended that all questions of fraud or collusion should be excluded from consideration, but that the particular question referred to was not material.

With these observations, the case is remanded to the Judge for trial. Costs will abide the event.

The 16th January 1872.

Present:

The Hon'ble Louis S. Jackson and A. G. Macpherson, *Judges.*

Boundary Disputes—Khusrah—Evidence—Using other decrees between same Parties.

Miscellaneous Appeal from an order passed by the Judge of Sarun, dated the 31*st December* 1870, *modifying a decision of the Subordinate Judge of that district, dated the* 11*th August* 1869.

Maharajah Rajendro Kishore Singh Bahadoor (decree-holder) *Appellant,*

versus

Hyabul Singh and others (judgment-debtors) *Respondents.*

Mr. J. T. Woodroffe for Appellant.

Baboo Mohesh Chunder Chowdhry for Respondents.

The appellant having obtained a decree in 1854, declaring him entitled to erect boundary pillars according to a certain ***khusrah***; HELD that it was now a work of great difficulty to ascertain and define the boundaries, and that the Court in executing that decree was not precluded from taking into consideration other decrees between the same parties not as contradicting or altering that ***khusrah*** but as explaining and supporting the views taken by the Court of what the boundaries really were according to the ***khusrah***.

Jackson, J.—I HAVE considered this case since it was argued last September, and I see no reason to think otherwise than I did at the hearing, namely, that justice has been done between these parties as effectually as any one could hope for in the state of things shown by Mr. Woodroffe, and indeed that the conclusion arrived at by the Subordinate Judge upon these complicated facts is in all probability correct.

This officer who visited the disputed locality in person, and remained about five days on the spot, has given excellent reasons in support of his decision, and has taken precisely the same course which I myself adopted, when a Zillah Judge many years ago, for the termination of a similarly protracted boundary dispute in Rajshahye.

It is highly improbable that a sounder opinion can ever be formed, when the problem is to trace a boundary line which was laid down twenty years ago and of which the indications of course became year by year fainter.

The question in truth is one of fact, and it is far from easy to see on what ground the interference of this Court in a special appeal in this execution case could be justified.

The gist of Mr. Woodroffe's contention appeared to be that whereas the special appellant had got an absolute decree declaring him entitled to set up his boundary marks in accordance with Muhboob Ali Ameen's *khusrah* the Court executing the decree should have looked to that *khusrah* alone, and should not have taken into consideration previous decisions in favor of the defendant apparently in conflict with that *khusrah*.

But in the first place I do not conceive it to be possible that the Court which gave the special appellant his decree could have intended by its declaration, in a form of words liable to be variously interpreted, to override express decisions in favor of the defendant in respect of defined pieces of land. And secondly, I conceive that when the Court executing the present decree found itself in doubt as to the identity of particular objects described in the *khusrah*, it naturally looked for light from previous or contemporaneous decisions between the same parties, reasonably enough assuming that such decisions would be in accordance with the otherwise declared rights of the disputants.

I am therefore of opinion that even were interference possible, we should do infinite harm by reopening a question upon which there could be no expectation of a more satisfactory judgment being passed than that of the Subordinate Judge slightly modified as it has been by the Lower Appellate Court.

The special appeal must consequently be dismissed with costs.

Macpherson, J.—It appears to me also that we ought not to interfere with the judgment of the Lower Court.

In 1864 the appellant instituted a suit praying for confirmation of his possession and for a declaration of his right to erect boundary pillars "according to Muhboob Ali's *khusrah*." On December 29th 1859, the Sudder Court practically decided that he was entitled to the decree he sought for. The appellant is now seeking to execute his decree by having the boundaries "according to Muhboob Ali's *khusrah*" ascertained and marked out by pillars. Muhboob Ali's *khusrah* is dated the 6th of June 1851, and there has been constant litigation between the parties ever since that date, as well as prior to it. It is unnecessary to say therefore that it must now be a work of extreme difficulty to ascertain and define the boundaries which the appellant in 1854 sought to mark out.

The question is merely one of fact, what are the boundaries according to Muhboob Ali's *khusrah*? It is not therefore *primâ facie* a proper subject of special appeal. The matter has been repeatedly and eventually most carefully enquired into. The Subordinate Judge of Sarun himself went to the spot and examined the ground and then fixed, so far as he could from the materials before him, what the boundaries are according to Muhboob Ali's *khusrah*. In the results arrived at by the Subordinate Judge the Judge concurs, subject only to some slight modifications; and I do not see that any error has been committed on which to base a special appeal.

It is said that other decrees have been referred to and acted upon, which ought not to have been looked at. But so far as I can understand the case in the exceedingly complicated state in which it is now before us, those decrees are not used as contradicting or altering Muhboob Ali's *khusrah*, but as explaining and supporting the views taken by the lower Courts of what the boundaries really were according to Muhboob Ali's *khusrah*. The Subordinate Judge is quite right in saying that the decree which the appellant obtained is not one under which the appellant is entitled to anything more than a mere marking out of boundaries "according to Muhboob Ali's *khusrah*" as directed by the decree. It is in no sense a decree for possession.

This appeal, therefore, will be dismissed, and the order of the Judge will be affirmed with costs.

The 21st February 1872.

Present:

The Hon'ble Louis S. Jackson and
F. A. Glover, *Judges.*

Splitting of Cause of Action—Act VIII of 1859 *s.* 7*—Rent Suits—Res Adjudicata—Act VIII of* 1859 *s.* 2.

Cases Nos. 1201 and 1202 of 1871.

Special Appeals from a decision passed by the Officiating Judge of Chittagong, dated the 5th August 1871, *reversing a decision of the Moonsiff of Coxbazar, dated the* 31*st May* 1871.

Ram Soondur Sein (Plaintiff) *Appellant,*

versus

Krishno Chunder Goopto and others
(Defendants) *Respondents.*

Baboo Nullit Chunder Sein for Appellant.

Baboo Okhil Chundra Sein for Respondents.

Arrears of rent for successive years are several and distinct causes of action, and not parts of one cause of action.

Quære.—Whether the provisions of Section 7 Act VIII of 1859 are applicable to rent suits under Act X of 1859.

Where a former judgment decided that the plaintiff had no cause of action, it is clear that there was no cause of action tried and determined between the parties, and consequently Section 2 Act VIII of 1859 is not applicable.

The Court declined to concur in a decision which should deny to plaintiff money now evidently due and which defendant has failed or omitted to pay, upon the ground that in a previous suit it appeared that defendant was willing to pay and consequently that suit was unnecessary.

Jackson, J.—In this case, the plaintiff sued to recover arrears of rent in respect of a *talook* held by the defendant, the arrear claimed being for the rents of the years 1229, 1230, and 1231 of the Mughée era.

Various pleas were set up by the defendant. They were all overruled by the Court of first instance, but on appeal the Zillah Judge decreed the appeal of the defendant on two grounds:—firstly, that inasmuch as the plaintiff had brought in the year 1231 a suit for the unpaid rents of the year 1220, and had not included in such suit the arrears for the years 1229 and 1230, he must be held to have split his cause of action, and under Section 7 Act VIII of 1859 to have lost his remedy in respect of the rents not so included. The second ground was that a previous suit between these parties had been heard and dismissed by the High Court in respect of the rents of the year 1229.

On the first of these points, the Judge has decided in direct opposition to a precedent of the Court reported in II Weekly Reporter, page 31, Act X Rulings. That was a decision of the late Officiating Chief Justice Mr. Justice Norman, and the late Mr. Justice Pundit than whom two more experienced and careful Judges, I suppose, never sat in this Court. The Judge of Chittagong takes it upon himself to say that it does not appear that in that case the point was carefully argued or that reference was made to the authorities which might have been quoted on the other side; and, having assumed this, the Judge proceeds to rely upon the authority of a Madras case in Volume IV of the High Court Reports of that Presidency, page 334.*

It is not clear whether the Judge of Chittagong, who gave this decision had the report of the Madras case before him, for he only cites the note of it to be found at page 54 of Broughton's recent edition of the Code of Civil Procedure. To show what bearing that case really has on the present one, we shall direct the report of it to be appended to the transcript of our judgment. But even taking Mr. Broughton's note of the case, it appears to me that the Madras case is clearly distinguishable from the present. It is stated in the note that "the plaintiff was the lessor and the defendant was the "lessee of certain lands under an agreement, "whereby the defendant bound himself to "deliver to the plaintiff certain amounts of "paddy at specified dates in consideration of "the plaintiff permitting him to occupy the "land for a certain period, and the defendant "failed to deliver the paddy; in a suit for rent,

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* Referred Case No. 15 of 1869.

Chockalinga Pillai against Kuthura Viruthalam.

This was a case referred for the opinion of the High Court by J. H. Nelson, the Judge of the Court of Small Causes at Combaconum in suit No. 102 of 1869.

This was a suit for rent due to the plaintiff by the defendant under a parol agreement, by which the defendant bound himself to deliver to the plaintiff thirty *kalams* of kadappa paddy in the month of October 1866, twenty *kalams* of Samba paddy in the month of February 1867, thirty *kalams* of Kadappa paddy in the month of October 1867, and twenty *kalams* of Samba paddy in the month of February 1868, in consideration of the plaintiff permitting the defendant to occupy certain land from the month of April 1866 to the month of March 1868.

The defendant's pleader objected to the jurisdiction of the Court to entertain the suit on the ground that there were four distinct cases of action, each of which was not cognizable by the Court, and relied on Section 8 of the Civil Procedure Code.

The Judge was of opinion that there were four distinct causes of action, each of them being cognizable by one and the same Court, but that Court, by reason of the amount of the suit, was the District Moonsiff's on the Small Cause Court side, and not the Court of Small Causes at Combaconum.

The Judge dismissed the suit subject to the opinion of the High Court upon the following question:—Can the Court try and determine the suit.

No Counsel were instructed. The Court delivered the following.

Judgment—The question referred is whether several claims each of which separately is within the Small Cause jurisdiction of a District Moonsiff, can be joined together, and form the basis of a suit in the Small Cause Court, and we are of opinion that such a suit is cognizable by the Small Cause Court. Although each item in the payments stipulated for in this lease constitutes a debt, the aggregate of such items constitutes but one cause of action,—the distinction between an agreement consisting of various items which are intended to form one entire demand on the one hand and several distinct and independent claims on the other, being clear and undoubted.

In Grimby *vs.* Aykroyd (a) it was held that where one item is connected with another in this sense that the dealing is not intended to terminate with one contract, but to be continuous, so that one item, if not paid, shall be united with another and form one entire demand, the plaintiff cannot split these items into separate causes of action but must sue upon the aggregate amount.

Here plaintiff was the lessor and defendant the lessee of certain lands for the term of the agricultural years 1866–68. The dealing was continuous for two years and though plaintiff of course might have sued for each item or instalment of rent as it fell due, the aggregate of two or more of such unpaid instalments cannot be divided into two or more causes of action, but must be deemed one cause of action.

(a) 1 Exch., 479.

"it was held on the authority of Grimby "*vs.* Ackroyd that, although the plaintiff "might have sued for each instalment of "rent as it fell due, the aggregate of such "unpaid instalments constituted but one "cause of action." There it may well have been considered, under the particular circumstances of the case, that the whole of the contract was one. The agreement to hold the land was for a certain limited period and the payment was to be a specified quantity of paddy, although that paddy was to be delivered in certain instalments, the Court may, therefore, have held that the whole of the paddy having become due, the agreement was one and constituted one cause of action. Here the case is very different.

But be that as it may, the decision of the Madras Court, although entitled to every respect, is not an authoritative decision which binds the inferior Courts of this Presidency; and the Judge of Chittagong, having before him a precedent of this Court which has never been overruled, was, I think, bound to follow that precedent. The learned Judges in the case reported in II Weekly Reporter say—"The Judge on appeal re"versed the Deputy Collector's decision on "the ground that, as there was no mention "of the rents of 1268 in the decree for the "arrears of 1269, the present suit is barred "under Section 7 Act VIII of 1859. "But arrears of rent for successive years are "several and distinct causes of action in "respect of which it is perfectly competent "to the party entitled to institute separate "suits." Now, in that case, no doubt, it might have been argued, as the Judge here argues, that it was questionable whether the provisions of Section 7 were applicable to rent suits under Act X of 1859; and that no doubt would have been an easy answer to the ground taken by the Lower Appellate Court in that case. But the learned Judges took no such ground. They broadly laid down that, supposing Section 7 to be applicable to rent suits, arrears of rent for successive years are several and distinct causes of action, and not parts of one cause of action. I think, therefore, that the Judge was in error in reversing the decision of the Moonsiff upon this ground.

Then, on the second ground, it appears to me that the decision is not only erroneous but most inequitable. It seems that, in the previous suit referred to, the plaintiff sued for an entire quantity of land, being twenty-seven *drones*, and as to that quantity of land, it seems to have been divisible into two portions; in respect of one of them, the defendant admitted the plaintiff's right, that is as to sixteen *drones*, but professed that he was and always had been ready to pay the rent due on that land, but that as to eleven *drones* he stated that the plaintiff had no right whatever. The Court here held in special appeal (under what circumstances I do not know) that the plaintiff's right as to eleven *drones* was not made out, and as to sixteen *drones* that, as the defendant was ready to pay the rent, the plaintiff had no cause of action. It seems that, whatever the defendant may have been disposed to do at the time he put in his written statement, he never did pay the rent, and in consequence of his refusal or omission to pay it the present suit has been brought. Now, if the Court held in that case that the plaintiff had no cause of action, it is clear that there was no cause of action tried and determined between these parties, and, consequently, Section 2 Act VIII of 1859 is not applicable.

But even if the case were not so, I should have considerable difficulty in concurring in a decision which should deny the plaintiff money now evidently due and which the defendant has failed or omitted to pay upon the ground that in a previous suit it appeared that the defendant was willing to pay and that consequently that suit was unnecessary.

On both grounds, I think the decision of the Judge below is incorrect, and that his decision must be set aside, and the judgment of the first Court restored with costs.

Glover, J.—I concur in reversing the decision of the Judge and in restoring that of the first Court.

The 21st February 1872.

Present:

The Hon'ble Louis S. Jackson and F. A. Glover, *Judges.*

Ijara—Agreement—Recovery of enhanced Rents.

Case No. 1245 of 1871.

Special Appeal from a decision passed by the Officiating Judge of Jessore, dated the 25th July 1871, *affirming a decision of the Subordinate Judge of that district, dated the* 14*th March* 1871:

J. B. Savi (Plaintiff) *Appellant,*

versus

The Collector of Jessore and others, (Defendants) *Respondents.*

Mr. J. S. Rochfort for Appellant.

Baboo Jugodanund Mookerjee for Respondents.

Plaintiff took an *ijara* of the defendant's estate at a time when certain ryots were under notice of enhancement and assessment of rent, as to which the agreement between the parties was, that defendant should furnish plaintiff with the requisite papers, that plaintiff should take the necessary steps to recover the rents and should have six annas of the increased rents so obtained, but that if, on plaintiff's default, defendant recovered any himself, plaintiff was not to make any objection. On plaintiff's default defendant recovered certain increased rents, towards the recovery of which plaintiff neither contributed, nor offered to contribute, his share of the necessary expenses. HELD that he was not entitled to his share of the increased rents.

Jackson, J.—IT appears to me that the decision of the Lower Appellate Court is right.

The plaintiff took an *ijara* of the defendant's estate, and it appears that at the time when the *ijara* was granted, certain ryots were under notice of enhancement or assessment of rent, and in reference to these notices the agreement between the parties was that the defendant should furnish the plaintiff with the requisite papers, that the plaintiff should commence the suits and should take necessary steps to enforce the enhancement; and that of the increase of rent so obtained, the plaintiff was to have six annas and the defendant the other ten annas. It then provided that if the plaintiff should fail to take the proper steps, the defendant should be at liberty himself to take proceedings and that the plaintiff should not be at liberty to object thereto.

The plaintiff did not take the proceedings contemplated in regard to the rents which are the subject of this suit, but the defendant did proceed and recovered in certain instances increased rent, and the plaintiff now sues to obtain from the defendant the six annas' share of such increase.

The plaintiff alleges that the reason why he did not take the steps contemplated in the agreement was that he was not furnished with the papers as stipulated in the contract, but he does not say that he offered, and it seems clear that he never has offered up to this time, to contribute that which the contract stipulated for, that is to say, a six annas share of all necessary expenses towards recovering these increased rents.

That being the case, it appears to me that the plaintiff is not entitled to sit quiet, to give neither exertions nor money, and afterwards profit by taking six-sixteenths of the advantage which the defendant has reaped by his own exertions and the expenditure of his own money.

Mr. Rochfort has contended that there is no stipulation in the contract which should deprive him of the six annas' share. To that it may be answered that there is nothing in the contract which gives him six annas under such circumstances, and that his own conduct does deprive him. Moreover, one of the conditions expressly contemplates the recovery of the whole amount by the Rajah without any deduction in favor of the plaintiff, because it is stated that, if the Rajah should take steps to recover those amounts in the plaintiff's default, the plaintiff was not to make any objection. It is quite clear that if the result of the Rajah's exertions was to be that the plaintiff was nevertheless to have a six annas' share of what the Rajah recovered, the plaintiff would be very far from objecting to his doing so.

I think, therefore, that the plaintiff had no case and that the special appeal must be dismissed.

Glover, J.—I concur.

The 21st February 1872.

Present :

The Hon'ble Louis S. Jackson and F. A. Glover, *Judges.*

Occupancy of land with huts thereon—Right of Landlord to determine Tenancy—Act X of 1859 *s.* 6—*Compensation.*

Case No. 1205 of 1871.

Special Appeal from a decision passed by the first Subordinate Judge of 24-Pergunnahs, dated the 12th August 1871, *reversing a decision of the Moonsiff of Alipore, dated the 29th July* 1870.

Addoyto Churn Dey (Plaintiff) *Appellant,*

versus

Peter Doss (Defendant) *Respondent.*

Baboo Hem Chunder Banerjee for Appellant.

Mr. M. L. Sandel for Respondent.

Defendant had occupied the land upon which his huts were standing for some thirty years, and he put up a wall round the land some ten or twelve years ago. HELD that the permissive occupancy of land under such circumstances could not give defendant a right to retain possession of it when the landlord desired to put an end to the tenancy or entitle him to compensation; Section 6, Act X of 1859, having no bearing upon the case.

Jackson, J.—IT appears to us that the decision of the Lower Appellate Court cannot be supported.

The defendant, it seems, had occupied the land upon which his huts are standing for some thirty years, and about ten or twelve years ago, he put up round the land a wall of bricks, or what is called a *kutcha-pucka* wall. The plaintiff, who has lately purchased the ground, gave him notice to quit. The defendant refused to leave the land, and the suit was brought to eject him.

The Moonsiff gave the plaintiff a decree.

On appeal, the Subordinate Judge considered that "when the former proprietor of the land allowed the defendant's father, and afterwards the defendant, to reside on the disputed land by raising houses as described above for two generations, embracing a period of thirty or thirty-two years, plaintiff, who is the recent proprietor of the disputed land, cannot eject the tenant, defendant, therefrom and obtain its *khas* possession."

The cases which the Subordinate Judge cites in support of this proposition do not appear really to go to that extent. The case chiefly referred to has been that of Banee Madhub Banerjee against Joy Kissen Mookerjee, reported in XII Weekly Reporter, page 495. In that case, the facts were somewhat similar, though perhaps a little stronger than in the present case. The rights of the tenant had been sold and the zemindar ignored the purchaser and affected to treat him as a stranger and a trespasser. In that case, the Court, without actually deciding whether or not the previous tenant could be ejected, held only that the rights, whatever they are, were transferred, and that the zemindar could not summarily eject the purchaser.

Section 6 Act X of 1859 has no bearing upon this case, and the Courts are not competent to extend the provisions of such a rule of law as that by what they may consider to be an analogy to a different case. It seems to be quite clear that the permissive occupancy of land under such circumstances as the defendant has held this land will not give him a right to retain possession of it when the landlord desires to put an end to the tenancy.

Then the respondent has pressed us on the subject of compensation. We cannot discover that anything was proved at the trial which entitles him to compensation. The only circumstance that has been shown is that some ten or twelve years ago he put a wall round the premises, which he says cost somewhere about 500 rupees. We do not know that any evidence of that fact was given or that there is anything in that fact which entitles him to compensation at the hands of the plaintiff.

It appears to us that the decision of the Lower Appellate Court was wrong, and that it must be set aside, and the plaintiff must have a decree with costs.

The 26th February 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble Louis S. Jackson, *Judge*.

Decree for Land—Change in aspect of Land (by shifting of river)—Execution.

Case No. 284 of 1871.

Miscellaneous Appeal from an order passed by the Officiating Judge of Rungpore, dated the 12th June 1871.

Pertap Chunder Burooa (Judgment-debtor) *Appellant*,

versus

Kistendro Roy Chowdhry and others (Decree-holders) *Respondents.*

Baboo Gopal Lall Mitter for Appellant,

Baboos Kalee Mohun Doss and *Mohinee Mohun Roy* for Respondents.

A decree awarding land may be executed, though there may have been a change in the aspect of the land by the shifting of the river, if by any means the position of the land awarded can be ascertained when the decree comes to be executed.

Couch, C. J.—It appears to me that no ground has been shown for our disturbing the conclusion that has been come to by the Lower Court. It is admitted by the pleader for the appellant that the boundaries given in the plaint are vague, but he contends that the decree which was made by the High Court in the year 1864, when it reversed the decision of the Lower Court and decreed for the plaintiff, must be construed strictly with reference to the boundaries which are so admitted to be vague, and that it must be understood as merely a decree awarding to the plaintiff the land which could be shown to be within those specified boundaries. I think that that cannot be allowed. When the judgment of the High Court is referred to, the way in which the Court recites the judgment of the Lower Court, and the language it uses with regard to it and the claim of the plaintiff show, I think, that what was intended was to award to the plaintiff the land as claimed by him not limited by the supposed southern boundary, but land lying between the lines A. A. and B. B. The decree has been executed as so awarding the plaintiff's claim.

From the report of the Moonsiff, there appears to have been a very patient and careful investigation He seems to have done all that could be done, considering the extreme difficulty of the case owing to the way in which the land has been altered by the shifting of the river : and certainly I think that the defendant who has so long been resisting the execution of the decree cannot require that more should be done in the execution of it than the circumstances of the case admit of.

We cannot admit the proposition that, if a man in the year 1864 gets a decree awarding land to him, it is not to be executed because there was a change in the aspect of the land by the shifting of the river, if by any possible means the position of the land which was awarded to him can be ascertained when the decree comes to be executed. That seems to have been done in this case, and nothing has been shown to lead us to think that the conclusion, which the Moonsiff reported to the Court and which the Judge adopted, is a wrong conclusion.

I think there is no ground for this appeal: it is rather a vexatious one, and must be dismissed with costs.

Jackson, J.—I entirely concur. It seems to me that the result, both of the decree in this Court and also of the proceedings in execution, has been to give the plaintiff just that to which he was entitled, namely, that he has been put as nearly as possible in the position in which he would have been as to the possession of this land if he had never been ousted by the defendant ; but, if there is any appreciable difference in the precise position in which he now will be by this execution and that which he would have occupied if there had been no dispossession, that is clearly the result of his own act and the complications which have arisen are entirely of his own creation.

The 26th February, 1872.

Present:

The Hon'ble W. Markby and Dwarkanath Mitter, *Judges.*

Lakheraj—Possession—Grant.

Case No. 1189 of 1871.

Special Appeal from a decision passed by the Officiating Subordinate Judge of Shahabad, dated the 28th June 1871, reversing a decision of the Moonsiff of Buxar, dated the 19th September 1870.

Mohabeer Juswar (Defendant), *Appellant,*

versus

Dowlut Sonar (Plaintiff) *Respondent.*

Baboo Mohesh Chunder Chowdhry for Appellant.

Baboos Doorga Mohun Doss and *Kalee Kishen Sen* for Respondent.

The finding of the Subordinate Judge that the plaintiff had been more than twelve years in possession as *lakherajdar* was held sufficient to dispose of the question of boundaries and sufficient to establish a *primâ facie* title at any rate for the plaintiff ; whilst, on the other hand, the defendant had failed to make out any title either by showing a grant or that he had been in possession.

Markby, J.—We do not think it necessary for us to call upon the other side in this case. The suit was to recover possession of 5 beegahs of land on the ground that the defendant by virtue of a sale in execution of decree had illegally dispossessed the plaintiff. The plaintiff said that the land formed part of a *lakheraj* grant of 15 beegahs made by the zemindar to plaintiff's ancestor. The defendant on the other hand contended that the 5 beegahs were portion of an ancient ryotee tenure of the judgment-debtor in execution against whom he purchased.

The Subordinate Judge has given a decree in favor of the plaintiff upon this ground. He finds that the plaintiff has been more than twelve years in possession as *lakherajdar*, and he says that that alone is sufficient to enable the plaintiff to recover unless the defendant can show that the judgment-debtor had a title, and then he goes on to consider the defendant's case and says that there is not an iota of evidence to support that case. He also says that, if necessary, he considers the *lakheraj* title proved.

Two objections have been taken in special appeal against this finding of the Lower Appellate Court; *firstly*, that whether the *lakheraj* was valid or not, it was necessary for the plaintiff to show that the 5 beegahs in suit fell within the boundaries, and *secondly*, that the Judge is wrong in saying that there is not an iota of evidence in support of the defendant's title. These two objections as put forward by Baboo Mohesh Chunder Chowdhry, pleader for the special appellant, substantially resolve themselves into the question as to whether the point of possession has been really tried; because if the question of possession has been really tried, that disposes of the question of boundaries; and if also the question of boundaries has been properly disposed of, the defendant has made out no title because he has shown no grant and the Court has found that he has not been in possession. It seems to us, reading the judgment of the Lower Appellate Court as we ought to read it, that the Court has disposed of the question of possession. He states as his deliberate opinion, in which we concur, that twelve years' possession is *primâ facie* at any rate sufficient to establish the plaintiff's title, and he finds that that possession did exist, and we think we must presume that he came to this finding upon a consideration of the whole evidence; and when he says that the defendant has not got an iota of evidence to support his title, we do not think he means to say that, if a search is made into the whole records from end to end, we should not find the least evidence in the defendant's favor, for that is in the last degree improbable, but only that there is nothing in the defendant's favor upon which he can in any way rely. We think, therefore, that the question of possession has been fairly tried in this case; and if this is so, the substantial question raised in special appeal fails.

The special appeal is dismissed with costs.

The 26th February 1872.

Present:

The Hon'ble W. Markby and Dwarkanath Mitter, *Judges.*

Suit for Rent—Alleged Dispossession—Title.

Case No. 1177 of 1871.

Special Appeal from a decision passed by the Judge of Sarun, dated the 14th June 1871, reversing a decision of the Moonsiff of that District, dated the 3rd December 1870.

Rung Lall Singh (Defendant) *Appellant,*

versus

Lalla Roodur Pershad and another (Plaintiffs) *Respondents.*

Mr. R. E. Twidale and *Moonshee Mahomed Yusoof* for Appellant.

Baboos Mohesh Chunder Chowdhry, Chunder Madhub Ghose, and *Kalee Kishen Sen* for Respondents.

In a suit for rent, the lessee pleaded dispossession; but not being able to show that his lessors had no title and that the person who ousted him had a title, and relying for that purpose upon the result of certain suits one of which in no way affected the property in question, and the other in no way affected the title of his lessors who were not parties to it, his defence was held to have wholly failed.

Markby, J.—Since this case was argued on Monday last, we have had the opportunity of looking into the facts more leisurely, and we have come to the conclusion that the decision of the Lower Appellate Court ought to be affirmed and this appeal dismissed.

The facts are somewhat complicated, but we do not think it necessary to state them here at length, because they have been fully set out in the judgments of the two Lower Courts. The suit was brought to recover the rent of a 4 anna share of a certain property leased by the plaintiff to the defendants, and the defence which was set up was that the defendants had been ousted from their possession and therefore were not liable for the rent claimed. Now, the proposition of law which the defence resolves itself into is that, if a lessee is ousted from his possession by a person who has a good title, his lessor having none, that is an answer to a suit for rent; and for the purposes of this case, at any rate, we may assume that that proposition of law is sound, but applying it to the facts of this case, we think the Lower Courts are right in saying that the defence has not been made out. The defendant did not attempt in this case to show by any fresh enquiry into the matter that his lessor had no title and that the person who (he says) ousted him had a good title, but he relied on the result of certain previous litigation which, he said, established that fact, and that under the decrees given in those cases he has been ousted. Now the position of the parties was this. Bal Koonwar, a widow, while she was in possession had made certain alienations of the property of her husband. The lessors of the plaintiff, or the persons through whom they claimed, had by a suit established the validity of their title under one of these alienations as against Deo Koonwar, one of the members of the family, who disputed the right of the widow to alienate; and having obtained decrees, they leased the land to plaintiff. In another suit brought by a person who represented another member of the family, some of the widow's alienations had been set aside, and although this property, Rampore Serai, was not included in the original plaint, some attempt was made in the course of the suit to introduce it, but it is quite clear that that attempt was not successful, because one of the grounds of appeal, when the case came up to this Court, was that Rampore Serai had not been included in the decree. The judgment of this Court is wholly silent on this ground of appeal, and there is nothing in the decree to show that the defect had been amended. It is clear, therefore, that so far as that suit was concerned, no decree was passed in reference to this property, nor is there any thing whatever in the evidence to show that the decree has been held by any Court as having any reference to the property we are concerned with at present. The other suit was brought by Deo Koonwar for a similar purpose. It was subsequent to the decree in the suit of which we have already spoken brought by the lessor of the defendant, and it in fact (because it applies to this property) seeks to establish the very reverse of what was conclusively and fully established in the lessor's suit, *viz.*, that the alienation of this property was valid. It is quite true that in that suit Deo Koonwar did obtain a decree, but it is also clear that, as regards this property, that could only have been, because the person who passed on the record as defendant in respect to this property was a person who had at that time no title to it and was, therefore, not interested in defending the suit. Chintamun, who was made a defendant in respect of this property, had already parted with his interests in favor of the present plaintiffs. That decree, therefore, can in no way affect the present suit. This being so, the case stands simply thus :—The defendant accepted a lease from and was let in possession by the lessors. He has not shown in this suit that his lessors had no title and that the person who ousted him had a title, and he has relied for that purpose upon the result of certain suits one of which in no way affects this property at all and the other in no way affects the title of his lessors who were not parties to it. Therefore the defence which he attempts to raise wholly fails, and the decision of the Lower Appellate Court holding that he has not shown that he was legally dispossessed must be affirmed and this appeal dismissed with costs.

The 1st March 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Joint Tenants—Khas Possession of Portion of Land—Res Adjudicata—Cause of Action—Rent—Mesne Profits—Limitation—Damages.

Case No. 708 of 1871.

Special Appeal from a decision passed by the Additional Subordinate Judge of Dacca, dated the 18th March 1871, modifying a decision of the Moonsiff of Leokragunge, dated the 31st August 1870.

Huree Dyal Gooho Mojoomdar and another (Plaintiffs) *Appellants,*

versus

Gobind Chunder Paul (one of the Defendants) *Respondent.*

Baboos Kishen Dyal Roy and *Hurree Mohun Chuokerbutty* for Appellants.

Baboos Hem Chunder Banerjee and *Nullit Chunder Sein* for Respondent.

A joint tenant is not entitled to *khas* possession of any portion of a joint and undivided property without a *butwarra.*

The cause of action in a former unsuccessful suit for rent by a joint tenant against his co-sharers is quite different from the cause of action in a subsequent suit for mesne profits between the same parties.

The cause of action accrues to a joint tenant for damages caused by the digging of a tank by his co-sharers without his consent, from the time when the tank was dug.

Kemp, J.—THE plaintiff is the special appellant in this case. It appears that, on a former occasion, he brought a suit against the principal defendant No. 1 for arrears of rent for the years 1271, 1272, and 1273, in respect of the plaintiff's share in a *talook,* No. 4342.

The defendant denied that he was the tenant of the plaintiff, and alleged that he had obtained a pottah from the co-sharers of the plaintiff who, by a private *butwarra,* held exclusive possession over the land leased to him. The rent suit was dismissed on the ground that the plaintiff had not proved the relationship of landlord and tenant between him and the defendant. The present suit is brought in the Civil Court, *first,* for a declaration of the plaintiff's right; *second,* for *wassilat* from 1271 to 1276; and *third,* for damages. The *wassilat* on the whole amounts to 3 rupees 8 annas 6 gundahs; the damages amount to 10 rupees 15 annas; and the land on the plaintiff's share is valued at 12 rupees 2 annas; the total valuation of the suit being 26 rupees 9 annas 6 gundahs.

The Lower Appellate Court has given the plaintiff a decree for possession of his share which has been admitted by his co-sharers who were made defendants; but such possession, the Court says, is not to be considered in the light of *khas* possession; the claim of the plaintiff for *wassilat* for the years 1271, 1272, and 1273, was dismissed on the ground that the suit for rent for these years having been dismissed, the claim for *wassilat* for the same period in the present suit was barred by Section 2 Act VIII of 1869. With reference to damages, the Lower Appellate Court held that, as the cause of action for damages is stated in the plaint to have accrued in Falgoon 1264, and as the plaintiff has not brought his suit within six years from that time, his claim for damages was barred by limitation.

In special appeal three grounds are taken: first, that the Lower Appellate Court was wrong in not decreeing *khas* possession; second, that the Court ought not to have disallowed the claim for *wassilat* for 1271, 1272, and 1273 on the ground of the suit for rent for these years being dismissed; and lastly, that the claim for damages was not barred inasmuch as the cause of action arose when the rent suit was finally decided against the plaintiff, and as six years had not expired from that time, the claim was not barred by limitation.

With reference to the first ground, we think that the Lower Appellate Court was clearly right in not giving the plaintiff *khas* possession of the land. The property being a joint and undivided property, and no *butwarra* having taken place, the plaintiff is not entitled to *khas* possession of any portion of it. Whether he is bound by any pottah granted by his co-sharers, depends upon whether he was a party to that pottah or not. We see no reason to interfere with the decision of the Lower Appellate Court, with reference to the question of the nature of possession to which the plaintiff is entitled.

With regard to the second question, we think that Section 2 in no way applies. The only issue in the rent suit was whether the relationship of landlord and tenant existed between the plaintiff and defendant No. 1 or not; and it was found that the plaintiff in that suit was not able to prove that the defendant was his tenant. The cause of action in the present suit is a different one. In this suit it has been established that the defendant is the joint tenant of the plaintiff and his co-sharers; and he, the defendant, is therefore liable for *wassilat* for any period within six years prior to suit; and inasmuch as in applying the six years' rule, the claim for *wassilat* for 1271 to 1276 is not barred by limitation, the plaintiff is entitled to the amount of *wassilat* for six years, namely, 3 rupees 8 annas 6 gundahs as claimed by him in the suit. We, therefore, modify the decision of the Lower Appellate Court to this extent.

On the last ground, we think that the decision of the Subordinate Judge is correct. The cause of action accrued when the tank was dug; and this was in Falgoon 1264. It is stated in the plaint that the defendant without a *bundobust*, that is, without coming to terms with the plaintiff, took the land for the purpose of erecting a house, and that he dug a tank in 1264, and therefore endamaged the plaintiff. The cause of action arose on that date, and it was admitted that, assuming that to be the time when the cause of action accrued, namely, the month of Falgoon 1264, the claim for damages is barred by limitation.

Therefore, subject to the above modification, we affirm the decision of the Lower Appellate Court, and dismiss this appeal. Each party will pay his own costs.

The 1st March 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Kuboolent—Onus Probandi—Rate of Rent.

Case No. 742 of 1871.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 5th May 1871, affirming a decision of the Moonsiff of Bancoorah, dated the 28th February 1871.

Ram Jeebun Chuckerbutty Bhuttacharjee and another (Plaintiffs) *Appellants,*

versus

Khoodeeram Chatterjee and another (Defendants) *Respondents.*

Baboo Nil Madhub Sein for Appellants.

Baboos Mohesh Chunder Chowdhry and *Rash Beharee Ghose* for Respondents.

A landlord is bound to prove that the rate of rent at which he claims a *kuboolent* is the rate that he has been in the habit of receiving from the tenant.

Glover, J.—This was a suit for a *kuboolent* in respect of five cottahs of land situate in the town of Bancoorah. The plaintiff claimed a *kuboolent* for seven rupees, which was said to be the fair rent of the land at "the rate prevailing in the neighbourhood." The defendants raised various pleas. They denied in the first instance that any relationship of landlord and tenant existed between them and the plaintiff, and alleged that they had received no notice and that therefore no *kuboolent* for rent at an enhanced rate could be given, and they alleged moreover that neither the plaintiff nor his predecessor had received rent for this property for 12 years. Both the Courts below refused the plaintiff a *kuboolent*, and the plaintiff now appeals specially to this Court.

It does not appear necessary to go *seriatim* into all the grounds taken in special appeal. The question as to whether the suit is maintainable without service of notice, or whether any notice was served upon the defendants or not, is immaterial, inasmuch as it seems clear to us that, under a long series of rulings of this Court, the plaintiff must fail on the ground that he has not proved by evidence the rate of rent demanded by him. Granting for the sake of argument that this was not a suit for a *kuboolent* at an enhanced rate, and that therefore no notice was required to be served upon the defendants, it would still be on the plaintiff to prove by satisfactory evidence that the rate of rent at which he demanded a *kuboolent* was the rate that he had been in the habit of receiving from the defendants. Both the Courts have found that he has not proved that rate; there was an allegation on the part of the special appellant that the Judge had misread the evidence on this point, to clear up which we have ourselves read such portion of the evidence as was necessary, and find that both the Courts below came to a right conclusion. The witnesses gave their depositions in the most vague and unsatisfactory manner, and in no way proved that seven rupees was the rate of rent heretofore paid for this land.

There is another point taken in special appeal which it is necessary to dispose of, and that is this, that the Judge's finding that there existed no relation of landlord and tenant as between the plaintiff and the defendants, is entirely opposed to the evidence on the record; and that the Judge has misconstrued the decrees of Court which the plaintiff had filed in order to prove the existence of such relationship. The Judge on this part of the case says that "the judgment of the Sudder "Moonsiff, dated 20th January 1864, declares "these plaintiffs to be the landlords, and "entitled to rent from the heirs of Bharut "Chunder Chatterjee, deceased; but that does "not prove plaintiff's relation as landlords to "defendants as tenants." Now this judgment and a subsequent judgment which was passed by the Principal Sudder Ameen in appeal on the 28th November 1864, most distinctly declared Khoodee Ram, one of the present defendants, to be the tenant of this particular piece of land, and likewise to be one of the heirs of Bharut Chunder. How, therefore, the Judge has come to the conclusion that there is nothing in those decisions which settles the position of the two parties is not easy to say. We, therefore, set aside the judgment of the Judge upon this point as having been come to upon a misconstruction of the evidence on the record, and uphold the rest of his decision which declares that the plaintiff is not entitled to demand a *kuboolent* from the defendant. Further, we dismiss this appeal with costs.

The 4th March 1872.

Present:

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Bonâ fide Proceedings (to keep decree alive)—Service of Notice—Mooktars not recognised agents.

Case No. 12 of 1872.

Miscellaneous Appeal from an order passed by the Officiating Judge of Chittagong, dated the 27th July 1871, affirming an order of the Officiating Additional Moonsiff of Satkhira, dated the 12th June 1871.

Kristo Chunder Goopto (Decree-holder) *Appellant,*

versus

Fuzul Ali Khan (Judgment-debtor) *Respondent.*

Baboo Okhil Chunder Sein for Appellant.

No one for Respondent.

Where an application to execute a decree as well as the service of notice took place within three years before the subsequent application, and it appeared that not merely was a notice issued and served but the judgment-debtor had cajoled or amused the decree-holder with repeated promises to pay and had thereby induced him to abstain him from proceeding further, the proceedings of the decree-holder were held to have been *bonâ fide.*

The Court ought to see that the notice is served on the right person and should not be satisfied with the return of service upon a mere *mooktar* and not the recognised agent of the judgment-debtor within the meaning of the Procedure Code.

Jackson, J.—It appears to us that in this case the order for execution ought not to be allowed to stand.

The Judge appears to have first remanded the case, and afterwards affirmed a contrary order passed by the Moonsiff upon the ground simply that the service of notice of execution upon a party who was not the judgment-debtor, nor the authorized agent of the judgment-debtor, ought not to be looked upon as a *bonâ fide* proceeding, because it would be dangerous so to consider it. It appears, however, that the application to execute this decree, as well as the service of notice, took place within three years next before the subsequent application, and the question therefore for the Court below was, whether such an application could be regarded as a *bonâ fide* proceeding.

As to the service of notice, we must observe that that is a matter which the Procedure Code casts upon the Court, and it seems to us that it was to some extent, at least, the duty of the Court to see that the notice was served on the right person, and that the Court ought not to have been satisfied with the return of service upon a party who was merely a *mookhtar* and was not the recognized agent of the judgment-debtor in the sense in which that term is used in the Procedure Code.

However, it seems that not merely was a notice issued and served, but the Moonsiff in his first judgment expressly stated that the judgment-debtor being a person of some respectability had cajoled or amused the decree-holder with repeated promises to pay, and that such promises had induced the decree-holder to abstain from proceeding further. That circumstance at once takes the matter out of the category of doubt, and it appears that, in the petition of appeal to the Zillah Judge originally preferred, this statement of the Moonsiff was not questioned. That being so, the Moonsiff properly held that the proceedings of the decree-holder had been *bonâ fide*, and his order ought not to have been disturbed. The first order of the Moonsiff, therefore, will be restored, and the order of the Judge will be set aside with costs.

The 4th March 1872.

Present:

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Ex parte Decree—Appeal from Order rejecting Application to set aside—Affidavit (reception of)—Act VIII of 1859 *ss.* 119 *and* 355.

Case No. 20 of 1872.

Miscellaneous Appeal from an order passed by the Judge of Twenty-four Pergunnahs, dated the 12*th October* 1871, *rejecting the application to set aside the ex-parte decree of the* 10*th October* 1871.

Shephard John Leslie (one of the defendants) *Appellant,*

versus

William Osmond Allender (Plaintiff) and another (Defendant) *Respondents.*

Messrs. J. W. B. Money and *R. T. Allan* for Appellant.

Mr. G. C. Paul for Respondents.

The Court declined, on appeal from an order rejecting an application under Section 119 Act VIII of 1859 to set aside an *ex-parte* decree, to receive an affidavit which had not been previously tendered, and held that Section 355 was not meant to have application to such a case as this, but to empower the Court of Appeal at its discretion to receive evidence upon issues of fact which had been tried in the Court of first instance.

Jackson, J.—This is an appeal against an order of the Judge of Twenty-four Pergunnahs by which he rejected an application on the part of Mr. Leslie to set aside a judgment passed against him on the 10th of October last.

It appears that the plaint on which this judgment was passed was filed on the 29th of August 1871. The summons directed to Mr. Leslie was served upon him on the 23rd of September. It appears that in the plaint Mr. Leslie was described as residing at Calcutta, but that at the time of the commencement of the suit he was actually residing at Berhampore, and by the summons the 5th of October was named as the day on which the suit was to be heard, and the defendant was directed to file his written statement four clear days before that date.

On the 5th October the case was called on, and one of the defendants, Mr. Dear, appeared and was heard. Mr. Leslie put in no appearance, but it seems that he instructed Mr. Linton, who is an attorney of the High Court and also a Vakeel, and that Mr. Linton came into Court on the 5th October but took no part in the proceedings.

The Judge having heard the case on that day reserved his judgment, and afterwards delivered it on the 10th. Two days later, that is, on the 12th October, a petition was filed by Mr. Linton, on behalf of Mr. Leslie, with a *Vakalutnamah*, and in the petition certain grounds were set forth, and the Judge was asked to set aside the judgment and to rehear the case.

The petition was not accompanied by any affidavit, nor was it verified, nor did the petitioner offer or ask to be allowed to prove that he had been prevented by any sufficient cause from appearing when his suit was called on for hearing. The Judge thereupon refused to set aside the judgment and he observed that "if the defendant Leslie had de-"sired more time for preparing himself to "defend the suit, he should have instructed "his attorney to apply for a postponement "before the hearing, and his own statement "shows that had notice twelve days before the "hearing. I must reject the application."

Section 119 of the Code of Civil Procedure allows an appeal from the order of rejection to this Court, and the appeal having been lodged here, it is now proposed to put in and read an affidavit on Mr. Linton's part, the affidavit being the joint affidavit of himself and of Mr. Leslie, and containing, we suppose, an explanation of the conduct of the defendant and of his attorney.

The learned Counsel Mr. Money, who was followed by Mr. Allan, pressed us to receive this affidavit. Mr. Money cited several cases from the Bombay Reports, which he contended were authority for the affidavit being received in the appeal; but it appears that, in all those cases, the affidavit had been previously tendered and in some of the cases had been received in the Court of first instance. No case was shown to us in either of the Bombay Reports or the Report of this Court, in which an affidavit offered for the first time in the Court of appeal had been received nor indeed does any such case appear to have occurred.

Independently of the general objections to receive an affidavit in this stage of the proceedings, it seems to us that there are peculiar objections which apply to the reception of it in this case, because the circumstances set forth in the affidavit are those upon which the Lower Court was specially qualified to form a judgment and upon which some of the allegations made might perhaps have been contradicted by that Court out of its own record and from the Judge's own knowledge.

Section 355 of the Code of Civil Procedure has been pressed upon us by Mr. Allan as affording a ground for receiving this affidavit. It appears to us that Section 355 was not meant to have application to such a case as this is, but to empower the Court of appeal at its discretion to receive evidence upon issues of fact which had been tried in the Court of first instance. But even if the Section did apply, it seems to us no case has been shewn here to justify us in exercising such a discretion in favor of the appellant. The affidavit, therefore, must be refused.

Mr. Allan has made an elaborate address *ad misericordiam*, and has also enlarged upon what he calls the negligence of Mr. Linton the attorney. We have nothing before us, the affidavit not having been received, upon which we can come to any conclusion as to the conduct of Mr. Linton. It is not necessary, therefore, nor would it be proper that we should advert to it.

It was then suggested that there was a defect of jurisdiction apparent on the face of the proceedings. This does not seem to us to be so; but even if it were, we think this is not the mode in which that defect should be brought to our notice. That which we have before us now is simply an appeal against the order of rejection. If there is any defect of jurisdiction which ought to have the effect of nullifying the proceedings of the Court below, that defect should be brought before this Court in the proper way.

It appears to us, therefore, that this appeal has failed and should be dismissed with costs.

The 12th February 1872.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Evidence (on oath before Income Tax Officer as to extent of Ryot's holding)—Jumma-wassil-bakee and Shushmahee Papers.

Case No. 1024 of 1871.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 15th June 1871, *modifying a decision of the Moonsiff of Buxar, dated the 22nd March* 1871.

Radha Pershad Singh (Plaintiff) *Appellant,*

versus

Bheenuck Roy (one of the defendants) *Respondent.*

Baboo Doorga Mohun Doss for Appellant.

Baboo Taruck Nath Dutt for Respondent.

The judgment of the Lower Appellate Court was reversed as erroneous in law, because it ignored defendant's evidence on oath before the Income Tax Officer as to the extent of his holding, and because it dismissed plaintiff's claim to the cesses on account of a trifling difference between the *jumma-wassil-bakee* and ***shushmakee*** papers.

Bayley, J.—The plaintiff in this case sued for the recovery of Rs. 860 as arrears of rent from 1274 to 1277 as per ***wassil-bakee***, dated the 80th Bysack 1277.

The issues raised by the first Court were, ***firstly***, whether the defendant held under the plaintiff 75 beegahs 5 cottahs 19 D. of land at an annual ***jumma*** of Rs. 818-5 annas 8 pie as alleged by the plaintiff or 68 beegahs 16 cottahs 17 D. at a ***jumma*** of Rs. 165-9-5 as alleged by the defendant; and ***secondly***, whether the rent had been paid as alleged by the defendant.

The first Court found in favor of the plaintiff and gave him a decree for his whole claim with the exception of Rs. 5-14-6. The first Court held on the evidence specially on that of Jhoomuck Doss Putwaree that 67 beegahs 16 cottahs of land held by the defendant was his hereditary *goosashta*, but that when Mr. Burk was *ticcardar*, the land was measured, and 2 beegahs 12 cottahs were found in excess; that the remaining land was held by one Mohabul Koyaree who in 1268 gave up his holding which was added to that of the defendant Bheenuck who was still in possession thereof, and that it was proved by the plaintiff's witnesses, and even admitted by the defendant Bheenuck Roy himself before the Income Tax Officer, that he had a holding of 75 beegahs of land in Mouzah Pipree.

The Judge on appeal commences by saying that it was acknowledged before him that the claim was laid upon the fact of the defendant's evidence before the Income Tax Officer, but that that evidence, even if admissible in the case, does not show that the defendant held the land as ryot of the plaintiff. The Judge then goes on to say "The plaintiff relies on ***jummabundee*** and ***shushmakee*** papers, but these do not agree, and "moreover the plaintiff must prove the rent "due and paid in the year preceding the suit." Further on—"It is proved by plaintiff's witnesses that defendant holds the land claimed "by defendant as his *goosashta*, *viz.* 67 beegahs "16 cottahs 17 D. at Rs. 2-7 annas per "beegah, and beyond this nothing is really "proved to be in the defendant's hands." The Judge on these gounds gave the plaintiff a decree for Rs. 165-9 annas 3 pie being the balance found after deduction of the payment acknowledged by the plaintiff. But as to the cesses, he dismissed the plaintiff's claim altogether.

The *first* ground taken in special appeal is that the Lower Appellate Court has misconstrued the legal effect of the evidence of the plaintiff's witnesses as they do not say that 67 beegahs 16 cottahs 17 D. at Rs. 2-7 annas per beegah were held by the defendant, and further that the ***jumma-wassil-bakee*** papers and the ***shushmakee*** need not necessarily agree and that the difference in those papers is no legal ground for dismissing the plaintiff's claim in this case, and that the evidence of the defendant before the Income Tax Officer was not the only evidence relied on by the plaintiff, but that that was relied on merely to corroborate the ***jumma-wassil-bakee*** papers filed by the plaintiff.

It must be observed that all parties admit that the plaintiff is the zemindar of Mouzah Pipree, and the defendants admits that he holds 67 beegahs in that village as *goosashta* at the rent of Rs. 2-7 annas per beegah. As to the evidence of the defendant before the Income Tax Officer, on the admissibility of which the Lower Appellate Court seems to have some doubt and the legal effect of which that Court altogether ignores, it may be remarked that the defendant's statement as to the extent of the property liable to be taxed is on oath and he says that he holds 75 beegahs in Mouzah Pipree.

We then come to the point relied on by the Lower Appellate Court that the ***jumma-wassil-bakee*** papers and the ***shushmakee*** do not agree. The ***jumma-wassil-bakee*** show a ***jumma*** of Rs. 218-5 annas 8 pie for 75 beegahs 5 cottahs 19 D., and the ***shushmakee*** which is thirty years old shew a ***jumma*** of Rs. 212-15 annas 9 pie for 77 beegahs and odd cottahs. Again the ***shushmakee*** shew that there was a tenure in the name of Bheenuck Roy of Rs. 129 ***jumma***, and another held by him in the name of Luchmun Roy of Rs. 68-7 annas 6 pie in Mouzah Pipree. Comparing the two items, the result very nearly approaches the area stated by the plaintiff and the disagreement is too trifling to justify the entire dismissal of the plaintiff's claim.

We have also heard the oral evidence, and we quite concur in thinking that so far from shewing that 67 beegahs and odd cottahs was the only tenure held by the defendant, it is quite clear that there were 67 beegahs and odd cottahs *before* 1268 and an addition from Mohabul Koyaree's tenure after 1268. It may also be observed that the ***jumma-wassil-bakee*** papers and the ***shushmakee*** are deposed to by the man who wrote them, *viz.* Jhoomuck Doss.

On the whole, we are of opinion that the judgment of the Lower Appellate Court is erroneous in law on the points on which it has reversed the judgment of the first Court, and we therefore reverse the judgment of the Lower Appellate Court and restore and affirm that of the first Court with costs of this appeal and of the Lower Appellate Court.

Markby, J.—I am of the same opinion.

The 24th February 1872.

Present:

Sir James W. Colvile, Sir Montague E. Smith, Sir Robert P. Collier, and Sir Lawrence Peel.

Transactions with Purdah Women—Proof of Execution of Deed—On Appeal from the High Court at Agra.

Mussumats Azeezoonnissa and Ehsan Beebee,

versus

Baqur Khan.

The Privy Council dissented from the conclusion come to by the High Court that any *primâ facie* case had been made out by the plaintiff (respondent); and considered that the suit, being one brought against purdah women upon a deed alleged to have been executed by them, wholly failed, inasmuch as there was no proof that the women had ever signed the deed, or that it had been ever signed by them, and that their Lordships, if they affirmed the judgment of the High Court, would be going against the whole course of cases that have been decided in India and by the Privy Council in respect of transactions to which purdah women are parties.

THIS appeal arises out of a suit brought by the present respondent against the appellants for the recovery of the possession of a village named Burehta, under a title which was originally a mortgage title, but which may be taken to have been made absolute by foreclosure.

The suit was resisted by the appellants, the then defendants, on the ground that they never executed the mortgage deed in question. That is the substantial issue in the case, that it was executed neither by them nor by any person duly authorised to execute it on their behalf. The Zillah Judge who tried the case in the first instance found that the plaintiff had wholly failed to make out his case, and dismissed the suit. The plaintiff then appealed to the High Court in Agra, and the learned Judges who heard that appeal reversed the decision of the Zillah Judge and found in favor of the plaintiff; and it is against that decree that the present appeal is brought.

What was the foundation of the judgment of the High Court? The learned Judges begin by saying, "We do not mean to find "that the plaintiff's case is free from doubt; "but the admitted facts, and some reasonable "presumptions, lead us to conclude that the "plaintiff had at least proved a sufficient "*primâ facie* case, and that the defendants "not having adduced such evidence in answer "to it as they might fairly be expected to do, "there should be a decree against them." Therefore, the judgment assumes that the plaintiff had made out a *primâ facie* case, and that the defendants had failed to make a sufficient answer to that case.

It is, then, desirable in the first instance to consider what was the *primâ facie* case, which, in the opinion of the learned Judges, had been proved. The case of the plaintiff was that, on the 22nd of January 1857, in consideration of an advance made by him to the defendants they had executed to him a bond hypothecating another village named Nundsenee; that finding he had not got the security which he intended to have, namely, a mortgage by conditional sale, he applied to them for further security, and that after some dispute it was agreed that the instrument upon which he sued should be given to him in substitution for the other, which was in fact, though not actually cancelled, treated as being superseded and made of no effect by the second transaction.

It appeared by the evidence, and it was not contested at the Bar, that both these instruments were executed by Mahomed Alee, the husband of the appellant, Ehsan Beebee, and each document appears to have been registered on the day on which it was executed, not at Cawnpore, the place where the defendants resided, and where the transaction of advance, if any advance was made, is alleged to have taken place, but in Futtehpore, the district in which the village of Burehta is situated.

So far, no doubt, the plaintiff proved his case. But he failed to show that either at the time of the registration, or at any subsequent time, any *mooktearnamah* authorising the execution of those deeds by Mahomed Alee, as agent of the appellants, was produced or verified; or proved in any way. No mention of such an instrument is made in the endorsement of registration upon either mortgage, all that therein appears being that Mahomed Alee was identified, and that upon such identification the deeds were registered.

Again, what is the account which the plaintiff gives of the advance and of the transaction? He alleges that this Mahomed Alee was not only the manager on behalf of his wife and her sister—of their property—but that he had some employment under a person described as the Rajah of Rusbharree; that in that capacity he wanted to obtain a loan of Rs. 16,000, to be applied in paying off a mortgage upon Mouzah Rusbharree belonging to the Rajah; that he, the plaintiff, agreed to advance Rs. 8,000, part of this money, on the security of the appellants villages, and that the remaining Rs. 8,000, were to be advanced by one Rae Chund, a banker in Cawnpore: and that in some way or other the appellants were to have a counter security upon Mouzah Rusbharree. There is no evidence whatever that any such transaction ever really took place, except the deposition of the plaintiff himself. None of the subscribing witnesses to the execution of the first bond, which was the only occasion on which money is alleged to have passed, were called. Two persons were called by the plaintiff, who alleged that they were creditors of the ladies. They gave a wholly different account of the transaction, representing that the ladies were about to change their residence, and to leave Cawnpore, that they owed to one of these persons Rs. 1,000, and to the other Rs. 451, and that these debts were paid out of the Rs. 8,000 advanced. Neither of them professed to have seen the ladies; and neither of them spoke to the execution of the first bond in his presence. They left it uncertain where the first bond was executed; their testimony pointing to its execution at Futtehpore, and not at Cawnpore where the ladies were living.

Then only one of the subscribing witnesses to the second instrument was called, and he too did not profess to have been present at its execution, or to have seen any power of attorney under which it was executed; nor does his evidence fix the place of its execution; or show under what authority it was executed.

Their Lordships, therefore, considering that these ladies are purdah women, are of opinion that the High Court was in error in considering that a *primâ facie* case had been made out at all. The witnesses differ from the plaintiff as to the nature of the transaction, they are not consistent as to the execution of the instruments, and not one of them pretends to prove the authority under which they purported to be executed. That authority was either a written authority, or if such a thing would suffice, it was a verbal authority. No written authority is produced or proved. If there was a verbal authority, it lay upon the plaintiff to prove that verbal authority, and not upon the defendants to show that Mahomed Alee acted without their authority.

If, then, there has been any error in not calling Mahomed Alee, that is a fault of which the plaintiff and not the defendants should suffer the consequences, because it was clearly the plaintiff's business to establish the authority under which he says he took the conveyance of this village from a person purporting to be an agent on behalf of the purdah women, who were the real owners of the village. But either falsely in order to excuse himself, or truly, he has alleged on the face of his plaint that Mahomed Alee is dead. He, therefore, cannot be heard to say that the defendants are in fault for not calling Mahomed Alee, even supposing that it lay upon them and not upon him to call that person.

Their Lordships have not omitted to consider some documentary evidence relied upon by the plaint, *viz.*, the petitions put in by Mahomed Alee in 1858 and afterwards in 1860. In 1858 Mahomed Alee seems to have either truly or untruly alleged that these instruments, though executed by him, never were really delivered to the plaintiff; that they remained with him until the advance should be actually made, and that during the disturbances consequent upon the mutiny at Cawnpore his house had been plundered, and these and other documents had been taken away. It is perfectly clear that at that time the documents were in the hands of the plaintiff. He put in a counter petition. The case was heard in a summary way by the Sessions Judge, who said that the parties must try their rights in a civil action, and dismissed the criminal charge. That statement of Mahomed Alee was either true, or false. If it were true, there is an end of the plaintiff's case. But if it were false, there is nothing whatever upon the face of the petition to connect that proceeding with the defendants, except the mere statement of Mahomed Alee. The High Court seems to have assumed that, because Mahomed Alee said he presented that petition on behalf of the defendants, it must be taken to have been presented by their authority, and that they were therefore concurring with Mahomed Alee in an attempt upon a suggestion of that which was false, to escape from the consequences of this deed, and to get back the documents from the plaintiff. But there is really no more proof of Mahomed Alee's having acted as their agent in that case than there is of his agency in the original transaction; and, therefore, the inference which the learned Judges drew from the mere presentation of the petition appears to their Lordships to be unwarranted. The same observation applies, perhaps even more strongly, to the petition put in by Mahomed Alee in 1860, as an intervenor in the foreclosure proceedings.

Therefore, taking the whole evidence produced by the plaintiff, their Lordships must dissent from the conclusion of the learned Judges of the High Court that any *primâ facie* case had been made out; and they considered that the suit, being one brought against purdah women, upon a deed alleged to have been executed by them, wholly failed inasmuch as there was no proof that the woman had ever signed the deed, or that it had been ever signed by any person authorised by them; and that their Lordships, if they affirmed that judgment, would be going against the whole course of cases that have been decided in India and at this Board in respect of transactions to which purdah women are parties.

It has perhaps by anticipation been stated that, even had a *primâ facie* case been proved, their Lordships would not have concurred with the learned Judges in thinking that the case should be decided against the defendants because they had failed to call Mahomed Alee (if Mahomed Alee is still in life), in order to prove either that he did not deliver this deed as he says he did not, or that he did not act in that transaction as their agent. They have given, by the mouth of Amjud Alee, evidence far more satisfactory than any statement of so untrustworthy a person as Mahomed Alee, that that person was not their general manager or their manager at all, and that there is no reason to suppose that he acted in the transaction in question under any special authority from them.

For these reasons their Lordships are of opinion that, without relying upon the evidence that has been given of the bad character of the plaintiff, or of the fact that he is a person, as he certainly seems to have been, not likely to have had the means of making the advance which he says he made, the judgment of the Zillah Judge was correct, and they will humbly advise Her Majesty to allow this appeal, to reverse the judgment of the High Court, and in lieu thereof to direct that the appeal to that Court be dismissed, and the judgment of the Zillah Judge affirmed with costs, and that the respondent should also pay the costs of this appeal.

The 4th March 1872.

Present:

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Act VIII of 1859 s. 264—Sale in Execution of Decree—Delivery of immoveable Property to Purchaser—Appeal.

Case No. 34 of 1872.

Miscellaneous Appeal from an order passed by the Officiating Judge of Jessore, dated the 28th September 1871, *reversing an order of the Moonsiff of Narail, dated the 11th February* 1871.

Omirto Moyee Dossee and another (Petitioners) *Appellants,*

versus

Gooroo Doss Roy (Opposite party) *Respondent.*

Baboo Bungshee Dhur Sen for Appellants.
No one for Respondent.

No appeal lies from an order of a Court giving possession under Section 264 Act VIII of 1859 to a purchaser at a sale in execution of a decree.

Jackson, J.—In this case, the Court of the Moonsiff ordered the sale of the right, title, and interest of certain ladies in a *putnee talook* of which the description is fully given in the proceedings, and Gooroo Doss Roy, having purchased those rights and interests, applied to be put into possession thereof under Section 263 of the Civil Procedure Code, the aim of that application being to procure the ejection of the ladies in question from the dwelling-house which they occupied and which was situated within the limits of the *talook.*

The Moonsiff refused to order delivery of possession under that Section, but approved and confirmed what his officer had done in giving possession under Section 264.

Against that order of the Moonsiff, an appeal was heard by the Judge. It seems that the present special appellants were not present when that appeal was heard, and they petitioned the Judge stating that they had never been served with summons. On appeal, the Judge reversed the order of the Moonsiff and held that Section 263 was the proper Section to be applied; and reviewing the case on the application of the ladies, adhered to his first decision and rejected their application.

It appears to us that the Judge had no authority to entertain this appeal. I do not find any provision in the Code which enabled him to interfere. This is not a case under Section 11 between the parties to the suit. It was a question between the purchaser at the sale in execution and the judgment-debtors whom the purchaser desired to evict. It seems to me that the Moonsiff was competent to interpret his own proceedings and to give the purchaser that amount of assistance which he thought the case demanded, and that if the purchaser did not recover by the aid of the Court any thing to which he thought himself entitled under his purchase, he ought to have been allowed to bring a suit against the parties withholding possession.

The inclination of my own mind is that Section 264, and not Section 268, is the proper Section to apply; but it is sufficient for the purposes of this case to say that the order of the Judge is made without jurisdiction, and it is therefore set aside with costs.

Mitter, J.—I concur.

The 6th March 1872.

Present:

The Hon'ble G. Loch and W. Ainslie,

Judges.

Limitation—Act XIV of 1859 s. 20—Keeping Decree alive—Consent of Parties—Agreement to suspend Execution for a definite Time, not a "Proceeding."

Case No. 244 of 1871.

Miscellaneous Appeal from an order passed by the Judge of Purneah, dated the 23rd May 1871.

Bibee Meheroonissa (Decree-holder)

Appellant,

versus

Ránee Rowshun Jehan and others (Judgment-debtors) *Respondents.*

Messrs. G. C. Paul, G. Gregory, S. P. John, and *R. E. Twidale* and *Baboo Ashootosh Dhur* and *Moonshee Mahomed Yusuf* for Appellant.

Messrs. J. T. Woodroffe and *C. Gregory* for Respondents.

Consent of parties cannot extend the period allowed by law for enforcing a decree or keeping it in force, nor is an agreement to suspend execution for a specified time a "proceeding" within the meaning of Section 20 Act XIV of 1859.

Loch, J.—The petitioner before us seeks to execute a decree against Ahmed Reza. It is a decree of 1846, and apparently various processes of execution have been taken out, which, however, need not be referred to. The Judge, by his proceeding of 23rd May 1871, rejected the petitioner's application on two grounds: 1st, that the application was not made in proper form; and 2nd, that execution was barred by limitation, and from this order the present appeal is preferred to this Court.

We need only refer to the last proceedings taken in execution. The last proceeding taken in this case, if it be a proceeding such as comes within the meaning of that word as used in Section 20 Act XIV of 1859, was taken on 6th February 1867, when Meheroonissa and Ahmed Reza filed petitions, whereby the decree-holder agreed, in consideration of a payment of Rs. 2,000, not to proceed further against the debtor for the period of one year. The present application for execution was put in on 4th February 1871, and it is contended by the appellant that, as she had bound herself not to proceed in execution for one year, she was entitled to reckon the period of three years within which she was bound by law to take steps to enforce her decree or keep it in force, from the close of that year, *viz.*, 6th February 1868. The Judge rests upon a judgment of a Full Bench of this Court in the case of Krishno Kumal Singh, reported at XIII Weekly Reporter, F. B., page 44; and under a rule of this Court of July 1867, we are bound to follow that decision, if it is applicable to the present case, and has not been set aside by any subsequent ruling. Now, the main object of the present appeal is to get behind the said decision of the Full Bench, and to induce us to refer the question again for the further consideration of the Court. The petitioner must make out a very clear and strong case before we can do what he wishes us to do.

We think that this case comes within the scope of the decision of the Full Bench of this Court referred to above; and the cases quoted to us (reported in XI Weekly Reporter, pages 86 and 570) as shewing that other Judges of this Court have held a different opinion on this subject from that expressed by the majority (4 to 1) of the Judges in the Full Bench case, were considered and have been overruled by that Full Bench decision, and can therefore be no longer used as precedents.

It is urged before us that the Law of Limitation is applicable to and was only intended to prevent parties being harassed by stale claims; that where laches have occurred by the neglect of a party, his remedy may properly be affected by limitation, but where parties consent to give time and show by their conduct that they neither relinquish nor sleep over their claims, the Law of Limitation cannot be applied. The construction of the law adopted in the Full Bench decision is too strict and technical, and not applicable to the case where parties have acted by consent; such act, when intimated to the Court, being a proceeding to keep the decree in force, and according to the proper meaning of the words of Section 20 Act XIV of 1859, operating to keep it in force for the following three years; so that if parties consent to postpone the execution of a decree for three years, and intimate the same to the Court, that is a proceeding within the meaning of the law which gives the decree-holder a right to proceed within three years after the period agreed upon by the parties has expired.

In support of this argument, we have been referred to the practice of the Courts at home, and a case reported in III Adolphus and Ellis, page 676, has been quoted, and it is urged that we ought to follow the rule which was adopted in that case, *viz.*, that, if the plaintiff has judgment with a stay of execution for a year, he may after the year take out his execution, without a *scire facias*, because the delay is by consent of parties and in favor of the defendant, and Lord Denman adds:—"We should be very unwilling to disturb, except on the clearest grounds, a practice now well recognised, on which all persons have acted for a long series of years, and neither unreasonable nor inconvenient in itself." Now it is sufficient to say, with regard to the practice referred to, that no such practice exists in the ordinary Civil Courts of this country; the only process approaching to the *scire facias* known here being the notice which is required to be served on a debtor under the provisions of Section 216 Act VIII of 1859, should an interval of more than one year have elapsed between the date of the decree and the application for execution. But what is asked for by appellant is a very different thing from the practice set forth by his Counsel, for here we are asked to execute a decree of old date (1846), which has been partially executed at different times, and the further execution of which was by the consent of parties suspended for a year from 5th February 1867.

But it is said that the words of the law support the appellant's contention, and that they have been misconstrued by the Court. It is said that the proper reading of Section 20 Act XIV of 1859 is to connect the words "within three years," with the previous words "to keep the same in force," and not with the latter part of the sentence. The sentence should run thus:—"Unless some proceeding shall have been taken * * * * to keep the same in force within three years next preceding the application for such execution." So that, in fact, if this contention be correct, a decree-holder might by consent get six years, instead of three, to enforce or keep his decree in force. We demur to this construction of the sentence, and think that it must be read as it has hitherto been read, *viz.*, unless some proceeding shall have been taken within three years next preceding the application for such execution to enforce the judgment, or to keep the same in force.

Then it was contended that the word "proceeding," used in Section 20 Act XIV of 1859, must not be limited to proceedings in which the assistance of the Court has been invoked, that there is a difference between process and proceedings, and that any step taken by the parties by which they show that they do not sleep, and do not intend to give up their claim, must be considered as a proceeding; and a reference was made to a decision of the Privy Council, in the case of the Maharajah of Burdwan, reported in XIV Weekly Reporter, page 21, to show that, when the parties put in petitions regarding the execution, there was a *litis contestatio* which kept the case alive. There was this difference between the case decided by the Full Bench and the present, that in that case there was an executed contract which, the Court might perhaps rightly say, could not be substituted for the original decree; but in this case there was no such contract but merely a suspension of execution with consent of parties for the benefit of the debtor, for the execution was allowed to lie over for a year in consideration of the payment of Rs. 2,000, and it was urged that the great mistake made in that judgment of the Full Bench was that "abstaining for a consideration with consent" had been treated as "a voluntary abstaining" by which laches were incurred.

In the course of the argument, reference was made to the practice which prevailed before the enactment of Act XIV of 1859 in regard to the execution of decrees. Previous to the passing of that Act, there was no Law of Limitation in regard to the execution of decrees, and we cannot be guided by anything in the practice then prevailing.

Act XIV of 1859 has, however, introduced a distinct rule, and has provided for the execution of decrees or steps to be taken for keeping them in force within prescribed limits of time. The proposition put to us is in effect this :—Parties by consent can, notwithstanding the provisions of the law, extend the period allowed by law for enforcing or keeping in force a decree, and may execute a decree after the time which by law is the limit of execution in ordinary cases; and the proposition is thus illustrated :—Parties may consent to postpone execution for four or five years, and on the expiry of that period, the decree-holder would still be entitled to execute within three years from that date. In the case before us, the decree-holder on the 6th February 1867 agreed to abstain from further execution for a year, and it is said he is entitled to three years from the expiry of that year, *viz.* 6th February 1868. Looking at the provisions of the law (Act XIV of 1859), I cannot believe that it was ever intended that consent of parties should interfere with or alter the period fixed by law within which certain acts were to be done. It will not be contended that consent of parties could extend the time for instituting a suit for the recovery of possession of real property, and how can it be said, in the absence of any words to support the proposition, that consent is sufficient to extend the period allowed by law for enforcing a decree or keeping it in force. The law, as I read it, is precise, and enacts that no process of execution shall issue in execution of any decree, unless some proceeding shall have been taken within three years preceding the application for such execution to enforce such decree, or to keep the same in force. The law has, I apprehend, been of purpose strictly drawn up, and must be construed strictly; and if this be so, the decision of the Full Bench in the case of Krishna Komul Singh is applicable to the present case. In that case, the parties had, on the 6th February 1865, entered into an arrangement by which the property was released, and the decree was to be paid by instalments. The first payment under the *kistbundee* was due on the 14th July 1865; the application was made on the 14th July 1868. It appears to me, says the Chief Justice, that, although the decree-holder may have bound himself not to issue execution before the 14th July 1865, that circumstance did not give the decree-holder three years from that date to apply for fresh execution, but he ought to have applied from the 30th December 1864, *viz.*, the date of the last application for execution to the Moonsiff. Further on, in the judgment, the Chief Justice observes :—"A man may bind himself not to execute a decree of Court, or he may bind himself not to execute a decree of Court within a certain period, but he cannot by binding himself not to execute the decree for a certain period, add to the time within which the law allows him to execute it * * * So in the case of a decree, if a man binds himself not to execute a decree within a certain period, he must take care if he wish to execute the decree at all not to bind himself, not to execute the decree for a longer period than that within which the law would allow him to execute it." In the appeal before us, the decree-holder bound himself for a consideration not to execute his decree for one year from the 6th February 1867. On the expiry of that year, admitting for the sake of argument that this arrangement is such a proceeding as is contemplated by law, the decree-holder had two more years within which he could enforce his decree, or take steps to keep it in force. He did nothing till the 4th February 1871, or nearly four years from the date of his petition to the Court entrusted with the execution of the decree, and his case comes clearly within the ruling of the judgment of the Full Bench, and his present application not being within time, *i. e.* within three years from the 6th February 1867, further execution of the decree is barred by limitation, and the application has been rightly refused.

It is unnecessary to take up any other points in this case.

We dismiss this appeal with costs.

Ainslie, J.—The only point which has been argued is the question of limitation; unless that be decided in favor of the appellant, the other questions in the case need not be considered.

The decree-holder early in the year 1867 was proceeding to execute his decree, and had attached certain property, and caused it to be advertised for sale: the 11th February 1867 was fixed for the sale. On the 6th February, both parties informed the Court that 2,000 rupees had been paid in part satisfaction of the decree, and that they had agreed that no further proceedings should be taken for one year.

The Subordinate Judge called upon the decree-holder to state in distinct terms whether he wished to proceed with his execution suit or not, and he, by a petition dated 11th February 1867, asked that the sale should be stayed. Hereupon, the Subordinate Judge dismissed the application for execution.

This proceeding of the Subordinate Judge has been objected to, but I conceive that he was perfectly right in acting as he did.

Nothing was done for nearly four years On the 4th February 1871, the application to execute the decree was filed, and it has been contended, in the face of the Full Bench Ruling reported in XIII Weekly Reporter, F. B., 44, which is said to be bad law, that parties can by their own contracts extend the period of limitation indefinitely, and that a lying by under agreement is not a laches. It is also contended that this application was made within the period limited by Act XIV of 1859.

Section 20 Act XIV of 1859 is in the following words :—No process of execution "shall issue from any Court not established "by Royal Charter, to enforce any judgment, "decree, or order of such Court, unless "some proceeding shall have been taken to "enforce such judgment, decree, or order, "or to keep the same in force within three "years next preceding the application for "such execution." From the absence of a comma between the words "keep the same in force" and the words "within three years," it has been argued that these last words are to be taken as specially applicable to those that immediately precede them. If by this it is meant that the words "within three years" *exclusively* apply to the immediately preceding words "to keep the same in force," the whole Section becomes of no effect. We should then have for the first clause, no process shall issue to enforce any judgment unless some proceeding shall have been taken to enforce such judgment, which either excludes all execution of a decree, or provides for no limitation; and in either case the second clause is wholly immaterial.

Then, if we take the words "within three years" as applicable to both clauses, we get for the first, no process shall issue to enforce any judgment, unless some proceeding shall have been taken to enforce such judgment within three years; and for the 2nd, no process shall issue to enforce any judgment, unless some proceeding shall have been taken to keep the same in force within three years.

About the first there can be no doubt, the proceeding to enforce the judgment must have been taken within three years. Whether we say a proceeding must have been taken within three years to enforce the judgment, or a proceeding must have been taken to put the judgment in force within three years, the period after which no process shall issue is the same, *viz.*, three years.

But it is said that the second clause admits of a longer period, and that the three years is to count from the day up to which the judgment was kept in force by the last taken proceeding. So if A realizes a part of a decree to-day by sale of his debtor's property, he keeps his decree alive for three years under the first clause, and then under the second he gets three years more from the last day to which it is so kept alive, or in other words, he gets in every case six years. If it had been the intention of the Legislature to give six years, surely it would have been expressed directly, and not have been left to be inferred by such a circuitous process. Moreover, such a construction is inconsistent with the alternative form of the Section which clearly shows that there are two modes of keeping a decree alive, and that by either it may be kept alive for a certain term ; it may either be kept alive by directly attempting to enforce it ; or else by doing something which happens to be necessary to enable the decree-holder to enforce it, though it may not in itself be any of the proceedings in execution mentioned in Act VIII of 1859 ; as, for example, by bringing a suit to establish the debtor's title to a property, the attachment of which has been taken off on a claim by a third party under Section 246.

I can find nothing to suggest that the Legislature intended to provide two different terms of limitation in this one Section ; and as I find that the one term of three years is most distinctly provided in the first clause (no reading of this clause which will give a term of six years has been attempted), I must presume that the construction which extends that term to six years in the alternative clause is wrong. The Section is made perfectly clear by a transposal of the words, thus :—No process of execution shall issue to enforce any judgment unless, within three years next preceding the application, some proceeding shall have been taken to enforce such judgment, or to keep the same in force. This is the manner in which the Section has, as far as I know, always been construed, and I have no doubt that it is the manner in which it ought to be construed.

Then there is the contention that parties to a decree can by consent extend the time allowed by the law. The words of the law are positive: no process *shall* issue unless, &c. Consent cannot alter the law. But it is said that if consent cannot alter the law, yet an agreement not to proceed for a time specified is in itself a continuous proceeding throughout that time. This is to say that not doing and doing are the same thing.

I see no grounds on which it is possible to submit the questions raised to another Full Bench, and concur in dismissing the appeal on the terms proposed by Mr. Justice Loch.

The 6th March 1872.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Cause of Action (Time for objection as to)—Julkur—Onus Probandi—Quinquennial Registers (Authentication of) — Regulation XLVIII. 1793 s. 14—Evidence (Report of Record-keeper.)

Case No. 216 of 1871.

Regular Appeal from a decision passed by the Sudder Ameen of Jessore, dated the 8th May 1865.

Gobind Chunder Shaha and others (Defendants) *Appellants,*

versus

Puddo Monee Dossee and another (Plaintiffs) *Respondents.*

Mr. Bourke and *Baboo Bhowanee Churn Dutt* for Appellants.

Mr. R. T. Allan for Respondents.

Defendants were not allowed to take the objection of plaintiffs having no cause of action after the case had been three times before the first Court and twice before this Court in special appeal without such an objection having been taken before. HELD, however, on the merits not only that plaintiff had failed to make out a case, but that defendant had proved his long possession of the disputed *julkur* and his right to retain it.

According to Regulation XLVIII of 1793 s. 14, no counterpart quinquennial registers in the native language are considered authentic unless attested by the Zillah Judge.

The *onus* is on the plaintiff to prove his right to the particular fishery claimed by him.

The report of a Record-keeper is not admissible in evidence.

Glover, J.—THE plaintiffs in this case sued to have their right declared in a certain *julkur* or fishery of the river Mudoomuttee extending from the Kulna Trimohinee to Nakanda. Their allegation was that a slur had been cast on their title by some remarks of the Sessions Judge in a case under Act IV of 1840, decided on the 28th April 1862, with regard to the defendant's possession.

The defendant pleaded, *first*, limitation, and *secondly*, that the *julkur* pertained to his Putnee Talook Lot Lykyasha in Pergunnah Nuldee and had always been in his possession.

The Subordinate Judge held that the suit was not barred, and on the merits decided for the plaintiffs.

The defendant appeals, and Mr. Bourke on his behalf contends, first, that the plaintiffs have shown no cause of action, and that their suit is barred by the law of limitation.

On the merits, he contends that the documentary evidence relied on by the Subordinate Judge wholly fails to support the decision, but the oral evidence is of a most unsatisfactory description, and that the evidence, adduced by the defendant, is amply sufficient to prove his title. In other words, that the finding of the Court below is against the weight of evidence.

The objection as to the plaintiff's having no cause of action cannot, we think, be taken at this stage. The case has been no less than three times before the first Court, besides having been twice before this Court in special appeal, and at no time was it ever objected that the plaintiff had no cause of action. We give no opinion on the point, but we are quite clear that it is now far too late to take the objection.

The question of limitation was disposed of by the Judges of the Division Bench when the case was remanded, and we cannot reopen it, nor in fact should we be disposed to do so under any circumstances, for in the Act IV of 1840 case the defendant Beckwith alleged that he had been dispossessed by the plaintiffs, and as the Sessions Judge's order disallowed that of the Magistrate directing Beckwith to be restored to possession, it is clear from the defendant's own showing that the plaintiffs were in possession in the year 1861, and no question of limitation could therefore arise.

The Subordinate Judge holds the plaintiff's title to be proved, *first*, from the quinquennial papers of 1202 B. S.

Secondly, from the copy of a survey Register Book which showed that the disputed *julkur* belonged to the plaintiff's estate of Mokeempore.

Thirdly, from a report of the Collectorate Record-Keeper.

Fourthly, from a *Roobakaree* of the Collector, dated in 1825, which declared that the Nuldee zemindar had no claim to *chur* land in the river Mudoomuttee.

And *lastly*, from the *jumma-wassil bakee* papers of 1231, the *kabooleuts* of ryots, and the depositions of witnesses.

Now, with regard to the quinquennial register of 1202.—The copy on the record bears an endorsement to the effect that the original book did not bear the signature of any Government officer. This alone would be sufficient under the provisions of Section 14 Regulation XLVIII of 1793, to make the document worthless, that Section saying that no counterpart quinquennial registers in the native language shall be considered authentic, unless they are attested by the Judge of the Dewanny Adawlut of the Zillah. But if this objection were got over and the register taken as authentic, it would not support the plaintiff's case. These papers give them the *julkurs* of the Mudoomuttee and Altacabanka rivers, and the plaintiffs contend that inasmuch as the entire river Mudoomuttee is mentioned, their *julkur* must include that portion of it which is now in dispute between them and the defendant. But it is quite clear that the word used in the quinquennial register can have no such signification, for there is a very large portion of the river lying to the north of that now disputed which is not, and admittedly never has been, in the plaintiff's possession. The use of the words "Mudoomuttee river," therefore, proves nothing in favor of the plaintiff's case. That they had and have *julkurs* in that river is not denied, but they have to prove their right to the particular *julkur* claimed by them.

The Subordinate Judge says of the survey Register Book that it appears from it, that the *julkur* belonged to the plaintiff's estate Mokimpore, and that if the zemindar of Pergunnah Nuldee had any right to the *julkur* at all, he would have advanced his claim at the time of the survey. Now it appears from the proceedings on this record, that the survey register was made on the strength of a supposed proceeding of the Collector which decided that as between the parties to this suit, the *julkur* belonged to the plaintiffs; but the fact is not so. In 1860, the Collector on the part of Government claimed to assess this *julkur* when Rasmonee Dossee objected, on the ground that it was included within her permanently settled estate for which she paid a rent of Rs. 274-8-10, and the Collector recommended Government to relinquish its claim, refusing at the same time to decide upon the claim of a Mr. MacArthur, the representative of the present defendant to a small portion of the *julkur*. It is clear from this that the defendant made then the same objection as is made now, and that his claim was not investigated or decided. The Survey Register, therefore, which was drawn up on a mistaken idea as to what had been decided by the Collector, proves nothing against the defendant.

The report of the Mohafiz Duftur, or Record-keeper, dated the 22nd June 1869, has been a good deal relied on by the Subordinate Judge, but it is in point of fact not admissible as evidence against the defendant. To make it evidence the record-keeper should have been duly examined on oath as to the correctness of the report. Were it receivable, there would still remain the question why the *hakeekut milanee* papers referred to differed from the quinquennial registers.

The order of the Collector, dated the 15th August 1825, has nothing whatever to do with the present case. The contest in 1825 was regarding certain *chur* land claimed as an increment to the villages of Radhanuggur and Doollubpore (villages which the survey map shows to be on the western side of the Mudoomuttee river, and some distance inland), and it was decided that Government had no right to the land. No question of *julkur* was either raised or decided; and in fact, although as regards the *chur* land the Collector gave an opinion that the representatives of the present defendant, who was a party to the proceeding, had not made out their claim, it may be doubted whether, as between the plaintiff and defendant, the decision had any binding force, the question for the Collector's decision being whether or no Government had any right to resume the *chur* under Regulation II of 1819.

There remain the *kabooleuts* and the evidence of the witnesses, who depose to the plaintiff's possession of the disputed *julkur*, and this is in fact the only tangible evidence adduced by the plaintiff in support of her claim.

It is contradicted by oral evidence of a similar character on the part of the defendant, and this evidence is corroborated by documents which prove incontestably that the defendant was in possession of some portion of the Mudoomuttee river Julkur, a point entirely opposed to the plaintiff's assertion that she only held the entire *julkur*.

There are decrees for rent in favor of the defendant zemindar against parties using the disputed portion of the *julkur*, and *dowls* which show that at any rate the Nuldee zemindar considered this portion of the river to belong to him, and sublet it on several occasions to under-tenants. These last are of course, as the Subordinate Judge remarks, private papers only, but they stand in precisely the same category as those filed by the plaintiff, and the same objections apply to both.

It would be sufficient in this case to say that the plaintiff, who came into Court for a declaratory decree under Section 15 of the Procedure Code, has shown no cause for this Court to give him the relief he seeks, but after we have heard the case fully argued, I think we are bound to go further and to declare not only that the plaintiffs have failed to make out a case, but that the defendant has proved his long possession of the disputed *julkur* and his right to retain it.

The decision of the Subordinate Judge is reversed, and this appeal allowed with costs.

Mitter, J.—I am of the same opinion

The 8th March 1872.

Present :

The Hon'ble G. Loch and W. Ainslie,
Judges.

Decree—Appeal—Remand—Dismissal for Default—Petition of Compromise (presented by Vakeel)--Forgery—Evidence.

Case No. 928 of 1871.

Special Appeal from a decision passed by the Officiating Judge of Patna, dated the 18th May 1871, reversing a decision of the Moonsiff of that district, dated the 22nd March 1871.

Bal Kanai Chowdhry and another (Plaintiffs) *Appellants,*

versus

Toree Mahtoo (Defendant) *Respondent.*

Mr. C. Gregory and *Moonshee Mahomed Yusoof* for Appellants.

Baboos Chunder Madhub Ghose and *Luckhee Churn Bose* for Respondent.

Plaintiff obtained a decree from the first Court, which decree was affirmed in appeal by the Lower Appellate Court. On special appeal the case was remanded to the Lower Appellate Court for a distinct finding on two points. But the judgment of the first Court was not in any way affected by that order; and when the case came up before the Lower Appellate Court under the order of remand, defendant (appellant) made default, and the appeal was dismissed for default. HELD that the decree of the first Court remained in force, and was untouched and final.

Before a petition of compromise which was presented by a Vakeel in due course of business, and which operated to stay further proceedings in execution, can be declared a forgery, it is necessary that evidence should be taken upon it.

Loch, J.—IT appears that on the 11th Pous 1258, the ancestor of the plaintiffs purchased a 4-anna share in the property in dispute from Neerho Mahtoo and other proprietors, and they held possession. But on the death of Neerho Mahtoo and other vendors, the heirs of those vendors, the defendants in this case, without the knowledge of the plaintiffs, applied to the Collector in the month of September 1866 to have their names registered as proprietors of the estate, and the order for registering their names was accordingly made by the Collector. The plaintiffs objected to this registration, but their objection was rejected. They then brought a suit to have their names recorded in the Collector's register as proprietors on proof of their possession and title. They obtained a decree in the first Court on the 10th April 1867, which decree was affirmed in appeal on the 27th September 1867 But on special appeal, the case was remanded to the Lower Appellate Court for a distinct finding, first, on the point of limitation, and then upon the merits, there appearing some confusion in the mode in which the judgment of the Lower Appellate Court had been drawn up. The case was called up before the Lower Appellate Court in September 1868 ; but as the defendants failed to appear in support of the appeal, it was dismissed for default. An application for review was presented, but it was rejected on the 6th May 1869. Subsequent to this the plaintiffs applied to execute their decree for costs ; and when execution was taken out, the defendants on the 12th July 1869 presented a petition through their Vakeel Byjo Nath Sahoy, who is now dead, to the effect that the plaintiff was entitled to a 4-anna share of the property, and also to the other properties mentioned in the petition, that they had made an arrangement with him with regard to all these properties, and that they were willing to attorn to him and to exchange pottahs and *kubooleuts* for the lands which they held in the village in question : and they therefore prayed that the attachment might be removed, and the property be released.

Now it appears that the date on which the petition was presented, was the date which was fixed for the sale of the property which had been attached in execution of the decree for costs, and on this application being made, further proceedings in that execution case were withdrawn. The plaintiffs now bring this suit for the rent of 1277 against Futteh Mahtoo, one of the principal defendants in the previous case; and after filing their plaint on the 22nd November 1870, they also on the 16th February 1871 put in a copy of the said petition of the 10th July 1869; and on the same day the defendant Futteh Mahtoo put in his written statement. But in that no objection was taken to the petition of the 10th July 1869. In his written statement the defendant admitted the plaintiff's right to 1 anna and 15 gundahs, but denied that he had any right to 2 annas and 5 gundahs, which the defendant Futteh Mahtoo said were cultivated by Toree Mahtoo, who held from him.

The first Court, however, considering that the plaintiff had obtained a decree for 4-annas, and that he had a right to demand rent under the compromise which was come to on the 10th July 1869, gave a decree for rent against the defendant.

On appeal, the Judge has reversed the decree of the first Court on the ground, first, that the decree obtained by the plaintiff in 1867 was no decree at all; that the plaintiff was not in possession; that the petition presented on the 10th July 1869 was fraudulent; that no relationship of landlord and tenant existed between the plaintiff and the defendant; and therefore he dismissed the suit.

Now, with regard to the decree that was obtained by the plaintiff in 1867, we think that the Judge has taken a wrong view of that decree: it is clear that only the judgment of the Appellate Court confirming that decree was set aside on remand by the High Court. But the judgment of the first Court was not in any way affected by that order; and when the case came up before the Appellate Court for hearing under the order of remand, the defendant in this case and appellant in that case made default, and the appeal was accordingly dismissed for default. Therefore, the decree of the first Court remained in force, and is not up to the present time touched and is final.

Then the Judge has considered that the plaintiff is not in possession. Looking at that decree, we find that what the plaintiff asked for in that case was that on proof of his title and possession, his name should be entered in the Collector's Register, and in the judgment that has been read to us, he most clearly asserts that he was in possession at the time of bringing the suit. It is true that there is something at the end of that judgment which directs that the plaintiff should be put in possession, words which the defendants' pleader has tried to make the most of. But we have not the decree before us, and it is very probable that there is some clerical error in those words, because had the plaintiff got a decree according to his plaint which asserted that he was in possession and could prove his title: and as he did prove his title, it is very unlikely that the decree would have been one for possession.

Then again the Judge has set aside the petition of the 10th July 1869, and has set it aside without going into any evidence as to its being a forgery, or to its being anything but what it professes to be. It was presented by one of the Vakeels of the Court in due course of business, and operated to stay the proceedings in execution, and a copy of it has been boldly brought forward and put before the Court in this case. Before a document thus presented to the Court can be declared a forgery, it is necessary that evidence should be taken upon it. The defendants who in the first Court had in some way challenged its genuineness should have been required to state most distinctly on oath that it was a forgery. But all they did was this, they simply raised some kind of objection. On that the Moonsiff sent for the record, and from that he satisfied himself that it was a genuine petition; that it has been acted upon; and that upon that petition, all the proceedings in execution of the decree had been stayed for the benefit of the judgment-debtors, now the defendants. And yet the Judge in the face of all these circumstances, without taking any evidence at once, pronounces it to be a forgery, accepting the objection raised by the defendants, who, knowing that the Vakeel who presented the petition is dead, repudiate the transaction. Before pronouncing any opinion, the Judge ought to have examined the defendants on oath; and if they deposed that it was a forgery, he should have made due enquiry; and if on enquiry be found that there were good grounds for believing that it was a genuine document, he should have proceeded against the defendants criminally. But what do the defendants do on the judgment passed by the first Court? They come up in appeal; they make no distinct allegation against the petition in the appeal, but are satisfied with saying that the petition presented to the Moonsiff is *Kabully Chasnehi.* This is all the objection that they made; and upon such an objection as that, the Judge has thrown out the petition.

Then, with regard to the attornment, it is clear that the defendants in this case did agree, in the petition above referred to, to hold the lands from the plaintiff who is in possession of them, and they have been declared by a decree of Court to be his property, and there is no reason whatever why the plaintiff should not succeed in obtaining the rent from the defendants who have had the use and occupation of those lands.

We think, therefore, that the judgment of the Lower Appellate Court must be reversed, and the decree of the first Court restored and affirmed. The appeal will, therefore, be decreed with costs in this Court and in the Lower Appellate Court.

The 8th March 1872.

Present :

The Hon'ble G. Loch and W. Ainslie, *Judges.*

Presumption—Construction—"Karindah"—"Nij-jote"

Case No. 1045 of 1870.

Special Appeal from a decision passed by the Subordinate Judge of Tirhoot, dated the 26th February 1870, affirming a decision of the Assistant Collector of that district, dated the 2nd November 1869.

Hajee Shaikh Wajooddeen Hossein and another (Plaintiffs) *Appellants,*

versus

Madhoo Chowdhry and others (Defendants) *Respondents.*

Messrs. G. C. Paul and *C. Gregory*, and *Moonshee Mahomed Yusoof* for Appellants.

Baboos Bhowanee Churn Dutt and *Bipro Doss Mookerjee* for Respondents.

The word "*karindah*," as used in the pottah in this case, was held to be merely a term used to set forth what was the *status* of the person to whom the pottah was granted, and to afford no ground for the presumption of the tenant's holding previous to the date of that pottah.

Nor did the word "*nij-jote*," as used in this pottah, mean lands the cultivation of which is carried on by the cultivator himself, but lands which are held by the zemindars in their own possession, or their own private lands.

Loch, J.—The plaintiff in this case sues to recover rent at enhanced rates as per notice, in respect of 19 beegahs and odd cottahs of *ticca* land, and 8 beegahs and 17 cottahs of *bhowlee* land.

The defendant pleads that he has held the *ticca* land at unchanged rates of rent from the time of the decennial settlement, and that he is therefore not liable to have his rent enhanced: he further denies having held any *bhowlee* land.

In support of his statement, the defendant has filed some pottahs, the first one dating so far back as the year 1285; and he has also filed receipts showing uniform payment of rent from that period. And the conclusion come to by the Lower Courts is that he is entitled to the presumption which is stated in Section 4 Act X of 1859.

The Judge, in disposing of this case in appeal, says that the presumption of the defendant's holding, previous to the date of the first pottah of 1285, arises from the very words in that pottah. He says that the pottah runs in these terms:—"Jeetun Chowdhry, *sakin karindah mousah fullanah;*" and that the pottah is granted for certain *nij-jote.* From these words, the Judge held that the word *karindah* could not have been used had not Jeetun Chowdhry been at the time cultivator of *this* land, and that the word *nij-jote* was not, as was attempted to be explained before him, the *serat* lands, or the lands of the zemindar. He says:—"In this part of the country, land held by *maliks*, apart from ryotee lands, is always styled *serat*, not as in Bengal *nij-jote.*" But the Judge does not go on to say, if there is a difference between the words *serat* and *nij-jote*, what is the meaning of the word *nij-jote*, and how it is to be construed in that part of the country. But he seems to think that, with reference to the particular words in the pottah, *nij-jote* means lands the cultivation of which is carried on by the cultivator himself. Now it appears to us that the word *karindah* is merely a term used to set forth what was the *status* of the person to whom the pottah was granted, and that no such presumption can arise from the use of that word as has been drawn by the Judge. Again, we think that the Judge is scarcely correct in saying that the word *nij-jote* used in this pottah is not equivalent to the word *serat.* It is evident from the terms of the pottah that the lands let were *nij-jote zummin*; and the Regulations and Acts point out the *nij-jote* lands as the lands which are held by the zemindars in their own possession, or their own private lands. And there is no reason why a different interpretation should be put upon the word in construing the pottah before us, and the Judge has not shown that the word *nij-jote* does apply to something different.

It appears, moreover, in this case that the defendant himself has been examined, and although he states that he has held from ***muddutteh kudeemee***, or from a long time, yet he does not state that he has held from previous to the date of the pottah. And on a reference to a previous statement, which he made in another case between these parties, which we have allowed to be put in, and which we think the Judge ought to have allowed to be put in, it appears that he there also said that he has held from a long time, and he dates that long time from the date of the first pottah of 1235. We think, therefore, there can be no doubt that the beginning of his holding must be reckoned back only to the year 1235.

But it is urged on the other side that, from the plaintiff's own evidence, it can be shown that these lands were held by the defendant and his ancestors previous to the date of the pottah; and the evidence of the *naib*, or agent of the plaintiff, who was examined in this case, has been read to us: he says he knows that the defendant has held these lands from the time of his father and grandfather, and that the lands are ancestral. Now this witness appears to have been in the service of the plaintiff for about six years, as he says himself in his deposition; but he does not state what was the source of his knowledge; he does not state that he lives in the same village with the defendant. We must, therefore, accept this evidence, which has been given in most general terms, very cautiously: the words are so general that we can look upon them only as words spoken in a loose, careless, and general way. We think, therefore, that the conclusion come to by the Judge that a presumption arises from the words of the pottah that the defendant has been holding this land from a time previous to the date of that pottah, *i. e.* from the time of the decennial settlement, falls to the ground.

It will be necessary to remand the case to dispose of the question of rates.

With regard to the *bhowlee* lands, the special appellant gives up his appeal on that point. He also admits that he can make no claim against the other two respondents in this case, Delawar Chowdhry and Bhooput Chowdry, and they will be entitled to *their costs of this appeal.*

The special appellant will be entitled to his costs of this appeal from Madhoo Chowdry in proportion to the amount decreed and dismissed.

The first Court, in disposing of the question of rates, will proceed upon the evidence in the record if that is sufficient to enable it to pass a satisfactory judgment, otherwise he will allow the parties to adduce further evidence.

The 11th March 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and Dwarkanath Mitter, *Judge.*

Pleaders—Act XX of 1865—Improper Conduct—Compromise—Staying Execution Proceedings.

Reference under Section* 16 *Act XX of* 1865, *recommended by the Judge of Backergunge to be suspended for six months.

In the case of

Sreenath Roy, *Pleader.*

The omission of a pleader to examine the record of the case before making an application to stay execution proceedings upon the ground of a compromise was held not to amount to grossly improper conduct. But his not verifying the statement of the parties who came to him and made their statements (one of them being a Mookhtar) was considered at the most to amount to carelessness but not grossly improper conduct; whilst his omission to obtain the authority or concurrence of the senior pleader in the case could not be said to be improper conduct within the meaning of Act XX of 1865, certainly not such grossly improper conduct as calls for the punishment of suspension for six months

Couch, C. J.—THE circumstances of this case are, that the pleader, Sreenath Roy, presented to the Court a *vakalutnamah* which purported to have been executed by a person who had obtained a decree in the Court, upon which decree execution proceedings were being taken; and the pleader, at the time of presenting the *vakalutnamah,* put in an application asking the Court to put a stop to the execution proceedings on the ground that the parties had agreed to a compromise and that the decree-holder was no longer anxious to enforce the decree. Thereupon, the Court stayed the execution proceedings and accepted the compromise.

The statement of Sreenath Roy, the pleader, is that a person came to him, representing himself to be the decree-holder, Roy Chand; that he was accompanied by two other persons, one of whom was a Mookhtar of the Court, and they were persons whom he says he thought were respectable persons; and that upon his asking those persons what Vakeels were engaged, one of them told him that another Sreenath Roy had been engaged, but that he was dead, and the other Vakeels were not willing to take a *vakalutnamah.* We then stated that he would not take it, whereupon one of the persons, named Juggut Gangoolee, and also the man who professed to give the *vakalutnamah*, and represented as Roy Chand, stated that Roy Chand belonged to his part of the country, meaning the country of the pleader Sreenath Roy, and that there was no cause to doubt; and upon that he accepted the *vakalutnamah.*

The Judge says that he considers that Sreenath Roy, by failing to look at the record of the suit and to make himself acquainted with the facts of the cause in which he was engaged, by failing to verify in any way the statements that were made to him out of Court relative to the cause, and by presenting a petition affecting the same without the authority or concurrence of the senior pleader already engaged by his client in the cause, has been guilty of grossly improper conduct in the discharge of his professional duties, and has caused a great public scandal in the administration of justice.

Now, there is a rule which requires a pleader, before signing the grounds of appeal, to make himself acquainted with the record of the case; but I believe there is no express rule which requires him, before making such an application as this was, to examine the record. Looking at the nature of the application, which is to stay the whole of the proceedings, it would, no doubt, have been wise on the part of the pleader to ascertain precisely the state in which the case stood: but his omission to do that would not amount to grossly improper conduct.

In regard to his failing to verify the statements which were made to him out of Court, that would be improper or not, to some extent, having regard to the parties who came to him and made the statements. It might be that he put so much confidence in them, and thought that they were persons on whom he ought to rely, one of them being a Mookhtar, that his not verifying their statements would at the most amount to carelessness, but not to what might be called grossly improper conduct.

So, also, with regard to his obtaining the authority or concurrence of the senior pleader already engaged in the case, he does not appear to have been furnished with the names of the pleaders, and whether the Judge means that he himself was to enquire and ascertain who was the pleader already engaged in the suit does not clearly appear. But I do not think his omission to do that can be said to be such improper conduct in the discharge of his duties as was intended by this Act, certainly not such grossly improper conduct as calls for the punishment of suspension for six months. The conduct of the pleader has certainly been improper, and to some extent it may be said to be grossly improper. I cannot say that the finding of the Judge upon this point is wrong, but it appears to me that the sentence of suspension for six months, which, I understand, would be of serious consequence to this man, was more than was called for under the circumstances of the case, and that the justice of the case will be met by our passing upon him a sentence of suspension of five weeks, which will expire about this time. I hope that that will be a warning to him to be more careful in future when he presents to the Court such an application as this was.

The 11th March 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble Dwarkanath Mitter, *Judge.*

Limitation—Act XIV of 1859 *s.* 1 *cl.* 10 *and s.* 4*—Acknowledgment of Debt—Extension of Time for Payment of Debt.*

Application forwarded by the Judge of Midnapore pursuant to the Rule annexed to Circular Order No. 13 *of the 4th June* 1870.

Bissumbur Shi (Plaintiff) *Petitioner,*

versus

Syud Bukto Bedarul Hossein (Defendant) *Opposite Party.*

No one for Petitioner.

Baboo Radhika Churn Mitter for Opposite Party.

Section 4 Act XIV of 1859 applies to what is merely an acknowledgment of the debt being due, and not to a writing by which time is given for the payment of the debt, and which comes within Clause 10 Section 1.

Couch, C.J.—In this case the plaintiff sued for money which he alleged was due on a writing or acknowledgment by the defendant made on the back of an old bond. It appeared upon referring to the endorsement on the bond that an account was made up showing what balance was due, and then it was agreed to be paid, with interest in Pous 1276, the acknowledgment, or writing, being dated 2nd Magh 1275. The Judge of the Small Cause Court, upon a plea of limitation set up by the defendant, has held that the period of limitation runs from the date of the writing, and not from the date upon which the payment was agreed to be made.

We think he was wrong in this. He seems to have considered that this writing was to be treated simply as an acknowledgment under Section 4 Act XIV of 1859, but that Section appears to us to apply to what is merely an acknowledgment of the debt being due, and not to writings by which time is given for the payment of the debt, as was done in this case. Such a writing as this appears to come within the 10th Clause of Section 1 of the Limitation Act, which provides for a period of three years from the time when the debt becomes due, or when the breach of the contract takes place. Here there was a contract between the parties for which the agreement to pay the stipulated rate of interest might be a sufficient consideration for the plaintiff to postpone the payment of the balance until Pous 1276. It was then that the balance became due under this writing, and not at the time when the writing was signed.

We think that the decision of the Judge of the Small Cause Court was wrong, and that the Rule which calls upon the defendant in the case to show cause why the judgment should not be set aside and the Court directed to hear the case on its merits must be made absolute.

The parties not having appeared, we make no order as to costs.

The 12th March 1872.

Present :

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Sale of Putnee Talook for Arrears of Rent—Cause of Action—Act XIV of 1859 *s.* 7—*Recovery of Possession with Damages—Notice or Demand—Appellate Court (Functions of)—Issues.*

Case No. 656 of 1871.

***Special Appeal from a decision passed by the Judge of Dacca, dated the 4th March* 1871, *reversing a decision of the Subordinate Judge of that district, dated the 12th September* 1870.**

Brojo Soondur Mitter and others (Plaintiffs) *Appellants,*

versus

Futick Chunder Roy and others (Defendants) *Respondents.*

Baboo Mokinee Mohun Roy for Appellants.

Baboo Romesh Chunder Mitter for Respondents.

Upon the sale of a *putnee talook* for arrears of the landlord's rent, the purchaser acquires it free of all incumbrances created by the outgoing *putneedar:* and, according to Act XIV of 1859 s. 7, the purchaser's cause of action arises from the date of sale.

Semble.—The purchaser cannot recover possession with damages, without previous notice or demand of possession.

A Court of Appeal cannot raise on appeal an issue which was not raised in the Court of first instance, the functions of a Court of Appeal being not to interfere upon mere points of form, but to rectify a judgment where there has been error on the merits whether that error has arisen from a misapprehension of the facts or misapplication of the law.

Jackson, J.—It appears to us that the Lower Appellate Court has been in error in this case. Even if the ground which the District Judge appears to have taken for himself on the part of the defendant had been taken and determined in the Court of first instance, we should still hold that the plaintiff had been entitled to judgment, because the law is quite clear, that, upon the sale of a *putnee talook* for arrears of the landlord's rent, the purchaser acquires it free of all incumbrances created by the outgoing *putneedar;* and, as pointed out by the vakeel for the special appellant before us, Section 7 Act XIV of 1859 distinctly recognises the purchaser's cause of action as arising in such cases from the date of the sale of the *putnee.* We do not mean to say that for that reason the Court would favor a suit brought by the purchaser to recover possession, with damages from the *dur-putneedar,* if it appeared that no previous notice or demand of possession had been given. But that is not the case in the suit before us, because the plaintiff alleged (and we understand that the allegation was not contradicted) that he had sought to take possession as *putneedar,* but was resisted by the *dur-putneedar* who refused to give up possession. That being so, there was a clear cause of action. We do not think it necessary to say whether the defendant should have been treated as a trespasser, or by what designation he should have been called ; but the plaintiff was clearly entitled to possession. He sought to obtain possession, and was resisted by the defendant; he was therefore clearly entitled to bring this suit and to demand possession; and, apparently, he seems to be entitled also to *wassilat* from the time at which such demand for possession was resisted.

But in the present case it appears to us that the Judge was further wrong in having gone out of his way to raise on appeal an issue which was not raised in the Court of first instance. The functions of a Court of Appeal is not to interfere upon mere points of form, but to rectify a judgment where there has been error on the merits, whether that error has arisen from a misapprehension of the facts or misapplication of the law.

We think, therefore, that the judgment of the Lower Appellate Court must be set aside, and the case must go back to that Court, in order that the remaining issues may be disposed of. Costs will abide the result.

The 12th March 1872.

Present:

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Suit by Co-sharer—Enhanced Rent.

Case No. 1140 of 1871.

Special Appeal from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 15th June 1871, *affirming a decision of the Extra Assistant Commissioner of Manbhoom, dated the 24th February* 1871.

Bhyrub Mundul and others (Defendants) *Appellants,*

versus

Gogaram Banerjee (Plaintiff) *Respondent.*

Baboo Tarucknath Sein for Appellants.

Baboo Anund Chunder Ghosal for Respondent.

A single co-sharer cannot sue for his share of the rent, much less for enhanced rent.

Jackson, J.—THE plaintiff in this case is one of two joint owners of land occupied by the defendants, and he singly sued the defendants to recover rent to the extent of his own share at an enhanced rate, after notice.

The defendants in the first place objected to the plaintiff's suit on the ground that, as they held under both co-sharers, and as the land in respect of which the plaintiff claimed to enhance was not specified, the suit could not be maintained. They also set up a *mokururee* holding, and they further objected to the rates claimed by the plaintiff.

The plaintiff, however, obtained a decree in the Court of first instance, which decree has been confirmed by the Judicial Commissioner of Chota Nagpore.

In our opinion the plaintiff was not entitled to maintain this suit, he being one of two undivided joint owners, and the land in respect of which the suit was brought not being defined. It has frequently been ruled in this Court that, where the course has been to pay rent to co-sharers jointly, a single co-sharer will not be allowed to bring a separate suit for his share of the rent. The same rule appears to apply with still greater force to cases of enhancement. This is a principle which we think we should have the less hesitation in applying to the present case, because the facts appear to be such that, if we were deciding in Regular Appeal, we should not probably affirm the decision, for the plaintiff appears to have failed, to a great extent, in proving the rates claimed; and, further, the defendant set up a *mokururee* which, there is fair reason to suppose, he might have succeeded in proving if the plaintiff's father had attended to give evidence, as he had been summoned to do.

We think, therefore, that the decision of the Courts below must be set aside and the plaintiff's suit dismissed with costs.

The 12th March 1872.

Present:

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Mortgage Lands (Possession of)—Insufficient Tender of Mortgage Debt—Decree.

Case No. 1143 of 1871.

Special Appeal from a decision passed by the Judge of Mdinapore, dated the 27th June 1871, *affirming a decision of the Subordinate Judge of that district, dated the 25th May* 1869.

Boistub Doss Koondoo and another (Plaintiffs) *Appellants,*

versus

Huro Narain Haldar and others (Defendants) *Respondents.*

Baboo Kalee Mohun Doss for Appellants.

No one for Respondents.

Though it would have been more satisfactory if the Lower Appellate Court, instead of declining to give plaintiff a decree for possession of certain mortgaged lands on the ground that the sum tendered by them was insufficient to liquidate the mortgage debt, had made a decree in favor of plaintiff contingent upon their paying such sum as should be found due, yet the plaintiffs had no strict right to such a decree, and it cannot be said that the Lower Appellate Court had committed an error in law in refusing to make such a decree.

Jackson, J.—THE plaintiffs in this case sought to recover possession of certain mortgaged *talooks*, the suit being brought in furtherance of a previous decree and *solehnamah* between these plaintiffs and the mortgagors, but the present suit raising certain questions which had not been raised in the previous suit or compromise relating to the rights of certain previous mortgagors who are in this suit the defendants on the one part, the representatives of the mortgagors being the defendants on the other part. The plaintiffs now pay into Court the sum which they allege to be due for the complete satisfaction of the earlier mortgage, and claim to enter into possession.

The suit was at first dismissed by the Subordinate Judge on certain issues which it is not necessary to state now; and an appeal being made to the Zillah Court, the Judge ordered a trial upon certain other specified issues. Evidence was gone into and a finding returned upon those issues; and when the case came back to the Court of the Judge, he raised a further point as to whether the plaintiffs were entitled, in the event of its appearing that the sum tendered by them was not sufficient to liquidate the previous mortgagor, to get a decree for possession.

The plaintiffs, it is to be observed, made an offer in the Appellate Court to pay whatever sum should be found to be due, and asked that a decree should be made contingent upon their making such payment.

The Judge considered this question, and having determined against the plaintiffs, ordered their suit to be dismissed.

It is contended now in special appeal that the decision of the Judge upon this point involves an error in law.

We must confess to a certain amount of sympathy with the plaintiffs who have maintained a protracted litigation and find themselves now remitted to a second suit for the same purpose, and we must say that we should have thought it more satisfactory if the Judge had made a decree of the kind now suggested. But it is another thing to say that the Judge has committed an error in law, which we can set aside in special appeal, by reason of having, in his discretion, refused to make such a decree.

It must be borne in mind that the issue whether or not the sum tendered by the plaintiffs was sufficient, was raised and decided in the Court of first instance. The fact of the raising of this issue was quite sufficient to suggest to the plaintiffs that something would have to be done in case that issue were determined adversely to them, and then it was their business, it appears to us, to apply to the Court for leave to pay an additional amount, or, at any rate, to declare their readiness to pay such amount in case the issue of sufficiency of tender was decided against them. They did not do so in the Court of first instance, nor did they do so in first appeal. They must have been quite aware that, before they could succeed in the Appellate Court, that issue as to the sufficiency of their tender would have to be again raised and considered, and the issue might be decided against them at the trial in that Court. But it was not until the case came up again after the remand to the Court of first instance that they seem to have made any such application.

In strictness, we think there can be no doubt that the plaintiffs having alleged and offered to prove their right to recover these *talooks* upon the payment of the sum named, if they failed to establish that allegation, their suit might lawfully be dismissed. They had no strict right to insist upon a decree under the circumstances.

It is said that in this case the ends of justice require that such a decree should be made. In special appeal we know far too little of the merits of the case to enable us to say that that is so, although, as we have said, we should not have been dissatisfied, but the contrary, if the decree we suggested had been made; but we cannot say that an error has been committed in point of law by not making such a decree.

The special appeal is dismissed, but in the circumstances without costs.

The 18th March 1872.

Present:

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Suit for Accounts and Papers—Form of Decree.

Case No. 1277 of 1871.

Special Appeal from a decision passed by the Deputy Commissioner of Manbhoom, dated the 22nd July 1871, *modifying a decision of the Moonsiff of Maunbazar, dated the 3rd March* 1871.

Juggur Nath Panee (Defendant) *Appellant,*

versus

Rajah Chuttur Narain Deb (Plaintiff) Respondent.

Baboo Nil Madhub Sein for Appellant.

Baboo Gopeenath Mookerjee for Respondent.

In a suit to recover accounts and papers, instead of giving plaintiff a decree with a direction that it should be ascertained in execution what accounts and papers, if any, were in the hands of the defendant, the Lower Appellate Court ought to have remanded the case to the first Court with instructions to frame a new issue to try what papers and accounts, if any, were in the hands of defendant, and whether he had wrongfully refused or omitted to deliver them to plaintiff, and if so, decide the case accordingly.

Jackson, J.—THIS was a suit brought by the plaintiff against the defendant, who had been in his service as a *peshkar*, being, as we understand, an officer, entrusted with the collections of rent, for the recovery of certain accounts and papers alleged to be in the hands of the defendant, and not made over by him to the plaintiff.

The suit was tried by the Moonsiff of Maunbazar, who appears to have tried the case as if it had been a suit for an account. And he gave judgment for the plaintiff, ordering that the defendant should render an account of the different matters he had in his charge.

On appeal by the defendant, the case came before the Deputy Commissioner of Manbhoom as Subordinate Judge, and he corrected the error into which the Moonsiff had fallen, but fell into a distinct error of his own, for he rightly looking upon the suit as being one to recover accounts and papers, gave a decree for the plaintiff, but directed that it should be ascertained in execution what accounts and papers, if any, were in the hands of the defendant.

Now, it lay upon the plaintiff to make out that certain accounts and papers of his were in the hands of the defendant, and that defendant had wrongfully refused or omitted to deliver them up; and unless the plaintiff proved that, his suit would fail. According to the decision of the Subordinate Judge, whilst a decree was being given to the plaintiff, it might turn out in execution that there was no ground for the suit and that the defendant did not hold any of the plaintiff's papers in his hands. What the Subordinate Judge should have done was to set aside the decree of the Moonsiff and remand the case to him with instructions to frame a new issue to try what papers and accounts, if any, were in the hands of the defendant, and whether he had wrongfully refused or omitted to deliver them to the plaintiff, and if so, decide the case accordingly.

We must, therefore, set aside the order of the Deputy Commissioner, and substitute for his decree an order of the nature we have stated. The case will go back to the Moonsiff in order that he may deal with it.

The 18th March 1872.

Present :

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, *Judges.*

Office of Bhoonyee in Cuttack—Tenancy—Jageerdaree Right.

Case No. 1222 of 1871.

Special Appeal from a decision passed by the Judge of Cuttack, dated the 29th June 1871, *reversing a decision of the Moonsiff of Pooree, dated the 9th December* 1870.

Choitun Mohantee (Defendant) *Appellant,*

versus

Bhikaree Mohuntee (Plaintiff) *Respondent.*

Baboo Mohendro Lall Mitter for Appellant.

Babbo Tarucknath Dutt for Respondent.

Plaintiff's ancestor held certain lands from Government under a settlement at a fixed rent of 10 rupees 13 annas, but was subsequently appointed *bhoonyee* with a remuneration of Rs. 10-6-8 recoverable by deduction from the rent, leaving only 6 annas and 4 pies payable to Government by way of rent. HELD that the *sunnud* of appointment to the office of *bhoonyee* created no *jageerdaree* right, but that on the contrary the reservation of the rent of 6 annas 4 pies seemed to indicate that the tenancy remained, giving no right of exclusive occupancy to plaintiff as against defendant.

Jackson, J.—IN this case the plaintiff claimed to have exclusive occupancy of some lands held from the Government under a settlement by which the rent of that land was fixed at 10 rupees and 13 annas, on the ground that his ancestor, with whom a settlement was made, was subsequently appointed to the office of *bhoonyee*, which appears to be an office connected with land in the District of Cuttack, somewhat similar to that of *putwaree* elsewhere, and the remuneration attached to the office was set down at

10 rupees, 6 annas, and 8 pies, such remuneration being recoverable by deduction from the rent originally settled, leaving a sum of 6 annas and 4 pies payable to Government by way of rent.

The plaintiff contended that by this appointment the *jummayee* right originally created was converted into one of *jageeree*, by which Bhoobun, the original holder, became a *jageerdar*, receiving as the remuneration of his office of *bhoonyee* the entire profits of the land, paying only 6 annas and 4 pies to the Government; and he maintained that, in accordance with that grant, Bhoobun, and he himself in succession to Bhoobun, had been in exclusive occupancy of the land.

The defendant denied this and stated that notwithstanding the subsequent appointment of Bhoobun to the office of *bhoonyee*, the original tenant right continued to subsist, and that Bhoobun's remuneration consisted merely of an assignment of 10 rupees 6 annas and 4 pies out of the rent reserved upon the land; and the defendant alleged and gave evidence to show that he and the plaintiff had been in joint occupancy of the land as tenants.

This view was taken by the Moonsiff, but the Judge, taking the documents and oral evidence into consideration, came to the conclusion that the plaintiff's allegation was the true one, and that he was entitled to hold the land exclusively as *bhoonyee*. There being some conflict of evidence as to possession, the Judge gives credit to the evidence adduced for the plaintiff upon the ground that such evidence coincides with the documents, and this has reference to the view which the Judge took of the *sunnud* of appointment to the office of *bhoonyee*.

Now on reading that *sunnud*, although the remuneration assigned to Bhoobun for his office of *bhoonyee* appears to be small, only 10 rupees 6 annas and 4 pies, yet we think it is beyond dispute that that *sunnud*, if strictly read, does confer upon him that office with a remuneration of that amount, and that such remuneration has to be deducted from the entire rent payable to Government. Nothing is said of a *jageerdaree* right being created; on the contrary, the reservation of the rent of 6 annas and 4 pies, seems to indicate that the tenancy remained, but that so long as Bhoobun or his representatives held the office of *bhoonyee*, instead of 10 rupees and 13 annas, only 6 annas and 4 pies would be payable as rent.

That being the case, not only is the Judge's ground for preferring the oral evidence on behalf of the plaintiff taken away, but this puts an end to the claim of right set up by the plaintiff, and supports the view of the case originally taken by the Moonsiff that the land was at first held and continued to be held by way of tenancy, and that being so, we think there has been an error of law in the decision of the Lower Appellate Court and the judgment of that Court must be set aside and that of the Moonsiff must be restored with costs.

The 14th March 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Maintenance (of younger Brother)—Decree for less than claimed in Plaint.

Case No. 975 of 1871.

Special Appeal from a decision passed by the Judge of Cuttack, dated the 15th June 1871, modifying a decision of the Subordinate Judge of that district, dated the 4th November 1870.

Neeladree Singh (Plaintiff) *Appellant,*

versus

Rajah Rughoonath Singh (Defendant)
Respondent.

Baboo Mohendro Lall Mitter for Appellant.

Baboo Obhoy Churn Bose for Respondent.

Plaintiff sued his elder brother for maintenance, calculated at Rs. 300 per month. The first Court gave a decree for Rs. 50 per month, which was reversed on appeal by the Judge, on the ground that he could recover no smaller amount than that claimed in his plaint. HELD in special appeal that plaintiff had a right to a finding by the Judge as to what amount and what kind of maintenance he was entitled to receive from defendant.

Glover, J.—THE plaintiff in this case sues his elder brother, the Rajah of Domeparrah, for maintenance, calculated at 300 rupees a month. He states that he was always in the habit of living with his brother, and was provided by him with food, raiment, &c.; that this state of things continued up to the 28th of Falgoon 1277, on which date this provision was stopped, and hence this suit.

The Rajah defendant does not anywhere deny that the plaintiff has a right to maintenance from him; but he says that such maintenance is by a family custom always given in the shape of land; and that no money allowance was ever made.

It does not appear, however, that any land was either given or offered to the plaintiff by the defendant. The Subordinate Judge, taking the whole of the circumstances into consideration, and looking to the amount of the net income which accrued to the Rajah after paying the Government revenue and expenses of collection, &c., thought that fifty rupees a month was a fair and proper allowance for the plaintiff, and he gave a decree accordingly. The Rajah appealed to the Judge, and the result was that the plaintiff's case was dismissed altogether, the Judge holding that, inasmuch as the plaintiff came into Court to recover arrears of his maintenance at the rate of 300 rupees a month, he was bound to prove that that was the amount of his monthly allowance; and as he failed to do that, no decree for such smaller amount as the Court might think him under the circumstances entitled to, could be given. In short, the Judge reverses the decree of the Subordinate Judge, because it gave the plaintiff something which he did not ask for.

After hearing the argument on both sides, and taking into consideration all the circumstances of the case, I think that the decision of the Judge cannot be sustained. In the first place, it is not exactly correct to say that the plaintiff claims 300 rupees as a fixed money allowance; what he says is that he had been in the habit of living with the Rajah, and of being provided for by him with food and raiment, &c.; and that as the Rajah stopped his maintenance, the plaintiff, having calculated its value, claimed three hundred rupees a month. He did not say that this amount exactly represented the value of his maintenance, but that he supposed it to do so. And I do not see why the fact of the plaintiff's having asked for a fixed sum, should, when that sum is proved by evidence to be larger than what he was entitled to, be a reason for rejecting his entire claim. It is not denied that, by the custom of the family, he was entitled to maintenance from the family estate; and it would not be fair to prevent his recovering that maintenance, whatever it may be shown to be, simply because he asked in his plaint for more than he was entitled to.

I think, therefore, that the plaintiff has the right to a finding on the part of the Judge as to what amount and what kind of maintenance he is entitled to receive from the defendant. In deciding this point, the Judge will of course take all the circumstances into consideration, the value of the estate and the other demands upon the Rajah. He will also decide whether the allowance, when fixed, is to be made in money or in land. This point does not seem to have been enquired into by the Courts below, but it is an important one, and should not be overlooked.

The case will be remanded to the Judge for trial, with reference to the above remarks. Costs to follow the result.

Kemp, J.—I wish to say a few words in concurrence with this judgment. The contention of the pleader for the Rajah appears to amount to this that, because the plaintiff has asked too much, he is to get nothing at all. The plaintiff's right to maintenance is not disputed. The question in the Courts below as between the parties was whether the maintenance should be in the shape of *jageer* land or a money allowance. The plaintiff's plaint is explained and cleared up by the examination of his pleader. In the plaint he says, as shown by Mr. Justice Glover, that the Rajah had hitherto maintained him; that any little sums to meet his necessary expenses were always given by the Rajah; that suddenly without cause the Rajah refused to maintain him or to pay his expenses; and that, therefore, the plaintiff, estimating his proper maintenance at 300 rupees a month, came into Court and asked for arrears of such maintenance at that rate; and when he was called upon through his pleader to explain, the pleader stated candidly that the plaintiff had never received an allowance at the rate of 300 rupees a month; but that was his estimate of what he ought to receive with reference to the income of the estate. The pleader for the defendant, who was also examined, denied the correctness of that estimate, and there was also a difference of opinion between the pleaders on both sides as to whether the allowance should be given in the shape of money, or in the shape of land. But on what the parties went to trial was what ought to be with reference to the income of the Rajah, the amount which he should pay by way of maintenance to his brother. The Rajah failed in the first Court to prove his alleged custom that his brother was to receive the maintenance in the shape of land. The first Court very properly, instead of throwing out the whole of the plaintiff's claim, because he asked too much, assessed the amount of maintenance to which he was entitled with reference to the income of the estate. The plaintiff, although he got one-sixth of what he claimed, remained contented with that decision. The defendant Rajah raised all sorts of technical objections before the Judge as to the stamp and as to the valuation of the claim. We do not find, looking to the decision of the Judge, that he in anyway showed that the Court of first instance was wrong in the finding at which it arrived with reference to the fact that the Rajah did not prove the custom that the plaintiff was entitled only to maintenance in the shape of land. The Judge has followed the course which the pleader for the respondent has adopted in his argument in this case, namely that, because the plaintiff asked too much, he is not to get anything. I think that in equity the plaintiff is entitled to a finding as to what maintenance he is justly entitled to with reference to his *status* in the family, and also with reference to the circumstances of the Rajah, those circumstances being indicated by the net income of the estate. The Rajah is bound to maintain his brother, and he must maintain him in proportion to his means. The Court below will have to decide, therefore, what is the proper and fair maintenance which the plaintiff is entitled to receive from the Rajah.

The 14th March 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Exparte Decrees (below 100 *Rs.)—Suit to set aside—Appeal—Act VI of* 1862, *B. C.*, *s.* 14.

Case No. 985 of 1871.

Special Appeal from a decision passed by the Officiating First Subordinate Judge of Hooghly, dated the 4th July 1871, *reversing a decision of the Moonsiff of Ghattal, dated the 22nd March* 1871.

Raj Kishen Mookerjee (Defendant) *Appellant,*

versus

Modhoo Soodun Mundul (Plaintiff) *Respondent.*

Baboo Umbika Churn Banerjee for Appellant.

Baboo Chunder Nath Bose for Respondent.

In this case the Deputy Collector refused plaintiff's application to set aside a rent decree as passed against him upon a confession of judgment fraudulently filed by other parties. The value of the suit being between Rs. 100, he ought to have appealed to the Collector under s. 14 Act VI of 1862, B. C. Having failed to do so, he was held to have no right to bring a suit for the purpose in the Civil Court.

Glover, J.—THE plaintiff sues to have a rent decree passed against him in a suit under Act X of 1859 brought by the defendant cancelled, and likewise to have it declared that an *ekbal dâbee* or confession of judgment on which that decree proceeded, was not filed by him, but had been placed on the record fraudulently by other parties. It appears that, after the decree in the rent suit was passed, the plaintiff applied to the Deputy Collector under Section 58 Act X of 1859, setting out these facts; but the Deputy Collector, after hearing the evidence adduced to support the plaintiff's allegation, gave judgment against him holding that the *ekbal dâbee* had not been fraudulently obtained. Thereupon, the plaintiff brought the present suit in the Civil Court. The Moonsiff held that the suit was not one which the Civil Court could take cognizance of. But on appeal the Subordinate Judge thought that a Court of Equity should grant relief; and that the plaintiff was not shut out by the Act X decree from obtaining that relief. He, therefore, remanded the case to the Moonsiff to have the question of the *ekbal dâbee* decided on its merits.

The point taken in special appeal is that the Subordinate Judge is wrong in reversing the decision of the Moonsiff; this not being a case in which an action will lie in the Civil Court. We think that this special appeal must be allowed. In cases under Act X of 1859, which were decided *ex parte*, the party against whom judgment was given, could come within a certain fixed time, and show, if he could, good and sufficient cause for his previous non-appearance, and satisfy the Collector that there had been a failure of justice; and if he did both these things, the Collector might revive the suit and dispose of it according to the justice of the case. By Section 18 Act VI of 1862, B. C., any decision passed by the Collector under Section 58 Act X of 1859, rejecting an application to have a suit decided *ex-parte* revived was, in all appealable cases, appealable to the Court to which the final decision in the suit would be appealable. In this case the rent suit was appealable to the Collector, the value of it being below 100 rupees, and, therefore, when the Deputy Collector refused the plaintiff's application, he, the plaintiff, ought to have appealed to the Collector. The plaintiff having failed to do so, has, it seems to us, no right to bring a suit in the Civil Court. He was not debarred from a remedy. It was open to him to have the decision of the Deputy Collector in the rent suit considered by a superior Revenue Court in appeal. A case has been quoted from the 9th Weekly Reporter, page 80, Bhoojunga Thakoor *vs.* Luchmee Narain, but it does not appear to have anything to do with this particular case. We think, therefore, that, as a sufficient remedy was provided for plaintiff by law, a remedy of which he neglected to avail himself, he is precluded from bringing his suit in the Civil Court.

We reverse the decision of the Subordinate Judge, and restore that of the Court of first instance with costs.

The 14th March 1872.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Suit for Rent by Co-sharer—Enhancement.

Case No. 917 of 1871.

Special Appeal from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 16th June 1871, *reversing a decision of the Extra Assistant Commissioner of Manbhoom, dated the 28th February* 1871.

Haradhun Gossamee and another (Plaintiffs) *Appellants,*

versus

Ram Newaz Missery and others (Defendants) *Respondents.*

Baboo Woopendro Chunder Bose for Appellants.

Baboo Gopeenath Mookerjee for Respondents.

A landlord, one of several co-sharers, cannot sue a tenant of the joint estate for his separate share of the rent, unless the tenant has paid or agreed to pay to him separately. Consequently a suit for enhancement by such co-sharer will not lie.

Kemp, J.—THIS is a suit for enhancement of rent. The plaintiff says that he is a four annas shareholder in the property ; and that he therefore sues to enhance the defendant's rent in proportion to his, the plaintiff's four annas share. The Lower Appellate Court, reversing the decision of the first Court, finds that a landlord, one of several co-sharers, cannot sue a tenant of the joint estate for his separate share of the rent unless the tenant has paid or agreed to pay to him separately. A decision of this Court in the case of Gunga Narain Doss, dated 8th June 1869 (XII Weekly Reporter, p. 80), has been quoted. The Lower Appellate Court further finds that the plaintiff holds his four annas share jointly with several other co-sharers, and that there is no reliable proof that the defendant pays separately to the plaintiff or has agreed to do so, and consequently the plaintiff's suit to enhance will not lie.

We think that this finding is correct in law, and dismiss this special appeal with costs.

The 14th March 1872.

Present :

The Hon'ble W. Markby and W. Ainslie, *Judges.*

Construction—Decree—Interest.

Case No. 6 of 1872.

Miscellaneous Appeal from an order passed by the Officiating Judge of Gya, dated the 18th November 1871.

Syud Shah Abdoollah and others (Judgment-debtors) *Appellants,*

versus

Meer Reasut Hossein (Decree-holder) *Respondent.*

Mr. R. E. Twidale for Appellants.

Moonshee Mahomed Yusoof for Respondent.

Although the decree in this case did not specify the rate of interest before or after decree, yet, as it appeared that, in calculating the amount then due, the Court gave 12 per cent., and that that was the usual rate, HELD that the intention of the Court, when it passed the decree, was to give the same rate.

Markby, J.—IN this case we have no difficulty in ascertaining from the terms of the decree itself what rate of interest the Court intended when it passed the decree. It is true the rate of interest is not specified either as regards that part of it which accrued before the date of the decree, or that part of it which might accrue after the date of the decree. But in calculating the amount then due we find that the Court did give 12 per cent. We know also as a matter of fact that that was the usual rate in those days which was allowed upon decrees, and we cannot suppose it likely on the terms of that decree that the Court intended to give interest at two different rates ; or that it intended to give less than the usual rate, though of course it was competent to do so if it thought proper.

The appeal is dismissed with costs, sixteen rupees being allowed for pleader's fees.

The 14th March 1872.

Present :

The Hon'ble W. Markby and W. Ainslie, *Judges.*

Execution of Joint Decree—Application by one Decree-holder—Act VIII of 1859 *s.* 207—*No Appeal.*

Case No. 125 of 1871.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Tirhoot, dated the 4th February 1871.

Odhoya Perhad (One of the decree-holders) *Appellant,*

versus

Mohadeo Dutt Bhandaree and another (Judgment-debtors) and others (decree-holders) *Respondents.*

Mr. C. Gregory for Appellant.

Baboo Hem Chunder Banerjee for Respondents.

No appeal will lie from an order of a Lower Court refusing an application by one decree-holder, under Section 207 Act VIII of 1859, to execute the whole of a joint decree. Nor is an appeal necessary, for the Court is bound under that Section to protect the interests of any co-decree-holder not before the Court; so that if any application for execution has been preferred by the other decree-holders, the appellant is entitled to apply for leave to join in that application; or if there is no application now before the Court, the appellant is entitled to ask the Court, after calling upon the other decree-holders to join in executing the decree, and on their refusal or neglect to do so, to allow execution to proceed on his sole application.

Markby, J.—I THINK it is quite clear that this appeal will not lie. This case seems to be precisely similar to the one reported in XVII Weekly Reporter, p. 136, in which it was held by Mr. Justice Glover and Mr. Justice Mitter that the appeal would not lie. That was the impression we had before that case was referred to, and that case has confirmed it.

The appeal is dismissed with costs, sixteen rupees being allowed for pleader's fees.

Ainslie, J.—I quite concur in the view that an appeal will not lie. Moreover, it appears to me that no appeal is necessary. If any application for execution has been preferred to the Lower Court by the other decree-holders, the present appellant is at liberty to apply for leave to join in that application, so as to connect all the parties on the record with the proceedings going on. Even without this, the Court is bound under Section 207 to protect the interests of any co-decree-holder who is not before the Court. If there is no application now before the Court below, the appellant is perfectly at liberty to renew his application to the Judge and to ask him to re-consider the matter, and after calling upon the other decree-holders to join in executing the decree within a specified time, in the event of their refusing or neglecting to do so, to make an order under Section 207, that the execution shall proceed on the appellant's sole application. The reasons assigned by the Subordinate Judge for refusing the application are not sound and need to be re-considered.

After Doorga Doss had caused the appellant's name to be entered on the record as a co-decree-holder, the Court was not competent in execution of the decree, to re-open the question whether he was entitled as an assignee or not.

Markby, J.—I wish to add that I entirely concur in the observations that have just fallen from Mr. Justice Ainslie.

The 15th March 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble L. S. Jackson, *Judge.*

Ejectment and Arrears of Rent—Limitation—Act X of 1859 *s.* 23, *cl.* 6, *and ss.* 32 & 78.

Case No. 1249 of 1871 under Act X of 1859.

Special Appeal from a decision passed by the Officiating Judge of Nuddea, dated the 21st June 1870, *modifying a decision of the Deputy Collector of that district, dated the 16th February* 1870.

Deen Dyal Paramanick (Plaintiff) *Appellant,*

versus

Radha Kishoree Debee and others (Defendants) *Respondants.*

Mr. M. M. Ghose for Appellant.

Baboo Grish Chunder Mookerjee for Respondents.

During the period that litigation is going on under Clause 5 Section 28 and Section 78 Act X of 1859 for ejectment and arrears of rent, the defendant's tenancy and obligation to pay rent are in suspense. But, by payment of rent under the latter Section, a continuance of the tenancy is effected, the obligation to pay rent again arises, and limitation of the right to arrears of rent under Section 32 then begins to run.

Couch, C. J.—I THINK that the decision of the Privy Council in the case which has been quoted, reported in XI Weekly Reporter Privy Council Cases, page 5, is clearly applicable to the present case.

The facts of this case are that, at the end of the year 1271, the plaintiff instituted proceedings under Clause 5 Section 28 and Section 78 of Act X of 1859 for the arrears of rent due, and claimed to eject the defendant on account of the non-payment of those arrears. The litigation lasted until the year 1276, and the final result was that the defendant had the power of paying the arrears of rent claimed within fifteen days of the final decree, and if they were paid, then by virtue of Section 78 he would not be ejected.

Up to that time, the plaintiff could not tell whether the tenancy would continue or not. If the defendant did not think fit to pay the arrears, he would be ejected as upon a forfeiture of the tenancy. The suit was brought in the year 1271, and from 1271 to 1276 he would not then be in the position of having been tenant of the property at all. He would be liable for the profits which he might have received during those years, but there would be no tenancy, because by his own election he would have treated it as determined in 1871. But he did not do that: he paid the rent, and thereby secured the right of continuing as a tenant. By doing that, to use the language of the Lords of the Privy Council, he elected, in fact, to continue to hold the property as a tenant, and to have his possession treated as a continuance of the possession as a tenant.

The facts of the case before the Judicial Committee differ from the facts of the present case, but the principle equally applies. Instead of there being, what their Lordships say, a restoration of the property, there was here a continuance of the tenancy, and then it must be considered that the right to the arrears of rent has come within the principle of Section 32, and at that time the obligation to pay the rent must be considered to have arisen. Until that period, it was in suspense; but when he determined to continue as tenant, the obligation to pay the rent arose.

The principle of the decision of the Judicial Committee, I think, clearly applies to this case, and it has been applied to a case somewhat similar by two of the Judges of this Court in the case reported in XVI Weekly Reporter, page 79.

The decision of both the Lower Courts upon this point is wrong, and ought to be reversed. There seems to be also no ground for the way in which the Lower Courts decided with regard to the stamp. A decree will issue, declaring the plaintiff entitled to eject the defendants, if the rent is not paid within 15 days from the date of the decree, with costs.

Jackson, J.—I concur.

The 15th March 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Landlord and Tenant—Alteration of Land—Excavations for making Bricks.

Case No. 980 of 1871.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 30th May 1871, affirming a decision of the Moonsiff of Banooorah, dated the 7th February 1871.

Anund Coomar Mookerjee (Plaintiff) *Appellant,*

versus

Bissonath Banerjee and others (Defendants) *Respondents.*

Baboo Nil Madhub Sein for Appellant.

Baboo Toolsee Doss Seal for Respondents.

No tenant taking land is entitled, without some specific agreement on the subject, to change the nature of that land, or to make any permanent alteration in the state of the landlord's property. If a person wishes to lease lands for the purpose of making bricks, that should be the subject of a special agreement between the parties in the same way as when parties take lands for building purposes.

Glover, J.—THIS was a suit by the plaintiff, a *putneedar*, to have the defendant, his tenant, declared liable to fill up certain excavations made in lands rented by him from the plaintiff for the purpose of making bricks. The plaintiff says that his land has been permanently injured by these excavations, and sues to have the damage made good, laying his loss at 75 rupees. The defendant alleged in the first place that he was a *mokurureedar* and therefore only responsible to the plaintiff for rent of the land, and that the plaintiff cannot sue him for damages.

The first Court dismissed the plaintiff's claim, the ground of its decision being that the defendant himself had not made these excavations or done the damage, but somebody else to whom the defendant had given permission to make bricks on the land.

The Judge, on appeal, without going into the question whether the defendant was or was not a *mokururee* ryot, considered that the suit was premature, inasmuch as no present damage was done to the plaintiff. He upheld the decision of the Court below.

It is not very easy to understand the meaning of the Judge's order. He says: "It is allowed that there is no damage done to the plaintiff." If he means by that that so long as the defendant retains the tenure and pays rent for the same the plaintiff suffers no loss, he is so far right; but it may very well happen that the defendant may cease paying rent to the plaintiff or relinquish his tenure, and then how can it be said that no damage has accrued to the plaintiff in consequence of the excavation? It appears to us that very considerable damage has already been done, and that no tenant taking land without some specific agreement on the subject is entitled to change the nature of that land from what it was when he got it, or to make any permanent alteration in the state of the landlord's property. If a person wishes to lease lands for the purpose of making bricks, that should be the subject of a special agreement between the parties in the same way as when parties take lands for building purposes.

The Judge, moreover, has not decided the question whether the defendant was or was not a *mokururee* tenant. This, however, would not probably be of very great importance, for, supposing the defendant to make out his case, the question of damages would not be affected thereby, because it might very well be that this *mokururee* tenant, after exhausting the whole of the land, might refuse to pay any more rent and let the holding fall into the hands of the landlord in which case the landlord's loss would be very considerable.

It seems to us that the loss to the landlord is a present loss. For instance, if the landlord wishes to bring a suit for enhancement against the defendant on the ground that the value of the produce or that the productive powers of the land had increased, he would find it extremely difficult to make out any case at all in consequence of the soil having been excavated and taken away by the defendant for the purpose of making bricks. From every point of view, therefore, the plaintiff, if he makes out his case as he brought it, can show very good grounds for damages on account of his having suffered loss by the act of the defendant. The suit should be decided on the merits, for which purpose it is remanded to the Judge. Costs to follow the result.

The 15th March 1872.

Present:

The Hon'ble A. G. Macpherson and Dwarkanath Mitter, *Judges.*

Act X of 1859—*Execution—Sale.*

Case No. 757 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Chittagong, dated the 18*th April* 1871, *affirming a decision of the Moonsiff of Baguya, dated the* 9*th September* 1870.

Wahed Ali (one of the Defendants)
Appellant,

versus

Sadiq Ali (Plaintiff) and others (Defendants)
Respondents.

Baboo Umbika Churn Bose for Appellant.

Baboo Kashee Kant Sein for Respondents.

A purchaser at a sale in execution of a rent decree under Act X of 1859 against a person who at the time had no interest in the tenure sold in execution of that decree, simply took nothing.

Macpherson, J.—It appears to us that the decree of the Lower Appellate Court ought to be reversed, and that the plaintiff's suit ought to be dismissed.

The plaintiff makes his title under a purchase made at a sale in execution of a rent decree (under Act X of 1859) which had been obtained against Mukbool Ali, but it appears that, prior to the date of the decree under which that sale took place, the tenure had been sold to Wahed Ali. That being the case, the tenure was not the property of Mukbool Ali at the time of the decree, or of the subsequent attachment and sale, and the plaintiff who purchased at the sale simply took nothing.

Following the decisions which will be found reported in X Weekly Reporter, pp. 434, 436, and 494, and in XV Weekly Reporter, page 341, we hold that the decree under which the plaintiff purchased was against a person who, at the time had no interest in the tenure which was sold in execution of that decree, and therefore that nothing passed to the plaintiff. The decree of the Lower Court is reversed, and the suit is dismissed with costs.

The 18th March 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble Louis S. Jackson, *Judge*.

Evidence (of Rent)—Old Decree—Payment of reduced Rent for twenty years.

Case No. 1361 of 1871.

Special Appeal from a decision passed by the Judge of Twenty-four Pergunnahs, dated the 28th August 1871, *modifying a decision of the Moonsiff of Satkhira, dated the* 31*st October* 1870.

Wooma Moyee Burmonya (Plaintiff) *Appellant*,

versus

Kunuck Chunder Mookerjee and others (Defendants) *Respondents.*

Baboo Mohinee Mohun Roy for Appellant.

Baboo Bama Churn Banerjee for Respondents.

The Court saw no ground for saying that there was any error of law in the Lower Court, when it found that a decree was made in 1849, and that the amount of rent stated in it had never been paid, but that for twenty years subsequent to the decree a reduced rent had been paid, coming to the conclusion that the decree had been abandoned by the parties or treated by them as a matter which was not to regulate the amount of the rent.

Couch, C. J.—The question which was raised in the suit was as to the amount of rent. The decree could be and was used only as evidence of it. When the Court found that the decree was made in 1849, and that the amount of rent stated in the decree had never been paid, but that for twenty years subsequent to the decree, the reduced rent had been paid, it was competent for it, taking the decree as part of the evidence in the case, to come to the conclusion that in some way or other the parties had abandoned the decree, or that it had been treated by them as a matter which was not to regulate the amount of the rent. It was a question of evidence what was the value of a decree which for twenty years appeared never to have been acted upon in any way. It would not have been a wrong conclusion to come to if the Judge had said, I will not treat this decree, after the lapse of twenty years, as conclusively fixing as the rent between the parties that which had never been paid or received during the whole of the time subsequent to the decree. This is a special appeal, and there is no ground whatever for saying that there is any error in law in the Lower Court dealing with this decree in the way in which it did.

The appeal must be dismissed with costs.

The 21st March 1872.

Present:

The Hon'ble A. G. Macpherson and Dwarkanath Mitter, *Judges.*

Abatement—Less Quantity found on Measurement.

Case No. 62 of 1872.

Special Appeal from a decision passed by the Judge of Nuddea, dated the 31st August 1871, *affirming a decision of the Moonsiff of that district, dated the 29th December* 1870.

Seetanath Bose (Plaintiff) *Appellant*,

versus

Sham Chand Mitter (Defendant) *Respondent.*

Baboo Bhowanee Churn Dutt for Appellant.

Baboo Chunder Madhub Ghose for Respondent.

Though a *pottah* provided for an abatement of defendant's rent if on measurement the land was found to be less than 145 beegahs, yet it was held that if defendant came to be in possession of that less quantity by his own default and not that of the lessor, the mere fact of defendant having been in possession of less than 145 beegahs would not entitle him to an abatement.

Macpherson, J.—We think this case must go back in order that the Judge may enquire whether or not the defendant is entitled to an abatement, and (if to any) to what abatement of his rent, under the terms of the *pottah* which provide for an abatement if on measurement the land is found to be less than the 145 beegahs mentioned. If, in making the enquiry, the Judge should find that the defendant was, for the period which was the subject of the suit, in possession of less than the full quantity of land, he must consider how he came to be in possession of that less quantity and by reason of whose default, because if the default was the default of the defendant, and not that of the lessor, the mere fact of the defendant having been in possession of less than 145 beegahs would not entitle him to an abatement. If the Judge finds that the defendant ever got possession of the full quantity of land, he will enquire under what circumstances it was that he afterwards abandoned or was ousted from it.

Costs will follow the result.

The 21st March 1872.

Present :

The Hon'ble A. G. Macpherson and Dwarkanath Mitter, *Judges.*

Limitation—Guardian of Minor.

Case No. 70 of 1871.

Regular Appeal from a decision passed by the Subordinate Judge of Tipperah, dated the 27th December 1870.

Sreemutty Suffuroonissa Bibee and others (Defendants) *Appellants,*

versus

Moonshee Noorul Hossein (Plaintiff) *Respondent.*

Baboo Hem Chunder Banerjee for Appellants.

Baboo Chunder Madhub Ghose for Respondent.

A suit by a guardian on behalf of a minor is the suit of the minor, and is governed by the law of limitation applicable to the minor.

Macpherson, J.—This appeal was argued before E. Jackson and Mookerjee, JJ., on the 16th of August last. It was then contended that the plaintiff's suit was barred by limitation, although it was admitted that no such plea could have been raised if the minor, on whose behalf the suit was instituted, had attained his full age, and had been personally suing within three years after attaining his majority. It was urged that, if it had been brought by a plaintiff under no legal disability, the suit was clearly barred by the ordinary law of limitation; that a guardian is under no disability, although his word may be so; and that therefore this suit is barred as being one instituted by a guardian on behalf of a minor.

The learned Judges considered that there were conflicting decisions upon the question whether, if the minor would have a right to sue until the lapse of three years from his attaining his full age, the guardian may not sue on his behalf at any time so long as he remains a minor: and they referred the question to a Full Bench.

The Full Bench finding that, whereas there were two express decisions (VII Weekly Reporter, 161, and VI Weekly Reporter, 19) to the effect that a guardian can sue at any time up to the date of the minor's majority, there was in opposition to these no actual decisions of any Court, but only an expression of opinion by a single Judge (see XIV Weekly Reporter, 346), considered that there was no such conflict of decisions as warranted a reference to a Full Bench, and declined to enter upon or decide the matter which had been referred. Thereupon, the case was sent back to this Bench that it might be finally disposed of. The only point which Baboo Hem Chunder Banerjee for the appellant asks us to decide now, is the question whether the suit being instituted by a guardian on behalf of the minor is or is not out of time.

In our opinion, inasmuch as the suit, although brought by a guardian, is the suit of the minor, it is not barred by Act XIV of 1859. We agree with the view of the question taken in the two cases already referred to (VI Weekly Reporter, 19, and VII Weekly Reporter, 161).

This being the only question which we have to decide now, it appears to us that the appeal must be dismissed, and the judgment of the Lower Court affirmed with costs.

Mitter, J.—I am of the same opinion. The suit is in every respect the suit of the minor. It is the minor, and not the guardian, who is the plaintiff in the cause; for the relief sought for in the plaint, if granted, would inure to the benefit of the former, and not to that of the latter. The title to be enquired into is the title of the minor; and the application of the law of limitation must therefore depend upon the determination of the question as to whether that title, and not the title of the guardian, is extinguished by lapse of time. Under such circumstances, it would be highly unreasonable to hold that the suit is barred by limitation when it is beyond all question that the cause of action upon which it is brought is still alive to the minor under the express provisions of the 11th Clause of Section 1 Act XIV of 1859. Such a conclusion might in many cases lead to the most dangerous consequences; for while it would afford no protection to the defendants from the claim of the minor, which might be re-instituted within three years after he attains majority, it might in the meantime destroy the muniments of the minor's title, as well as the other means by which his guardian is now in a position to establish it.

The question regarding the application of the law of limitation to the claim of the plaintiff Kumroonissa has not been raised before us by the pleader for the appellant.

The 21st March 1872.

Present:

The Hon'ble A. G. Macpherson and Dwarkanath Mitter, *Judges.*

Lease by Co-sharer—Rent—Consideration.

Case No. 1020 of 1871.

Special Appeal from a decision passed by the Judge of Gya, dated the 27th March 1871, *affirming a decision of the Subordinate Judge of that district, dated the 4th August* 1870.

Ram Debul Lall (Plaintiff) *Appellant,*

versus

Mitterjeet Singh and others (Defendants) *Respondents.*

Moonshee Mahomed Yusoof for Appellant.
Mr. C. Gregory for Respondents.

Although one co-sharer cannot give a good lease of the whole 16 annas of property which belongs to himself and his co-sharers, yet one co-sharer may give a lease of his own share which would be binding against himself at least.

Rent reserved is a sufficient consideration in law.

Macpherson, J.—THIS case will be remanded to the Court of first instance in order that it may be properly tried.

The plaintiff alleges (and no doubt it is the fact) that he got a *mokururee pottah* in April 1864 from Gouree Byjnath of sixteen *beegahs* and ten *biswas* of land in *mouzah* Chandpore, and by that *pottah* it was provided that the tenure was to commence from the year 1277. Gouree Byjnath was the proprietor of an eight-anna share of the lands comprised in the lease, his brother Joy Kurrun having the other eight-anna share. In the year 1277, when the plaintiff attempted to take possession under his *pottah*, he was opposed by the defendants who pleaded that they had obtained a *mokururee* on the 14th of April 1868 from Gouree Byjnath of an eight-anna share of the whole *mouzah* within which the lands in question lie.

Both the Lower Courts have decided against the plaintiff, and apparently considered that the lease was bad for want of consideration, and that it never was intended to be, and in fact never was attempted to be acted upon until after the defendants got their *pottah*. The Lower Courts appear also to have been of opinion that the plaintiff's claim was bad, inasmuch as one sharer could not by himself give a good lease of the joint estate. It may be that one co-sharer cannot give a good lease of the whole sixteen annas of property which belongs to himself and his co-sharers; but there is no doubt that one co-sharer may give a lease of his own share, which would be binding against himself at the least, and it is difficult to see why the lease which the plaintiff obtained should not be a good lease so far as the eight-anna share of Gouree Byjnath is concerned. It is said by the Court below that there is no consideration; but even if there is no evidence of other consideration, the rent which is reserved is in law a sufficient consideration, if the transaction was a real substantial one. Then it is said that it is shown that this lease to the plaintiff was never intended to be acted upon, because he never attempted to get possession until the year 1277; but there is nothing extraordinary in his waiting till 1277, when we bear in mind that according to the provisions of the lease, possession under the *pottah* was not to commence until that year.

The case must be carefully tried, and the Court must fix issues which will bring out the true nature of the transaction between Gouree Byjnath and the plaintiff. Of course, if it is proved as a fact that the *pottah* was not a *bonâ fide* transaction at all, and was a mere paper transaction for which no consideration passed and which the parties never intended should be acted on, then the Court will do rightly in not giving effect to it.

The *pottah* recites that an arrangement was to be come to between Gouree Byjnath and his co-partner Joy Kurrun Lall, which would enable Gouree Byjnath to give up the whole sixteen-annas of the land which was leased to the plaintiff. Now, with reference to that, and with reference also to certain other points which arise in the case, it may be that the legal representative of Joy Kurrun Lall ought to be a party to the suit; and if so, it appears to us that the Lower Court may even now add him as a party if it be necessary to do so in order that the real issues in the suit may be determined.

The case must go back to the first Court and fully tried, the parties being at liberty to give fresh evidence. It appears to us to be right to allow this, as the principal issue in the case has not been tried at all.

The 21st March 1872.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Suit for Confirmation of Possession—Proof of Possession—Special Appeal—Ejectment.

Case No. 1213 of 1871.

Special Appeal from a decision passed by the Officiating Subordinate Judge of Sarun, dated the 9th June 1871, *reversing a decision of the Moonsiff of that district, dated the 19th December* 1870.

Beegoo Roy and another (Defendants) *Appellants,*

versus

Bal Mokund Misser (Plaintiff) *Respondent.*

Baboo Bama Churn Banerjee for Appellants.

Baboo Kalee Kishen Sein for Respondent.

The legal principle which holds that no suit for confirmation of possession will lie if possession at the time of the institution of the suit is not shown, refers to cases where no possession of any kind is shown within a reasonable time before suit, and not (as in this case) where legal possession under a decree has been found.

The Court cannot in special appeal go behind a decree for ejectment, and hold that the tenure in question was of that character that no order for ejectment could pass.

Bayley, J.—We think this special appeal must be dismissed with costs.

The *first* ground taken is that the identity of the lands has not been established, and that the Lower Appellate Court was not right in deputing an Ameen for that purpose.

Now, in the written statement, the plea taken by the defendant was that the decree was incapable of execution, as neither the decree nor anything on the record indicated the boundaries of the lands decreed. The plea now taken is that, as a matter of fact, the lands now decreed are not identical with the lands decreed to the plaintiff in the former suit. This, therefore, is a new plea altogether, and cannot be admitted in the face of the finding of fact by the Lower Appellate Court from the report of the Ameen that the lands are identical and the very lands formerly decreed to the plaintiff according to his claim.

It is then urged that this suit for confirmation of possession will not lie, as the plaintiff's own case shows that he was out of possession. Now the plaintiff's case was that he obtained possession under the decree, and it is not contended that the officer deputed to give legal possession did not give him such possession. If it so happens that, immediately before the institution of the suit, the ryots did not pay him rent, or did anything just from that period which interfered with his enjoying the lands of which legal possession had been given to him, that would not make his suit for confirmation of possession liable to dismissal on the ground of not being in actual possession. The legal principle which holds that no suit for confirmation of possession will lie if possession at the time of the institution of the suit is not shown refers to cases where no possession of any kind is shown within a reasonable time before suit. Here legal possession under the decree is found. To hold that, under such circumstances, no suit would lie would be to render a decree for possession wholly inoperative and a nullity.

Lastly, we cannot in this case go behind the first decree for ejectment and hold, as we are now asked at this stage of special appeal, that the tenure was of that character that no order for ejectment could pass.

On the whole, I see no ground to interfere in special appeal, and would therefore dismiss this appeal with costs.

Markby, J.—I concur in dismissing this appeal.

The 22nd March 1872.

Present:

The Hon'ble G. Loch and W. Ainslie, *Judges.*

Estoppel — Former Defence — Hindoo Law — Insanity—Sale in Execution of Decree against Widow (for a Debt of her own creation)—Reversioners.

Case No. 180 of 1871.

Regular Appeal from a decision passed by the Subordinate Judge of Gya, dated the 18th June 1871.

Brij Bhookun Lall Awustee (Plaintiff) *Appellant,*

versus

Mohadeo Dobey and others (Defendants) *Respondents.*

Messrs. J. T. Woodroffe and *C. Gregory*, and *Baboos Unnoda Pershad Banerjee* and *Mohesh Chunder Chowdhry* for Appellant.

Messrs. R. T. Allan and *R. E. Twidale*, and *Baboos Sreenath Doss, Chunder Madhub Ghose*, and *Mohinee Mohun Roy* for Respondents.

Plaintiff's father was by a decree of 1848 declared entitled to his cousin's estate as reversioner. When the reversion opened out, plaintiff's father was insane, and plaintiff as the representative of his father, having endeavoured to obtain possession under the decree, was successfully opposed by the defendants who obtained a judgment of the High Court in their favor on the ground that plaintiff's father was no longer heir under the Hindoo law in consequence of supervenient insanity. Plaintiff was then obliged to bring this suit to establish his own title as heir, and defendants dispute his right on the ground that his father is not disqualified by insanity which was not congenital. HELD that defendants were estopped by their former defence from pleading their present defence.

A decree in a suit against a widow in temporary possession for a debt arising out of her own neglect to do her duty, is not binding on all persons who take the estate in succession to her. A sale made in execution of such decree passes no more than the widow's personal interest.

Ainslie, J.—This is a suit to establish the plaintiff's right to certain villages included in Lot Moranwan as heir of his cousin Chintamun Awustee.

The property in suit with other properties formerly belonged to Deo Kishen Awustee, who died leaving two sons, Shew Churn and Muddun Mohun, who became separate in estate. Shew Churn died leaving a son Kanhya Lall, who is still living, but is a lunatic. The plaintiff Brij Bhookun is son of Kanhya Lall.

Muddun Mohun died leaving a widow Nêt Kooer and two sons, Bâl Gobind and Chintamun. These two lived in commensality, but have both died childless. On the death of Bâl Gobind, his brother took the whole of their father's estate, and died leaving two widows, Radhé Kooer and Doorga Kooer; Radhé Kooer died in 1267, and Doorga in 1277.

By an agreement between Nêt Kooer and her sons, the sum of Rs. 200 per annum was fixed for her maintenance, and the same agreement (which is not on the record) apparently contained a hypothecation of three villages, Bheekunpore Karee, Gobindpore Karee, and Sowa, as security for the due payment of this allowance. This is gathered from the plaint filed by Nêt Kooer in the suit to be noticed hereafter and from the fifth paragraph of the written statements of Jhuree Sing and Bechun Dobey, defendants in this suit.

During the life-time of Chintamun, Nêt Kooer's allowance fell into arrears, and she had occasion to sue him for those arrears, and caused several house properties to be sold in execution of decrees obtained by her. It also appears that on one occasion Chintamun sold one of his villages, Mouzah Birnee, and paid Nêt Kooer some arrears, then due to her, out of the proceeds; but it is admitted that at his death he was not in debt to his mother on account of this allowance.

After his death, and when the ancestral estates were in the hands of the widows, arrears again accrued; and finally, after the death of Radhé Kooer, when Doorga Kooer was in sole enjoyment of the estate, Nêt Kooer instituted a suit against her, and obtained a decree for something between 1,300 and 1,400 rupees.

In execution of this decree, Nêt Kooer attached Lot Moranwan, and applied for the sale of the rights and interests of Mussamut Doorga Kooer therein. But at this stage of the proceedings she died, and the execution suit dropped. After a contest, Brij Bhookun was declared to be entitled to a certificate under Act XXVII of 1860 as representative of Nêt Kooer.

Before following that suit any further, it is necessary to revert to a suit instituted by Kanhya Lall, father of the plaintiff, in 1847. In this suit against the widows of Chintamun, Kanhya Lall, on the 18th April 1848, succeeded so far that he obtained a decree declaring him entitled to the estate of Chintamun as reversioner, after the decease of both the widows. Subsequently, but before the death of Nêt Kooer, Kanhya Lall became insane, and his son, the plaintiff, was duly appointed guardian and manager of his estate.

The decree obtained by Nêt Kooer against Doorga Kooer having, as related above, come into the hands of the plaintiff, he in 1866 applied to renew the execution thereof by proceeding against the properties previously attached by Nêt Kooer, and accordingly a sale was effected on the 19th June 1866, at which Byjun Dobé was recorded as the purchaser for a sum of Rs. 5,585. About 3½ years after this, Doorga Kooer died, and the reversion opened out.

Brij Bhookun then attempted to obtain possession of Chintamun's estate under the decree of 1848 as representative of his father. He was met by the auction-purchaser by the plea that, although Kanhya Lall was the next heir to Chintamun in 1848, when the decree was made, he not having at that time become insane, yet, when the succession opened out, he was no longer an heir at all under Hindoo law in consequence of supervenient insanity, and that the plaintiff, as representing one who had ceased to have any right, could not execute the decree.

This Court, in a judgment reported in XIV Weekly Reporter, page 880, held that the contention was good, and affirmed the order of the Court below which refused to allow Brij Bhookun to enter on Chintamun's estate by executing his father's decree. The plaintiff was thus thrown back on a regular suit to establish his own title as heir to Chintamun on the death of Doorga Kooer, the last surviving widow. Hence this suit. In his plaint, the plaintiff alleges that the decree obtained by Nêt Kooer was a decree against Mussamut Doorga Kooer personally, and that in execution thereof he sold the life-interest of that lady; and he further alleges that she herself bought in the property in the name of her servant Byjun Dobé.

The right of the plaintiff as heir to Chintamun is disputed on the ground that his father is not disqualified by insanity which was not congenital.

It is also contended that what was purchased at the execution-sale was the absolute proprietary title in Lot Moranwan, and not the widow's life-interest, and that Byjun Dobé was not the nominal purchaser on account of Doorga Kooer; that the 260th Section of Act VIII of 1859 bars the plaintiff's opening up the question whether Byjun's purchase was real and for his own benefit, or nominal and for the benefit of Doorga Kooer; and that plaintiff cannot impugn the dealings of the defendant Jhuree with Byjun, such dealings having been carried on *bonâ fide* with the ostensible owner of the estate.

The judgment of the Court below was in favor of the plaintiff on the first point and against him on the others. The respondents have objected under Section 348 to that part of the judgment which is against them, so that the whole case is before us.

The first point to be disposed of is the right of the plaintiff to bring this suit. It is admitted that either the plaintiff himself or his father is the heir of Chintamun now that the reversion has opened out. The plaintiff is the legal representative of his father; should his father recover the use of his reason, a question might arise whether he or his son was entitled to take the inheritance on the death of Chintamun; but in the meantime, there can be no doubt that the plaintiff, and the plaintiff only, is the person who is entitled to the occupation of the estate. It is not contended that the form of the suit has in any way prejudiced the defendants, and I should find it very difficult to hold that the suit ought to fail, even if plaintiff is not the heir under the Hindoo law. But, independently of this, it is clear that the defendants are estopped from raising the plea by their own acts. Rightly or wrongly, they insisted in the former proceedings that Kanhya Lall's right was barred by insanity, and they obtained a decision of this Court in their favor (a decision which it is not my intention to question in any way), and they are bound by that decision. They cannot be allowed to come into Court and plead one defence, and then, as soon as they have succeeded in that and forced the plaintiff to take up the position which they then assigned to him, turn round and say he ought to go back to his former place; they took a decision of the Court on the point, and for all purposes connected with this litigation they must be bound thereby.

The next question is what passed by the sale of the 19th June 1866, the limited interest of the widow, or the absolute interest as it existed in the hands of Chintamun?" This question is sub-divided into two branches: 1st, whether in fact the sale was intended to be a sale of more than the life-interest; and, 2nd, whether in law, irrespective of the intentions of the decree-holder, it did operate to convey the absolute estate.

It seems to me that there is no room for doubt as to the intentions of the person at whose instance the sale was held. He was the personal representative of Nêt Kooer, and as such had an interest in recovering from Doorga Kooer, who held the estate of Chintamun for her life, the money for which she had become liable as such life-tenant, but he was also the reversionary heir to whom the property was to come immediately on Doorga Kooer's death.

It has been contended that he took the place of Nêt Kooer, and must be held to have executed the decree precisely in the same manner as she would have executed it in, and the fact that he asked to proceed on her application is pointed to. But that application, though, by reading it in connection with matters not included within the paper itself, it may possibly be construed as containing a prayer for the sale of something more than the personal interest of Doorga Kooer, certainly does not on its face show that there was such a prayer in it. It asks for the sale of the rights and interests of Doorga Kooer; if, when presented by Nêt Kooer, we are to suppose that, under this expression, she wanted to attach the reversion, surely we cannot hold that, when presented by the reversioner himself, it was intended to do so.

Unless we take Brij Bhookun to be of as weak intellect as his father, we cannot suppose him to have intended to sell his own interest to pay himself.

That he knew what he was doing is manifest from his conduct on the day of sale, when, in his application to be allowed to bid and to set off his claim against the purchase-money should the property be knocked down to him, he distinctly speaks of the subject of the sale as the life-interest of Doorga Kooer.

The petition itself is not forthcoming, but evidence has been given to show that it has been destroyed in the ordinary course of business, and the purport of the petition is proved by the *vakalutnamah* of the 18th June 1866 appointing the vakeel by whom it was presented, and by the examination of the plaintiff himself. It is objected that, if the petition was destroyed, the *vakalutnamah* would also have been destroyed, and the uncertain nature of the first few answers of the vakeel Mohabeer Pershad are pointed to as indicative of the want of genuineness of this paper. It is true that the vakeel does not speak very positively about the sale; but when the *vakalutnamah* bearing his signature was put into his hands, he identified it at once. This paper came from the records of the Court, and contains a memorandum of the date on which it was filed (*viz.* 18th June 1866), signed apparently by some officer of the Court; and if the defendants intended to charge the officers of the Court with substituting the paper produced for another paper not originally on the record, or with allowing a fabricated record to be placed with the genuine records, they should have pursued their enquiry further. On the evidence now before us, we can, I think, come to one conclusion only, namely that there is nothing to warrant the rejection of the *vakalutnamah* as spurious. Even without this evidence, and looking merely to the position of the party executing the decree, I could not persuade myself that he intended to sell anything more than the personal interest of the debtor.

This brings me to the second branch of the question on which, in fact, the whole case of the defendants rests. It is contended that the maintenance of Nêt Kooer was a charge on the whole and every part of the estate of her husband Muddun Mohun; that the non-payment of the maintenance by Doorga Kooer, the tenant for the time, rendered the estate itself, and not her interest therein, liable to sale; that the suit and decree against her were not in her personal but in her representative capacity; and that under that decree, whatever was the intentions of the person executing it, what was sold, not having been expressly limited to the life-interest of Doorga Kooer, was the absolute estate; and that the purchaser is entitled to take everything that the decree can be made to cover.

It has been contended that the widow of Muddun Mohun was entitled to a share of his estate on partition. But as there was no partition, this is immaterial. As matters stood, she was entitled only to maintenance.

The point was considered in a case reported in IX Weekly Reporter, page 61, and the observations of Mr. Justice Mitter thereon are conclusive. It is not denied that the person whoever he or she may be, who holds the estate for the time being, holds it subject to a charge for maintenance; but on the other hand, no authority is shown which goes the length of laying down that each and every part of the estate is so hypothecated for this charge that the holder, if, as was the case with Chintamun, he had an absolute interest, uncontrolled by co-existing rights of sons, could not alienate any portion free from the charge, however ample the remainder might be to provide for the widow's dues. I am not prepared to say that the widow could not, under any circumstances, follow the property into the hands of the alienee, for it is unnecessary to discuss that question, but I have no doubt that, if she wished to do so, she must do it by a suit expressly framed for the purpose. It is said that this was a suit against Doorga Kooer as representing the estate of Chintamun, but it seems to me that, if she is to be treated as representative of Chintamun, and not as personally liable, it must be made out that there was a debt by Chintamun. But it is admitted that at his death, Chintamun did not owe any portion of the money for which Nêt Kooer obtained the decree under consideration. Apparently he did not owe Nêt Kooer anything for her maintenance at that time. The debt, it is said, was of the nature of instalments falling due on a bond executed by Chintamun; but the analogy is incomplete, for the claim did not arise out of any act of Chintamun, but altogether independently of him, and would have existed equally, though he had attempted to ignore it; the agreement of 1234 originated no right, it merely defined and limited one that already existed.

By the Hindoo law, the claim was one to be satisfied by the holder of the property at the time when each successive annual payment became due. It is impossible to say that Chintamun who died in 1252 was then in debt for allowances that actually did not become due for from ten to sixteen years later, and that possibly might never have become due at all. I must hold that the debt was a debt incurred by Doorga Kooer herself (or more correctly by Doorga and Radhé Kooer, but the introduction of Radhé's name in no way affects the case).

This then being a debt incurred by Doorga Kooer, can she be said properly to represent all persons interested in the estate in the suit brought against her, or must the suit be held to have been against her personally? Assuming for the moment that Doorga Kooer's income from the properties of which she was tenant for life, with the rights of a Hindoo widow, was ample to provide for Nêt Kooer's allowance, as well as her own necessary expenses, it could not be asserted that there was any legal necessity sufficient to render valid an alienation by her. A refusal to pay the allowance out of the income, and an alienation of the *corpus* to raise money for satisfaction of the claim, would be a wholly indefensible act and an invasion of the rights of the reversionary heirs. Can it then be said that the person who had so invaded their rights was a proper person to represent them in a suit brought to establish such a sale as valid against the estate? In the *Shiva Gunga case*,* which has been quoted, their Lordships of the Judicial Committee, no doubt, do say that "it is obvious that there would be the greatest possible inconvenience in holding the succeeding heirs were not bound by a decree fairly and properly obtained against the widow," but this leaves it an open question in each case whether a decree binding the estate was fairly and properly obtained against her. The particular decree there referred to was one in a suit brought by the widow which, if successful, would have resulted in benefit to the reversioners as well as to herself; but when the circumstances are reversed, when the conduct of the widow is prejudicial to the interests of the reversioners, I do not think we can say that a decree in a suit against the widow in temporary possession is necessarily a decree binding on all persons who take the estate in succession to her. I think it is clear that a suit against her to establish a sale made without legal necessity would not in any way bind the reversioners, and that she could not be said to represent them in such a suit, and I fail to see how she becomes their proper representative in a suit brought to recover a demand accruing entirely through her fault, especially as there was no prayer in the plaint that the estate or any particular portion of it should be declared liable to sale in satisfaction of the claim. If it is said that the rights of Nêt Kooer are secured on the estate, and that her rights are not abridged, because Doorga Kooer held something less than the absolute interest, I am fully prepared to admit it; but the only result, as far as I can see, is that, if Nêt Kooer desired to push her remedy beyond the life-interest of her debtor, she ought to have made the heir expectant a party. Had she done so, I think, such heir would have been entitled to ask the Court to make the decree with a proviso that execution should issue against the defaulter in the first instance and against him (the reversionary heir) only after the interest of the defaulter had been exhausted.

Numerous cases have been cited in which decrees against a widow have been held to be binding on the reversioners, and in which sales of the widow's interests have been held to convey the entire estate, but it is admitted that in all these cases the debt to be recovered was one existing before the widow entered into possession, and not one arising out of her own neglect to do her duty.

In the case of *Nogendur Chunder Ghose* v. *Sreemuttee Kaminee Dossee* (XI Moore, 240*), cited by Mr. Woodroffe who appeared for the appellants, it was held that, where an action was brought against a person in possession of an estate with a limited interest, in the form of a personal action, and a decree gave no remedy against the estate, it could only be enforced against the property of the person in possession, including her limited interest in the estate. In that suit, the personal nature of the action was, no doubt, fixed by the form of the suit as under Section 9 Act I of 1845; in the suit of Nêt Kooer, we have not a specific enactment which distinctly determines the nature of the action; but in the absence of any specific prayer in the plaint to make the estate liable and the corresponding absence of any specific declaration in the decree of the liability of the estate, and looking to the origin of the debt, and the omission to make the reversioners parties, I would hold that there is no evidence to show that the suit was anything more than a personal action.

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* XI Moore's I. A., 529; II W. R., P. C., 31; and Suth. P. C. Rep., 520.

* VIII W. R., P. C., 17.

The respondents rely on a passage at the conclusion of their Lordships' judgment in the following terms:—"Their Lordships "wish it to be understood that they leave "unimpaired the general rule that, in a suit "brought by a third party, the object of "which is to recover or to charge an estate "of which a Hindoo widow is the proprie-"tress, she will, as defendant, represent and "protect the estate, as well in respect of "her own as of the reversionary interest;" but for their purpose, they must expunge the words "and protect." Their Lordships say not merely "represent," but "represent and protect," and, I think, we are bound to hold that, where protection is evidently absent, representation of the reversionary interest is also wanting. And, moreover, their Lordships refer to suits of which the object is (either expressly or by necessary implication from the facts) to recover or charge the estate.

I have assumed that Doorga Kooer was in a position to meet the demands upon her: looking to the form of Nêt Kooer's suit, it seems hardly necessary to go further and enquire whether this was so in fact; but as there is evidence on the point before us, it may be as well to refer to it briefly.

In the outset, I think, we may fairly presume that the allowance for maintenance was a reasonable charge which the estate could bear, without unduly curtailing the profits derivable by the two sons of Muddun Mohun, which subsequently accumulated in the hands of Chintamun. With the exception of the sale of Mouzah Birnee and some house property in Chintamun's life-time, it does not appear that the estate of Muddun Mohun had been materially reduced at the time when it came into the hands of his son's widows, nor is it shown that there were incumbrances created by Chintamun, which the widows were obliged to clear off. The plaintiff has given evidence to show that the property, which is the subject of this litigation, was of considerable value, and yielded a sufficient income to meet all reasonable expenditure, and the transactions of, or in the name of, Byjun Dobé since the auction-sale, also indicate that the property was a valuable one. Then there were other properties which the widows held, but which have since passed away from them by sales in execution of earlier decrees for Nêt Kooer's maintenance. There is nothing to show how the incumbrances grew up, which ended in the widow's having no sufficient income to meet Nêt Kooer's claim, or that they were of such a nature as to constitute proper charges on the estate.

Holding that nothing passed by the execution-sale of 19th June 1866, but the personal interest of Doorga Kooer, I need not go on to determine the further questions raised by the defence.

I would allow the appeal and reverse the decision of the Court below, and make a decree in favor of the plaintiff for possession of the properties set out in the plaint, with costs in both Courts and interest on the same, from the dates of the decrees in this Court and the Court below respectively at 6 per cent. per annum.

Loch, J.—I concur.

The 22nd March 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Suit by two Ryots of same Zemindar—Attendance and Evidence of Zemindar.

Case No. 983 of 1871.

Special Appeal from a decision passed by the Officiating Judge of Midnapore, dated the 10th June 1871, reversing a decision of the Moonsiff of Tumlook, dated the 29th November 1869.

Khettur Mohun, *alias* Haradhun Dutt (Plaintiff) *Appellant,*

versus

Soobul Doss and others (Defendants) *Respondents.*

Baboo Nullit Chunder Sein for Appellant.

Baboo Hem Chunder Banerjee for Respondents.

In a suit between two ryots holding from the same zemindar as to a portion of a *khal*, the question being whether the disputed portion of the *khal* was situated in plaintiff's or defendant's holding, the Moonsiff on remand sent for the zemindar who put in a verified *kyfeut* in favor of plaintiff, whereupon the Moonsiff, considering it unnecessary to enforce the zemindar's attendance, gave a decree for plaintiff. The Judge was of opinion that the *kyfeut* was not admissible in evidence and dismissed plaintiff's suit without enforcing the attendance of the zemindar. The Court in special appeal held that the Judge was bound under the circumstances to enforce the zemindar's attendance and to have examined him, and remanded the case accordingly.

Kemp, J.—THIS is a somewhat peculiar case. The plaintiff, who is the special appellant before us, sued to recover a portion (about three rupees in extent, the first Court says) of a *khal* belonging to *mousah* Koorchuck, Pergunnah Tumlook, which he says belonged to his holding, obtained from the zemindar, and he also sued for the recovery of Rs. 85 damages, the value of fish appropriated by the defendants Nos. 1, 2, and 3, and for possession of the portion of the *khal* of which he has been dispossessed by the defendants.

The defendants in their answer stated that the disputed portion of the *khal* does not belong to *mousah* Koorchuck at all, but belongs to *mousah* Junyadighee leased to them, that the plaintiff was never in possession of the disputed *khal*, and that they, the defendants, held possession. The issues which arose on the pleadings of the parties were as to which village the disputed fishery belongs and what is the amount of damages. Upon these issues, the first Court on the evidence found that the disputed *khal* belongs to the village leased to the plaintiff and not to the village leased to the defendants. The Moonsiff also found on the evidence that the plaintiff was entitled to the damages claimed and gave him a decree.

On appeal to the Judge by the defendants, the plaintiff was cast and the decision of the first Court reversed.

In the first Court, no question was raised as to the power of the zemindar, who is admittedly the zemindar of both parties, to grant leases, or as to whether the zemindar's *naib* was incompetent to grant the *pottah* to the plaintiff or not, and the grounds of the appeal to the Judge as stated in his decision were as follows,—that the *khal* in dispute belongs to the defendant's *mousah*, that the plaintiff was never in possession, and that the defendant *tuhsildar's* written statement was no evidence as against the appellants, and that the damage was not proved.

The Judge, after setting forth the pleadings of the parties in the Court of first instance, observes that the plaintiff and defendants are lessees holding under the same zemindar, so that the dispute is really between two tenants claiming from the same landlord, the defendants having the advantage of being in possession; but the Judge says that an additional ground of appeal is raised before him by the appellant's pleader, that is to say, the defendant's pleader, that the plaintiff cannot recover possession without showing that his grantors were properly empowered to grant him the lease. The Judge admits that this point was not put in issue and not tried below, but that under the circumstances, though without giving any reason for so thinking, it was a material point, and he then says, that there was no evidence on the record to enable him to determine the question. The case was, therefore, remanded to try whether the *tuhsildar* defendant was authorised to grant the lease to the plaintiff.

The Moonsiff, on remand, sent for the zemindar, and the zemindar put in a verified *kyfeut* stating that he knows nothing of his zemindaree affairs, that they were managed entirely by his *karpurdauses*, and that the *hookumnamah*, under which the *tuhsildar* had acted, was one granted by him; and altogether we may safely say that his *kyfeut* was in favor of the plaintiff. The Moonsiff was of opinion that it was unnecessary to enforce the attendance of the zemindar, and that his *kyfeut* was sufficient. He, therefore, adhered to his former opinion in his decision under Section 354; he held that the defendant's objection was futile, and he sent back the case to the Judge with this finding.

On receipt of the opinion of the first Court, the Judge observed that the common zemindar of both parties was summoned but did not appear, that the *kyfeut* put in by him could, under no circumstances, be acted upon as evidence against the defendants, and therefore it followed that, because the plaintiff had failed to show that he held under a lease of the *khal* binding upon the landlord, he was not entitled to disturb the possession of the defendants, and the result was that the appeal was decreed and the judgment of the first Court reversed.

In special appeal, it is contended, 1st, That the question as to the authority of the *tuhsildar* to grant the *pottah* to the plaintiff was not raised by the defendants in the first Court or in appeal, nor was the issue material or relevant to the case, and that the Lower Appellate Court was wrong in dismissing the plaintiff's suit when the zemindar by a verified petition admitted the authority of the grantor of the *amulnamah* and supported the plaintiff's allegation.

We think that in this case, as the defendants were in possession and were upon vantage ground, they were entitled to put the plaintiff to proof of his title, and the way in which they did that was by averring that the *khal* in dispute did not belong to the *mouzah* leased to the plaintiff, but to the *mouzah* leased to the defendants; they did not in any way dispute the fact that the *mouzah* of Koorchuck had been leased to the plaintiff, but contented themselves with averring that the lands in dispute did not form part of that *mouzah*, and therefore, as contended for by the pleader for the special appellant, we think that the question was to which *mouzah* did the disputed part of the *khal* belong, and we think that the decision of the first Court on that question of fact proceeded upon the issue which was raised by the parties themselves and which really was the material and only issue in the case. The Judge, for some reason which we cannot understand, thought proper to raise another issue. He considered that the issue which he raised was an issue essential to the right determination of the suit upon the merits. He also found that the evidence upon the record was not sufficient to enable him to determine that issue, and he was therefore competent under Section 354 to remand the case. We find that, after the remand, the special appellant, in as far as in him lay, did accept the remand order, for he was a party to citing the zemindar as a witness. The zemindar did not appear, but the first Court was of opinion that for the reasons stated in the *kyfeut* of the zemindar, which was a verified *kyfeut*, it was unnecessary to enforce the attendance of the zemindar, and he passed an opinion in favor of the plaintiff's case on that *kyfeut* and on the evidence which had already been considered by him before the case was remanded to him. The Judge, because he was of opinion that that *kyfeut* was not admissible in evidence, has dismissed the plaintiff's case without enforcing the attendance of the zemindar. We think that if the Judge was of opinion, contrary to that expressed by the first Court, that the *kyfeut* of the zemindar which was verified and which entirely supported the plaintiff's claim, that zemindar having been cited by both parties, was not admissible in evidence, the Judge was bound to enforce the attendance of the zemindar and to examine him. As already observed, this is a case in which two ryots are holding from the same zemindar, and the only question is whether the disputed portion of the *khal* is situated in the holding of the plaintiff or within that of the defendants. The evidence of the zemindar will clear up that point, and we think that the Judge ought to have examined him. We, therefore, remand the case and direct the Judge to enforce the attendance of the zemindar and to examine him, and after recording his deposition, to re-decide the case. Costs to follow the result.

The 26th March 1872.

Present:

The Hon'ble G. Loch and W. Ainslie, *Judges.*

Execution of Decree—Illegitimacy of Decree-holders.

Case No. 387 of 1871.

Miscellaneous Appeal from an order passed by the Officiating Judge of Gya, dated the 16th August 1871.

Mirza Himmut Bahadoor and another (Decree-holders) *Appellants*,

versus

Mr. A. Solano and others (Judgment-debtors) *Respondents.*

Mr. R. T. Allan for Appellants.

Mr. J. T. Woodroffe and *Baboo Rajendro Nath Bose* for Respondents.

A subsequent declaration of illegitimacy cannot affect the right of persons, who were parties to a decree when it was made, to execute the decree which is in their names.

Loch, J.—THE appellants in this case obtained a decree on the 29th November 1862 in the High Court, by which it was declared that they were entitled to recover from the defendant R. Solano the sum of 20,000 rupees, *minus* a percentage of one per cent. on the gross value of the property, consisting of cash and jewels, of which he took delivery from Government, and remitted to the plaintiff. What is the value of the cash and jewels together, we do not find stated either in the judgment or in the decree. But at the foot of the decree is a note by an officer of the Court to this effect, that the value of the jewels has not been ascertained. Application for execution was made to the Judge of Gya on the 16th August 1871, when two objections were preferred by the judgment-debtor: *first*, that the petitioners were not entitled to execute the decree, because by a subsequent decision of the High Court, they have been declared to be illegitimate; and, *secondly*, that, as there was no proof of the gross value of the jewels, the sum due to the petitioners could not be determined; and until this was done, no order could be made for the repayment of the difference.

The Judge going upon the second point held that, under a precedent of the High Court, reported in XII Weekly Reporter, page 99, he was unable, in execution of the decree, to take further evidence to ascertain what the value of the jewels was, and therefore the decree in the present state could not be executed; and he considered it unnecessary to enter into the first objection that had been raised.

An appeal has been preferred to this Court. An objection to the appeal was taken by Mr. Woodroffe for the judgment-debtor to the effect that, as the parties seeking to execute this decree had been declared illegitimate by a subsequent decision of the High Court in another case, they were not entitled to execute the decree. As, however, we find that the petitioners were parties to the decree when it was made, we think that this objection is untenable, and that they are entitled to execute the decree which is in their names.

With regard to the merits of the case, we think that there is sufficient evidence upon the record to show what was the value of the jewels, for we find, from the evidence of Mr. Lydiard, a witness for the defendant Solano, that the sum recovered by Solano from the Government was five *lacks* of rupees, and the jewels amounted to two *lacks* more; that "the treasure and jewels were sent to Ticcaree by Mr. Chardon and other servants of Mr. R. Solano." He then goes on to say:—"After giving the treasure to Burratee Begum, myself and Mr. Chardon took a letter and receipt from the Begum to Mr. R. Solano."

There is no reason to question the correctness of the evidence of this witness, and it is quite sufficient to enable the Court to execute the decree. We, therefore, direct that the petitioners do execute their decree, deducting therefrom one per cent. on the value of the property, *viz.*, 5 *lacks* of cash and two *lacks* of jewels.

The order of the Judge is reversed, and the appeal decreed with costs, four gold mohurs being allowed for pleader's fees.

The 26th March 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Plea of Limitation (raising of, by Court)—Dispossession (under Sale Certificate not warranted by Sale).

Case No. 1049 of 1871.

Special Appeal from a decision passed by the Deputy Commissioner of Chota-Nagpore, dated the 6th July 1871, *reversing a decision of the Moonsiff of Rughoonathpore, dated the 10th August* 1870.

Bheem Goyallee (Plaintiff) *Appellant,*

versus

Khoobun Sahoo and others (Defendants) *Respondents.*

Baboos Woopendro Chunder Bose and *Bhowanee Churn Dutt* for Appellant.

Baboo Ashootosh Mookerjee for Respondents.

The Deputy Commissioner was held not justified in raising the plea of limitation, as it was no part of defendants' case and was never put forward at any stage of the proceedings; and although there might be circumstances under which a Judge was bound to notice such a defect in the plaintiff's case, he could only properly do so when the bar was patent on the face of the pleadings.

Plaintiff having been dispossessed under a certificate of sale which was not conformable to or warranted by the sale itself, was declared entitled (having made no complaint to the Court which was executing the decree) to bring his suit for restoration to his property any time within 12 years from the date of his dispossession.

Glover, J.—THE plaintiff in this case sued to recover possession of land from which he had been ousted by the defendant, the purchaser at a sale in execution of decree. The plaintiff alleged that no decree had been given against him and that his property was not sold.

The defendant pleaded possession under a *bonâ fide* purchase at the auction sale.

The Moonsiff decreed for the plaintiff, but the Deputy Commissioner, without going into the merits of the case, held that, as the suit was subsequently one to annul the auction sale, it should under the provisions of Clause 8, Section 1, Act XIV of 1859, have been brought within one year from the date on which the sale was confirmed, and being so brought was barred by limitation.

We think that this decision must be reversed. In the first place, we do not see that the Deputy Commissioner was justified in raising the plea of limitation. It was no part of the defendant's case, and was never put forward at any stage of the proceedings; and although there may be circumstances under which a Judge is bound to notice such a defect in a plaintiff's case, he can only properly do so when the bar is patent on the face of the pleadings, as where for instance a landlord sues for six years' rent, or a tradesman seeks to recover the amount of his bill ten years after the goods have been sold. The case of Payne *versus* Constable goes no further than this.

Now, in the present case, there was and is nothing to show that the plaintiff ever wished to have the auction sale set aside; indeed his whole contention was that the sale *per se* had not passed any property belonging to him, and it was because it had not passed his land that he demanded to have that land taken away from the possession of the defendant and restored to himself.

It was argued that the plaintiff's name was included in the sale certificate granted to the defendant, and that therefore, without the annulment of the sale, the plaintiff's rights which had vested in the defendant by reason of that certificate could not be re-transferred.

A similar objection was raised and disposed of in the Full Bench decision in Baboo Pertab Chunder Chowdhry *versus* Baboo Brojo Lall Shaha, VII Weekly Reporter, 258. That case is on all fours with the one now before us, and in both the sale certificate professed to pass interests, which had not been the subject of the decree. The Chief Justice in delivering the judgment of the Full Bench said: "The sale took place "under the proclamation and was completed "and the certificate ought to have been a true "certificate of the sale which actually took "place. There was no necessity to set aside "the sale because Sandyal's interests alone "had been sold although the certificate "stated that the plaintiff's ancestors' interests "had also been sold; and in a regular suit "for confirmation of title and for restoration "of possession it was competent to the "plaintiff to show what the sale really was "and that the certificate was wrong. The "period of limitation for the suit for confirmation of title and for restoration of "property is twelve years under Clause 12, "Section 1, Act XIV of 1859."

The plaintiff in this case was dispossessed under a certificate of sale which was not conformable to, or warranted by the sale itself, and is therefore entitled (having made no complaint to the Court which was executing the decree) to bring his suit for restoration to his property any time within twelve years from the date of his dispossession.

We, therefore, allow this appeal and reverse the decision of the Deputy Commissioner, directing him to dispose of the appeal on its merits. The case is remanded to him for that purpose, and cost will follow the result.

The 26th March 1872.

Present:

The Hon'ble G. Loch, *Judge.*

Limitation—Mahomedan Endowment—Mutwullee—Act XX of 1863.

Application for Review of Judgment passed by the Hon'ble J. P. Norman, Officiating Chief Justice, and the Hon'ble G. Loch, Judge, on the 11*th May* 1871, *in Special Appeal No.* 1506 *of* 1870.

Shaikh Laul Mahomed, Plaintiff (Appellant) *Petitioner,*

versus

Lalla Brij Kishore, Defendant (Respondent) *Opposite party.*

Mr. C. Piffard and *Moonshee Mahomed Yusoof* for Petitioner.

No one for Opposite party.

Since the passing of Act XX of 1863, a *mutwullee*, or manager of a Mahomedan endowment, cannot be considered to hold the position he was taken to have in the judgment of the Privy Council (6 W. R., P. C., 8), *viz.* as an officer appointed by the Government; and therefore the ordinary rules of limitation are applicable to such cases.

Loch, J.—An application for the review of a judgment of this Court of the 11th May 1871, is made on the ground that the Court was in error in supposing that the suit of the plaintiff was barred by limitation, for that in cases where *wuqf* property is concerned, the limitation runs not from the time when the defendant took possession of the property, but from the time when the *mutwullee* was appointed; and in support of this proposition, the Counsel for the petitioner has quoted a judgment of the Privy Council, reported in VI Weekly Reporter, page 8, Privy Council Rulings. It appears that in that case, the plaintiff was appointed by the Government to be *mutwullee*, or manager of the endowment in 1819; that he sought to set aside certain alienations that had taken place at the time of his predecessors. The ordinary law of limitation was pleaded against the suit. But it was held by the Privy Council that "the "*mutwullee* is the procurator of the donor, "which in this case was the Sovereign, and "it appears by Regulation XIX of 1810, "that it is the duty of every Government "to provide that the endowments for pious "and beneficial purpose be applied according "to their real intention; that local agents are "appointed to ascertain and report the names "of trustees, managers, and superintendents, whether under the designation of *mutwullee* or any other, and all vacancies, and to recommend fit persons where the denomination devolves on the Government; that the Board of Commissioners may appoint such persons, or make such other provision for the superintendence, management, or trust, as may be thought fit. The plaintiff, therefore, upon his appointment as *mutwullee*, became the authorized agent of the Government for the performance of the acknowledged duty of the Government to protect the endowment from misapplication ; for, as it is said in the opinion of the Mahomedan Lawyers, Appendix, page 21, 'The endower and the *mutwullee* are one and the same'; the endowment in this case was a perpetual *wuqf* endowment and the duty of the Government to preserve its application to the right use was a public and perpetual duty. By Regulation II of 1805, Section 2, it is provided that the limitation of 12 years for the commencement of civil suits shall not be considered applicable to the commencement of any suits for the recovery of the public revenue, or for any public rights or claims whatever which may be instituted by or on behalf of the Government with the sanction of the Governor-General in Council, or by direction of any public officer or officers who may be duly authorized to prosecute the same on the part of Government. The plaintiff, who was neither heir nor personal representative of his father in respect of *wuqf* property, had no right of action against the defendant till his appointment in 1819, and the defendant could acquire no right against the Government, whose procurator the plaintiff was, at least until 12 years had elapsed from his appointment."

Now, in the case disposed of by the Privy Council, it is clear their Lordships held that the plaintiff in that case was not barred in bringing his suit, because he represented the Government, and that the suit was in fact a suit on the part of the Government which, under the provisions of Regulation XIX of 1810, was bound to protect this property as other Government property, and that the period of bringing the suit on the part of the Government under the provisions of Regulation II of 1805 was not limited to 12 years, but extended to 60 years.

Now, by Act XX of 1863, the Government divested itself of the management of religious endowments, and repealed so much of Regulation XIX of 1810 as related to the endowments for the support of mosques, Hindoo temples, and other religious properties; and it laid down rules by which the charge of such endowments was to be made over to trustees. And it seems to me that, since the passing of that Act, a *mutwullee* cannot be considered to hold the position he was taken to have in the judgment of the Privy Council, *viz.* as an officer on the part of the Government, nor is it in fact shown in this case that the plaintiff had ever been appointed by Government to the charge of the *wuqf* property in dispute. I see no reason therefore, why the ordinary rules of limitation should not be held as applicable to this case as to that of other claimants. It is clear from the finding arrived at in the judgment we gave on the 11th May 1871, that the defendants have been in possession so far back as the year 1177. This being the case, the opinion we came to on the former occasion that the suit is barred by limitation appears to be a correct one, and I therefore reject this application for review.

The 27th March 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Small Cause Court Judge—Interest.

In the matter of
Nobo Coomar Bose, *Petitioner,*

versus

Gobind Chunder Poddar and others,
Opposite Party.

Baboos Grija Sunkur Mojoomdar and *Issur Chunder Chuckerbutty* for Petitioner.

Baboo Bungshee Dhur Sein for Opposite Party.

A Small Cause Court Judge has no discretion to allow interest at a rate below that stipulated in the bond.

Kemp, J.—On the 21st of February last, the petitioner obtained a rule on the opposite party to show cause why the order of the Small Cause Court, on the question of interest, should not be set aside. A pleader appeared for the opposite party to show cause, and both parties have been heard through their pleaders. It appears that the petitioner sued the opposite party in the Small Cause Court of Goalundo on a *khut*. The principal claimed was Rs. 99, interest Rs. 81-4, total Rs. 180-4, paid off Rs. 118-11-6, balance due Rs. 61-8-6, relinquished Rs. 1-8-6, due Rs. 60. Execution of the *khut* was admitted, and the defendants not being able to prove the plea set up by them, namely that they paid more than the plaintiff gave them credit for, the Small Cause Court Judge decreed the case awarding interest up to due date at the rate of two per cent. per mensem, and afterwards up to date of realization at the rate of one per cent. per mensem. The petitioner then came up to this Court, on the ground that the Small Cause Court Judge was wrong in awarding interest at the rate of one per cent. from due date, inasmuch as he had no discretion to allow interest at a rate below that stipulated in the bond.

On referring to the bond, we find that the terms of it are very clear. Rs. 99 was the sum borrowed, and it is stipulated that the interest to be paid thereon is two per cent. per annum, and that this rate of interest will be paid "সমুদয় টাকা আদায়ের তারিখ তক," that is to say, up to date of payment of the whole sum borrowed. There being, therefore, this clear stipulation in the bond that the judgment-debtor was liable for interest at the rate of two per cent. per annum, under Section 2 of the Usury law the Small Cause Court Judge had no discretion in the matter, and he was bound to award interest at the rate of two per cent. per mensem up to date of realization. His decision must, therefore, be amended accordingly, and interest at the rate of two per cent. per mensem will be awarded up to date of payment. The petitioner will recover his costs of this application.

The 3rd April 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble A. G. Macpherson, *Judge.*

Hindoo Widow—Right of Maintenance—Marriage Expenses of Daughters—Declaratory Suit—Practice (Prayer for Special and General Relief)—Framing of Issues.

Sreemutty Nistarini Dossee,

versus

Mukhun Loll Dutt and Chunder Mohun Soor.

The Appellate Court agreed with the Court below as to the propriety of the practice, whenever a widow sued to have her right of maintenance declared, for her to ask not that her right should be declared generally, but that it should be enquired what is a fit and proper sum for her maintenance; but acting upon the rule in Courts of Equity that, if the plaintiff should mistake the relief to which he is entitled under his special prayer, the Court may yet afford him the relief to which he has a right under the prayer of general relief, provided it is such relief as is agreeable to the case made by the bill, held that the suit ought not to have been dismissed on the ground that it was only for a declaration of right, and did not ask for any relief, because, although no proposal was made for amending the form of the suit, the Court might, upon the plaint as it then was, have framed issues for the purpose of determining what should be allowed for the maintenance and expenses if the plaintiff should be found to be entitled to them, and remanded the case for re-trial accordingly.

THIS was a suit by a Hindoo widow for a declaration of her rights in respect of her late husband's estate, for an injunction, and for other incidental relief.

The following were the facts of the case:—The plaintiff's husband, a Hindoo, died intestate, leaving him surviving the plaintiff, his only widow, three unmarried daughters, and an only son, the defendant Mukhun Loll, who was a minor at the time of his father's death. With the exception of an undivided third share in the ancestral family dwelling-house, the deceased left no property. Some time after her husband's death, the plaintiff, being unable to procure funds to defray the necessary marriage expenses of her two eldest daughters by mortgage or sale of the patrimony, which had descended to her son in consequence of his then minority, raised the sum required by the sale of her own personal jewels and ornaments, which formed her *stridhun*. In November 1870, shortly after the defendant Mukhun Loll had attained his majority, a partition of the family dwelling-house was effected between him and his co-sharers, under which an equal third divided share of the dwelling-house was allotted to him as his separate estate; and in July 1871, Mukhun Loll mortgaged his share to Chunder Mohun Soor, the other defendant in the present suit.

The plaintiff alleged that except this divided share of the ancestral dwelling-house, her son was destitute of means, wherewith to maintain her and her unmarried daughter, or to provide them with another dwelling, or to defray either the expenses already incurred on the marriage of her elder daughter, or which would be incurred when the youngest daughter should be married. She further alleged that the mortgage to the second defendant was made without her knowledge or consent, and without the existence of such legal necessity as would justify it; and that the mortgagee took the mortgage with notice of her rights; but, apart from the question of notice or no notice, she submitted that her right of maintenance and her rights with respect to the expenses attendant on the marriage of her three daughters, constituted, according to Hindoo law, a first charge on the mortgaged property. The plaintiff also stated that her son threatened and intended to sell his share of the dwelling-house. She prayed, therefore, that her rights over the estate of her late husband by way of maintenance, and for the expenses incurred on the marriage of her elder daughters, or which might be incurred on the marriage of her youngest, might be ascertained and declared; and for a declaration that the second defendant took his mortgage subject to those rights. She also prayed for an injunction to restrain the defendant Mukhun Loll from alienating his third share in the dwelling-house.

The defendant, Chunder Mohun Soor, in his written statement, denied that he had, at the time of executing the mortgage, any notice of the plaintiff's position or claim; and he submitted *inter alia* that the right to have the daughters' marriage expenses raised out of their father's estate, if any such right existed, was the right of the daughters and not of the plaintiff, and that the plaint disclosed no cause of action, or title to relief, against him.

The case was originally tried before Mr. Justice Markby on the 25th January 1872.

Mr. Lowe and *Mr. Bonnerjee* (*with them Mr. Evans*) *for the plaintiff.*

Mr. Marindin and *Mr. Branson for the defendant Chunder Mohun Soor. The defendant Mukhun Loll in person.*

Mr. Marindin.—This is simply a declaratory suit, and the plaint discloses no cause of action. The widow's maintenance is not, by the law of Bengal, a charge on her husband's estate in the hands of an alienee without notice of her claim—*Bhuggobutty Dossee* v. *Konny Loll Mitter* (reported in the *Englishman* of 20th January).*

[*Markby, J.*—If I understand you rightly, the judgment in that case is to the effect that it is the assertion of the right to maintenance which constitutes the charge.]

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* The 8th January 1872.

Present:

The Hon'ble J. B. Phear, *Judge.*

Sreemutty Bhuggobutty Dossee

versus

Konny Lall Mitter and others.

This was a suit instituted by a Hindoo widow for a declaration of her right to maintenance out of the rents and profits of the family dwelling-house and other premises belonging to her late husband, which had been sold at different times by her son, the defendant Konny Lall, to the other defendants in the suit: the alienations, she alleged, were without her consent, and in most cases without her knowledge; she also asked for a declaration of her right to reside in the dwelling-house. Portions of the dwelling-house had been bought by Kirty Chunder Mitter and Nuffer Chunder Bose; and the other defendants were purchasers of the remaining premises, which consisted of property adjacent to the dwelling-house which had been let out to tenants during her husband's life-time.

Mr. Branson and Mr. Bonnerjee for the plaintiff; Mr. Marindin for the defendant, Kirty Chunder Mitter; Mr. Phillips for Anundo Loll Mitter; and Mr. Lingham for Nundo Loll Mitter, two other defendants.

Mr. Marindin objected that the plaint disclosed no cause of action. The case of *Mongola Dabee* v. *Dinanath Bose*, 12 Weekly Reporter, O. J., 86, only decided that the widow could not be ejected from her family dwelling-house, without another suitable dwelling-house being provided for her, and it was not absolutely necessary to the case to decide even that. The decision, moreover, was not supported by the text upon which it was based, and which referred simply to giving away and not to selling property. In the present case the property had been sold, and the son had received the proceeds of sale, and, unless the widow's maintenance was a charge upon the specific property, she could not charge the lands in the hands of a purchaser, although she might charge the sale proceeds in the son's hands. And more than that, unless her maintenance was a charge upon the whole estate the suit was bad for multifariousness.

Mr. Branson cited several cases as showing that the widow's maintenance was a charge upon the whole of her deceased husband's property, and upon every part of it.

Mr. Marindin in reply observed that those cases were under the Mitakshara or Mithila, and not under the Bengal law; and they were also in other respects distinguishable from the present one.

During the course of the argument, his Lordship mentioned the case of *Khettur Monee Dossee* v. *Kasheenath Doss*, 10 Weekly Reporter, F. B., 89, and stated that his views with regard to the widow's right, was that as against her husband's heirs, and as against purchasers with notice of her claim, she had a right to have her maintenance charged on the inheritance in their hands; but he was not prepared to say that the mere fact of the existence of the widow was sufficient notice to give her a lien against the estate in the hands of alienees.

Phear, J.—The suit must go as against Kirty Chunder and Nuffer Chunder, but be dismissed as against the other defendants.

The cases are very different. As against an heir who has taken the property the widow has a right to have her maintenance treated as a charge on the property. She may doubtless follow the property in the hands of any one who takes it with notice of her having set up a claim for maintenance against the heir. I do not think that in Bengal she has a lien on the property in respect of her maintenance against all the world, irrespective of her notice. No such lien, as far as I know, has ever been established in these Courts; because, I think, the cases referred to by Mr. Branson have been rightly explained by Mr. Marindin.

The case against Kirty and Nuffer stands on a very different footing from that against the other defendants, inasmuch as it was alleged by the plaintiff to her preliminary examination that they have obtained possession of the dwelling-house, and practically excluded her from it; at the most they have left her only a small room, and one of them threatens to eject her from that.

That being so, the case of *Mongola Dabee* v. *Dinonath Bose* shows that she has acquired a right of suit against these persons. And it follows that she has a right of suit against Konny Loll for maintenance, and to have it charged upon any property in his hands. The suit must be dismissed as against Nundo Loll and the other defendants, with costs No. 2.

As to the extent of the son's legal liability to maintain his father's widow, see the judgment of Peacock, C.J., in *Khettur Monee Dossee* v. *Kasheenath Doss*, 9 W. R., 413, & 10 W. R., Full Bench, 89. The heir who takes the inheritance is primarily responsible for the maintenance of the widow, and she must claim it from him rather than from the estate—*Ram Churn Tewaree* v. *Musst. Jasooda Koonwar*, 2 Agra H. C. Rep., 134. In the case of *Heera Loll* v. *Musst. Konsillah*, 2 Agra H. C. Rep., 42, the purchaser had express notice of the widow's claim; the plaint in the present suit does not allege that we had notice of any claim made by her, or that she had ever asserted her right. As to the marriage portions of the daughters, that is not the widow's claim but theirs, and they ought to have been parties to the suit. Then the plaint contains no allegation that the defendant Mukhun Loll did not pay, and is not paying, her maintenance, or that we are about to foreclose; it simply, in anticipation of some possible injury, prays that the plaintiff's right to maintenance may be declared: the suit, therefore, is premature, the plaintiff must wait till some injury actually has happened—*Jackson* v. *Turnley*, 1 Drewry, 629; *Oomur Sulima Bibee* v. *Luckhee Prea Dabee*, 10 W. R., 47; *Anund Koomaree* v. *The Government*, 11 W. R., 180; *Padagalingam Pillai* v. *Shahnumgham Pillai*, 2 Mad. H. C. Rep., 383; *Promothonath Ghose* v. *Jodoonauth Sen*, 1 I. J. N. S., 239. I submit that the suit must be dismissed on two grounds—(1), there is no allegation in the plaint of such a claim to maintenance as would entitle the plaintiff to charge the estate in our hands, even if, which I do not admit, the assertion of such a claim, and notice of the assertion, would be sufficient to charge the estate in the hands of a *bonâ fide* alienee for value; (2), this is a suit not to have the maintenance fixed and made a charge on the estate, but simply for a declaration of the plaintiff's right,—that right not having been attacked by us.

Mr. Bonnerjee.—The plaint discloses a sufficient cause of action. The widow's maintenance is a charge on the inheritance and not merely a personal charge against the heir.

[*Markby, J.*—You contend in fact that the widow has a charge against the heir to be discharged out of specific property; and more, that she can follow that property even in the hands of an alienee; but, suppose the father had died largely indebted, and the son had sold the property to meet his father's debts, could the widow, in such circumstances, follow the property in the alienee's hands? Your contention seems to go as far as that.]

No, because it would simply amount to this, that the father had left no property out of which the widow's maintenance could come. All the cases cited by the other side show that the widow's maintenance is a charge on the property. In *Musst. Golab Koonwar* v. *The Collector of Benares*, 7 W. R., Privy Council, 47, it was held to be such a charge as to override a forfeiture by Government; and in *Râmchandra Dîkshit Sâvitribâi*, 4 Bom. H. C., A. C., 73, it is expressly laid down that the widow's maintenance is a charge upon the whole property, and, therefore, upon every part of it. That case was cited before Mr. Justice Phear in *Bhuggobutty Dossee* v. *Konny Loll Mitter* and distinguished on the ground that it was decided under Dravida law.

[*Mr. Marindin.*—I also pointed out that there the property was in the hands of the heir.]

There is no difference between the different Hindoo schools on the subject of the widow's maintenance. The chief difference between them is as to the widow's right of succession; there are several other minor differences but the right of maintenance is precisely the same under the Dayabhaga and the Mitakshara, which obtains in all the schools in Bengal where the Dayabhaga is law. All Hindoo schools admit the same moral obligations. It is difficult to understand what is meant by the assertion of the widow's claim; the seclusion in which a respectable Hindoo female lives renders any public assertion impossible, and an assertion of her claim to the members of her family would not be generally known. But I submit that, according to Hindoo law, it is not necessary that an alienee should have notice of the widow's assertion of her right to be maintained out of the property in order to enable her to follow that property in his hands; and the case of *Bhuggobutty Dossee* v. *Konny Loll Mitter*, if it goes so far as to say that such notice is necessary, is wrong, and at variance with *Musst. Golab Koonwar* v. *The Collector of Benares*. We shall, however, be able to show, if necessary, that the widow did in fact give the mortgagee notice of the assertion of her claim for maintenance.

Then as to the plaintiff's claim for her daughter's marriage expenses. Providing for the marriage of daughters is even a greater obligation than the maintenance of needy relations; after the father's death, the mother is the natural guardian of her daughters, and, during the minority of her son, is bound to provide for their marriage; and if, in performing this duty (which is a legal obligation on the heir), she has incurred expense, she is entitled to be recouped out of the inheritance; or if the heir, by divesting himself of all property, has incapacitated himself from the performance of his duty, the widow, I contend, is entitled to ask that provision for it shall be made out of the inheritance which came into his hands.

I admit that the son has a general right to do what he likes with the property, but he must not so deal with it as to jeopardize our rights. We do not ask that the mortgage may be declared void, but for a declaration that the mortgagee took the property subject to our rights. As the legal property is in him, he is a necessary party to this suit.

Markby, J.—This was a suit brought by the plaintiff, a Hindoo widow, against her son Mukhun Loll Dutt and one Chunder-Mohun Soor. The plaint alleged that Gopaul Chunder Dutt had died in 1864 intestate, leaving the aforementioned son, the plaintiff, and three unmarried daughters him surviving, the only property left by the said Gopaul Chunder Dutt, being a one-third share in the family dwelling house valued at Rs. 3,500.

It was further alleged that the defendant Mukhun Loll shortly after he came of age, namely on the 26th November 1870, came to a partition of the property with his co-sharers; that during her son's minority the plaintiff, being unable otherwise to procure funds for the purpose, had raised the sum required for the marriage of her two elder daughters, amounting to Rs. 2,500 by the sale of certain articles of jewellery which were her *stridhun*: that shortly after the partition above referred to, the defendant, who was alleged to be extravagant and wasteful, mortgaged that portion of the family dwelling-house which had been allotted to him on partition to the defendant Chunder Mohun Soor for Rs. 2,000; which mortgage was executed without the plaintiff's knowledge or assent and without any legal necessity; that the defendant had no other means of supporting the plaintiff or of providing the marriage expenses of her daughters except the said family dwelling-house, and that he threatened to sell the same; and lastly, that the defendant Chunder Mohun took the mortgage with notice of the plaintiff's rights thereon.

Upon these facts the plaintiff prayed that her rights over the estate of her late husband by way of maintenance and for the expenses attendant upon the marriage of her daughters, as well those already incurred as those which might hereafter be incurred in respect of the marriage of her still unmarried daughter might be ascertained and declared, and that it might be declared that the defendant Chunder Mohun took his mortgage subject to the plaintiff's right to be recouped the expenses necessarily and properly incurred by her in and about the marriage of her two elder daughters, as also the right to be provided with the expenses necessary for the due and fitting performance of the marriage of her younger daughter; and also that the defendant Mukhun Loll might be restrained from further dealing with the property.

The following issues were proposed on behalf of the plaintiff:—

1st.—Is the plaintiff entitled to such rights over the estate of her husband Gopaul Chunder Dutt upon the estate coming to the hands of Mukhun Loll Dutt as are stated in the plaint?

2nd.—Whether the defendant Chunder Mohun Soor took the property subject to such rights?

3rd.—Whether the defendant Chunder Mohun Soor took the property with notice of the plaintiff's right to maintenance?

4th.—Whether the defendant Chunder Mohun Soor took the property with notice of the plaintiff's claim to be recouped expenses incurred for the marriage of the sisters of Mukhun Loll Dutt?

5th.—Whether the plaintiff is entitled to any and what sum out of the said estate for the marriage expenses of the youngest daughter of Gopaul Chunder Dutt?

6th.—Whether there was any legal necessity for the alienation by Mukhun Loll Dutt to Chunder Mohun Soor?

7th.—Whether the mortgage was *bonâ fide*, and for valuable consideration?

The defendant Mukhun Loll was in Court but had put in no written statement. The only matter in which he was separately concerned was as to the restraint on future alienation. I did not consider that there was any ground shown in the plaint for such relief; and further it appeared to me that if the property were declared subject to the plaintiff's claim for maintenance and marriage expenses she would obtain thereby all the security she would require.

The defendant Chunder Mohun before proposing any issues, and reserving his other objections, objected generally to the form of the suit, *first*, on the ground that a Hindoo widow had no such rights as were claimed in this suit; *secondly*, on the ground that the plaint only asked for a declaration of right and not for any relief, and upon these two points after hearing Counsel on both sides, I was asked to express my opinion.

With regard to the first point, I considered that without expressing any final opinion of my own, and reserving to myself the power of reconsidering the matter in the Court of Appeal, I ought for the purposes of this suit to follow the ruling of Mr. Justice Phear in the case of *Sreemutty Bhuggobutty Dossee* vs. *Konnoy Loll Mitter* and others, decided on the 8th instant. The learned Judge (according to a report of his judgment* in the *Englishman* newspaper which has on this argument been treated as correct) said that he was not prepared to say that the mere fact of the existence of the widow was sufficient notice to give her a lien against the estate in the hands of alienees; that against an heir who has taken the property, the widow has a right to have her maintenance treated as a charge on the property; that she may doubtless follow the property in the hands of any one who takes it with notice of her having set up a claim for maintenance against the heir; but that in Bengal she has not a lien on the property in respect of her maintenance against all the world, irrespective of her notice.

I took the ruling of the learned Judge there to be that, in order to establish a lien against property in the hands of an alienee, the plaintiff, the widow, must show not only that the alienee had notice of her existence, and therefore notice of the existence of a person who might claim maintenance, but notice that she had actually set up that claim against the heir. I did not understand that any such notice as that was alleged to have taken place in this case, but all that was alleged here as regards the maintenance was that the mortgagee was aware of the widow's existence, and it was sought to be inferred from that that he was aware of her claim to maintenance, and the third issue was apparently framed with the intention of proving and relying on these facts, and I thought that according to the ruling of the learned Judge upon which I base my decision, that was not sufficient.

I also thought that without going into the question now (upon which no authority had been cited before me and upon which I express no opinion) as to whether or not the claim for the expenses of a daughter's marriage is precisely the same in character and extent as the claim for maintenance, it was quite clear that that part of the claim which relates to those expenses stands in the same position, because if it is necessary that notice that a claim has been set up as against the heir should be given in the case of maintenance, it seems to me by parity of reasoning that it must also be given in the case of expenses for the daughter's marriage.

The case was then adjourned until the following morning, in order that the parties might consider the effect of this ruling on the case as it stood. On the case being again called on, permission was asked on the part of the plaintiff to alter the frame of her third issue by substituting an issue in this form. Whether the defendant Chunder Mohun Soor took the property with notice that the plaintiff had asserted her right to maintenance out of the mortgaged property against the heir, and she also wished to make a similar alteration in the 4th issue. It was stated that the plaintiff was prepared to prove that the defendant Chunder Mohun had express notice of the plaintiff's assertion of her right and maintenance and marriage expenses. This alteration in the issues was opposed by the defendant Chunder Mohun as not being in according with the allegation in the plaint; and his Counsel relied on the case of *Eshan Chunder Singh* vs. *Shama Churn Bhutto*, 11 Moore's Indian Appeals, page 7*. But I thought that case had really nothing whatever to do with the question and decided to alter the issues.

It remained, however, to decide the other objection, namely, that the suit was only for a declaration of right and did not ask for any relief, and upon consideration, I think, that that objection is fatal to the suit in its present form. I am inclined to think that the rule which excludes suits for a mere declaration of right is not quite so strict here as in England, and that by the practice of the Courts, at any rate in the Mofussil, suits are admitted in certain exceptional cases for a declaration of right although no actual relief has been asked for or could be granted, probably because in these particular cases there is manifest convenience in having the right ascertained, and there is no other way of raising the question. But, I think, there is nothing in the practice of this Court which would justify this suit in its present form. On the contrary, I think, it is the practice here, whenever a widow sues to have her right of maintenance declared, for her to ask not that her right should be declared generally but that it should be enquired what is a fitting and proper sum for her maintenance, and upon what portion of her deceased husband's property and in what mode it should be secured. Whether or no such a suit must be preceded by a demand by the mother and a refusal by the son to maintain his mother. I need not now say, but I may observe, that there is no allegation in this case that the son is not maintaining his mother, or even that any funds applicable to that purpose have been diverted by him to any other purpose. It is not said that she has been turned out of the family dwelling-house or that there is any prospect of her being ejected. She asks for a general lien to be declared over the whole property for her maintenance without fixing the amount, and that the money expended on her daughters' marriages should be declared a charge on the property without any inquiry whether those sums were property expended. And the issues raised are in accordance with this indefinite prayer. In this form, I think, the suit cannot be maintained; and as no proposal is made for amending the form of the suit or the issues in this respect, the suit must be dismissed as against both defendants with costs on scale No. 2.

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* *Ante*, p. 433, *foot-note*.

* 6 W. R., P. C., 57.

From this judgment the plaintiff appealed for the following reasons :—

First.—That the said learned Judge erred in law in holding and finding that merely a declaratory decree was asked and sought for by the plaint.

Second.—That the said learned Judge erred in holding that the plaintiff's suit would not lie unless the plaint asked for a specific sum to be ascertained as necessary for the maintenance of the plaintiff and further sought to charge such sum upon a specific portion of the portion of the property mentioned in the plaint.

Third.—For that the said learned Judge instead of dismissing the said suit ought to have ascertained upon what questions of law or fact the appellant and the respondents were at issue and thereupon proceed to frame and record issues accordingly.

Fourth.—For that it sufficiently appears from the averments in the plaint and written statements, the appellant and the respondent Chunder Mohun Soor were at issue both in law and fact and that it was therefore the duty of the said learned Judge to frame such issues as were necessary for the purpose of deciding whether or not the appellant was entitled to the declaration and relief sought for in the plaint.

Fifth.—For that in addition to the averments in the plaint the appellant through her Counsel before the said learned Judge at the said hearing alleged that she was prepared with and intended to offer evidence to prove that the respondent Chunder Mohun Soor took the said mortgage deed with express notice of the appellant's claim to be maintained out of the property comprised in the said mortgage deed, and that the appellant had asserted such claim before and at the time the said property was conveyed to the said respondent, and that the appellant was residing in the said mortgaged premises before and at the time of the said conveyance to the said respondent, and that besides the said mortgaged premises there was no other joint estate out of which the appellant could be maintained or the said marriage expenses provided; the appellant therefore submits it was the duty of the said learned Judge to frame an issue or such issues as would have enabled the appellant to prove the said averments and the said allegations of her Counsel, and that the said learned Judge erred in not framing issues accordingly.

Sixth.—For that the said learned Judge erred in law in holding that even if the averments in the plaint were proved, the respondent Chunder Mohun Soor did not take the conveyance by way of mortgage in the plaint mentioned, subject to the plaintiff's rights of maintenance.

Seventh.—For that the said learned Judge ought to have held that apart from the question of notice or no notice, the said respondent under the circumstances took the said conveyance subject to the appellant's right of maintenance.

Eighth—For that the said learned Judge was wrong in not permitting the appellant to prove that the said respondent took the said conveyance with express notice of the appellant's right to maintenance.

Ninth.—That the said learned Judge ought to have held that the said respondent took the said conveyance not only subject to the appellant's rights of maintenance, but that the necessary marriage expenses for Sreemutty Surutmoney Dossee in the plaint mentioned, when incurred, constituted a first charge upon the premises comprised in the said mortgage deed according to the provisions of Hindoo Law, and that the said respondent took the said conveyance subject to the appellant's right to have such a sufficient sum provided for the expenses necessary for the due and fitting performance of the marriage of the said Sreemutty Surutmony Dossee when incurred.

The appeal was heard before Couch, C. J., and Macpherson, J., on the 14th March 1872.

Mr. Lowe and *Mr. Bonnerjee* for the appellant.

Mr. Marindin and *Mr. Branson* for the respondent.

Mr. Lowe (after reading the judgment of the Court below).—This judgment was based upon the case of *Bhuggobutty Dassee* vs. *Konnoy Lall Mitter*. More is asked for here than in that case. Our prayer is not simply for a declaration of right, but that maintenance may be ascertained and declared. (*Kenaram Chuckerbutty* vs. *Dinonath Panda*, 9 W. R., 325.) The widow has a right to reside in the family dwelling-house, and so have the unmarried daughters. The maintenance of the latter is a charge on the property in the hands of Mukhun Loll. (Shamachurn's Vyavastha-Darpana, 842; *Mangala Debee* vs. *Dinonath Bose*, 12 W. R., Original Jurisdiction, 35; *Ramchandra Dikshit* vs. *Savitribai*, 4 Bom. H. C., A. C., 78.) We ask for an injunction against Mukhun Loll, and that is something more than a mere declaration of right. *Gobind Monee Dossee* vs. *Sham Lall Bysack*, Special No. W. R., Full Bench Rulings, 165.

Macpherson, J.—You might have gone on, and asked for consequential relief.

Mr. Marindin.—Section 15 of Act VIII of 1859, enables the Court to make a declaratory decree, but it is discretionary with the Court, and the discretion will not be exercised unless the Court can give consequential relief. [*The Chief Justice.*—The substantial question in the suit is whether the property in the hands of the mortgagee is liable for maintenance. If an issue had been raised on that point, and as to what was a proper sum, ought the suit to have been dismissed? If necessary, we have the power to raise the issue now.] If the plaintiff had asked for it in the Court below, I don't think I could resist the issue being raised, and even if they wished to raise it now, I could not object. But if the plaintiff elects to take this course, I submit that she should be made to bear the costs.

Mr. Lowe.—I am willing, if the Court thinks it necessary, to raise the issue, but I contend that the costs of raising it should be costs in the cause.

Mr. Marindin.—I object to this. See *The Government* vs. *Rajah Raj Kishen Sen*, 9 W. R., 426 and 436. I do not wish to press a technical point like this, and I am willing that the question of costs should be left for your Lordships to determine. But if that is not done, the only course is to dismiss the appeal. I understand that the portion as to the expenses incurred for the marriages of the married daughters has been abandoned. Then we come to the claim for a marriage for the youngest daughter. If that is the right of any one, it is the right of the daughter herself, and not of the widow, and she should have been made a party. This is a fatal objection.

Mr. Branson (on the same side).—It is not our fault that the case has come up here. An opportunity was given to the plaintiff to raise the issue in the Court below, but she refused to do so. [*Macpherson, J.*—The Court could have raised the issue.] It could, but I do not know any case in which the Court has forced an issue on Counsel.

Mr. Lowe (in reply).—As to the point of raising issues, see the judgment of Couch, C.J., in *Arbuthnot* vs. *Betts*, 14 W. R., 181. [*The Chief Justice.*—That dictum must be taken to apply to special and not to regular appeals.] As to the point of marriage portions being a charge on the property, see Shamachurn's Vyavastha-Darpana, 842.

The Court took time to consider the case. On 3rd April the judgment of the Court was delivered by the Chief Justice as follows:—

The Chief Justice.—This is an appeal from a decree of Mr. Justice Markby, dismissing the suit with costs. The ground of this dismissal is stated by the learned Judge to be that the suit was only for a declaration of right, and did not ask for any relief, and that it is the practice of the Court, whenever a widow sues to have her right of maintenance declared, for her to ask, not that her right should be declared generally, but that it should be enquired what is a fit and proper sum for her maintenance. We agree that this is a proper practice, and that it would be unjust that a burden of indefinite amount should be imposed upon the property, which the defendant Chunder Mohun Soor holds as mortgagee, by a general declaration of the plaintiff's right to maintenance, rendering it necessary for him to institute a suit to have the amount determined. The plaint prayed that "the plaintiff's rights over the estate of her late husband by way of maintenance, and for the expenses attendant upon the marriages of her said daughters, as well those already incurred as those which may hereafter be incurred in respect of the marriage of her still unmarried daughter, may be ascertained and declared; and that it may be declared that the defendant Chunder Mohun Soor took his said mortgage subject to the plaintiff's right of maintenance, and right to be recouped the expenses necessarily and properly incurred by her in and about the marriage of her said two daughters, as also the right to be provided with the expenses necessary for the due and fitting performance of her said unmarried daughter's marriage when incurred, or to some one or other of such rights, and that for the purposes aforesaid all proper accounts may be taken and directions given." The plaint also prayed "that the defendant Mukhun Loll Dutt may be restrained by and under the order and injunction of this honourable Court from alienating, dealing with, or disposing of, the said one-third share of and in the said family dwelling-house No. 2, Beadon Street, until the further order of this honourable Court, and that the plaintiff may have such further or other relief as the nature of this case may require."

Now the rule in Courts of Equity is that, if the plaintiff should mistake the relief to which he is entitled in his special prayer, the Court may yet afford him the relief to which he has a right under the prayer of general relief, provided it is such relief as is agreeable to the case made by the bill.

This rule should be acted upon in this Court and is in accordance with the judgments of the Judicial Committee of the Privy Council in ***Eskanchunder Singh*** vs. ***Shamachurn Bhutto*** and others, 11 Moo. I. A.* and ***Mohummud Zahoor Ali Khan*** vs. ***Mussamut Thakooranee Rutta Kooer*** 20, 24, *Ib.* 473.† Although, as the learned Judge says, no proposal was made for amending the form of the suit, we think, he might, upon the plaint as it then was, have framed issues for the purpose of determining what should be allowed for the maintenance and expenses if the plaintiff should be found to be entitled to them, and that this should have been done instead of the suit being dismissed. No leave being reserved to bring a fresh suit, the effect of the dismissal is to bar the right of the plaintiff, which is too great a penalty for a mistake in the form of the suit. We think, the suit should be remanded for re-trial, fresh issues being framed in accordance with this judgment, and that the parties should bear their own costs of this appeal.

The 20th February 1872.

Present:

The Hon'ble H. V. Bayley and W. Markby,
Judges.

Bond—Consideration—Evidence — Actual Sight of the Passing of Money.

Case No. 1181 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Shahabad, dated the 25th July 1871, *reversing a decision of the Moonsiff of that district, dated the 28th September* 1869.

Mussamat Kurufool Kooer (Plaintiff)
Appellant,
versus
Mussamat Rajkulee Kooer (Defendant)
Respondent.

Baboo Mohesh Chunder Chowdhry for Appellant.

Baboo Anund Chunder Ghosal for Respondent.

Actual sight of the passing of the money is not the only mode of proving payment of the consideration for a bond.

Bayley, J.—I AM of opinion that the judgment of the Lower Appellate Court in this case must be reversed and that of the first Court restored with costs.

The remand order of this Court dated the 28th April 1871, most clearly and definitively put upon the defendant the *onus* of disproving the non-payment of the consideration which was recited in the bond to have passed to her and which bond she herself admitted to have executed. It was, therefore, only when the defendant could give some proof of that fact that the plaintiff had to be called upon to rebut it.

The Lower Appellate Court now finds (to use its own words): "The plaintiff's witnesses too do not shew that defendant did "receive the consideration in bond. The "three witnesses of plaintiff that are respectable aver not having seen the passing of "any such consideration."

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* 6 W. R., P. C., 57.
† 9 W. R., P. C., 9.

The ground on which this special appeal may generally be said to rest is that the mere circumstance of the defendant's three witnesses on whom the Lower Appellate Court relies, not having stated that the consideration was paid in their presence is no legal evidence of the non-payment of the consideration.

We have heard the evidence of the three witnesses whom the Subordinate Judge calls respectable, and the *first* witness states that he was a witness to the bond and he heard from the defendant Mussamut Rajkalee Kooer the admission that she had received the money, and he was well satisfied that the lady making the admission from behind the purdah was Rajkalee Kooer. The *second* witness was a Vakeel of the defendant and he deposed that he received a letter from the defendant asking him to come and be a witness to the taking of the consideration of the bond, and that he accordingly went and witnessed the bond and that had he not had full confidence in regard to the honesty of the transaction, he would not have gone and become a witness. The *third* witness, who is also a Vakeel of the defendant, does not say any thing as to his knowledge of the consideration having passed, but only says that he became a witness to the bond. These three persons are witnesses to the bond, and the Lower Appellate Court throws no discredit on their evidence. It only says that they do not depose to having *seen* the passing of the consideration. In a case of this kind, where it was for the defendant to disprove the payment of the consideration which is recited in the bond which she herself admitted to have executed, the actual sight of the depositions of the first two witnesses of the passing of the money is not the only evidence on which the Lower Appellate Court might legally have proceeded. The substance of the depositions of the first two witnesses as given above is some fair evidence of the fact that the consideration did pass and was admitted to have passed. With this evidence unrebutted, I think the Lower Appellate Court is wrong in confining its decision to the mere circumstance that there was no one who deposed to having *seen* with his own eyes the passing of the consideration. I think the order of remand most clearly threw the burden of disproving the fact of the passing of the consideration on the defendant, and that the defendant has not discharged that burthen. There being legal evidence of the consideration having passed, I think the Lower Appellate Court has erred in law in refusing to receive it as such and in confining its decision to requiring the testimony of witnesses who had seen the fact with their own eyes. I think it needless in a case like this, and under the circumstances stated above, to send the case back to the Subordinate Judge for trial, and I agree with the first Court in thinking that the plaintiff's case is borne out by the evidence on the record, and that the defendant has failed to rebut that case.

An argument has been raised by the respondent at the very close of the case (not raised before the Lower Appellate Court after remand) that the husband of the plaintiff is the substantial party and not the wife and therefore the case cannot proceed. It is needless to observe that such an objection cannot be allowed at this last stage of the case, even admitting, which is not shown, that the objection is good.

I would allow the appeal and reverse the order of the Lower Appellate Court and restore the decree of the first Court.

Markby, J.—I also think that the decree of the first Court giving the plaintiff a decree for the amount of the bond in suit ought to be restored. I must say I am quite at a loss to understand how in such a case the Subordinate Judge arrived at the conclusion on two successive occasions that the judgment of the first Court ought to have been reversed. As pointed out in the order of remand, the defendant admitted the execution of the bond which recited that the consideration had passed, and it therefore became the duty of the defendant, if she maintained that the consideration did not pass, to establish her allegation in some way or other. So far from doing that, of the very witnesses she produced two state that the consideration had passed, and one of them was her own Vakeel who says he satisfied himself before attesting the bond. It is a fallacy to suppose that the only mode in which the passing of consideration can be proved is by the testimony of persons who see the money change hands. I can conceive no better course for a lender of money who wishes to secure satisfactory proof of the transaction than to call in the legal advisers of the borrower as witnesses and to obtain their acknowledgment that they have satisfied themselves as to the money having passed. That to my mind is more satisfactory evidence than the depositions of any number of witnesses saying that so many rupees were counted out in their presence.

The 4th March 1872.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Enhancement—Lands used for other than Purposes of Agriculture and Horticulture—Act X of 1859 *s.* 17—*Act VIII of* 1869, *B. C. s.* 18.

Case No. 721 of 1871.

Special Appeal from a decision passed by the Additional Judge of Hooghly, dated the 27*th March* 1871, *affirming a decision of the Moonsiff of Sulkea, dated the* 28*th December* 1870.

Muddun Mohun Biswas (Plaintiff) *Appellant,*

versus

William Stalkart and others (Defendants) *Respondents.*

Baboos Bhyrub Chunder Bannerjee and *Umbica Churn Bose* for Appellant.

Baboo Rajendro Nath Bose for Respondents.

Lands used for other purposes than for purposes of agriculture and horticulture are not liable to enhancement under Act X of 1859 s. 17 or Act VIII of 1869 B. C. s. 18.

Kemp, J.—THIS is a suit brought by the agent of Ranee Lallun Monee upon a notice dated the 24th of Chyet 1276, addressed to Messrs. John and William Stalkart of Sulkea. The notice was issued under the provisions of Section 13 Act X of 1859, and is to this effect—that in No. 12 Khas Baxeaftee Bundobustee Mehal Chur Sulkea, the defendants, the Messrs. Stalkarts, hold a tenure which is recorded as Daghs Nos. 2 and 3 in the settlement proceedings, and that the area as per chittas is 13 beegahs odd cottahs; that on measurement it being found that they have in their occupation 40 beegahs of land, therefore there is an excess of 27 beegahs odd cottahs in their occupation; that ryots of the same class and holding lands of the same description, namely Messrs. Gregory and Mackenzie, pay a higher rent than the rent paid by the Messrs. Stalkart, and that the productive power of the soil has increased. The notice, therefore, is on this footing that the defendants do within seven days appear and execute a *kabooleut* at the rent of Rs. 50 a beegah.

The suit was instituted on the 11th August 1870; and when the suit was instituted, Act VIII of 1869 was in operation in the district which has jurisdiction over the suit, supposing it to be brought in the proper shape. The suit was instituted in the Court of the Moonsiff of Sulkea. The plaint states that the proper yearly *jumma* payable on the whole area is 2000 rupees, that on the plaintiff's share the *jumma* would be Rs. 625 per annum. The plaintiff does not sue for the increased rate after notice for the whole year according to the terms of her notice, but sues, perhaps by way of a feeler, for three months' rent, namely from Bysack to Assar, for Rs. 156-4.

The defence of the Messrs. Stalkart is a very elaborate and long one. It is not necessary to go into all the points raised in the defence on the merits of the case. It is sufficient for us to notice the points taken with reference to this suit not being maintainable under the provisions of Act X of 1859 under which the notice was served, or under Act VIII of 1869 under which the plaint was instituted.

The Moonsiff in a very careful decision notices only such of the pleas in the defence as are necessary to enable him to arrive at a decision as to whether he had jurisdiction to try the case under Act VIII of 1869.

The points taken are that the land is situated in the heart of the town of Sulkea, that it never has been used for agricultural or horticultural purposes or for any purposes incidental thereto, and therefore that the provisions of Act X of 1859 and Act VIII of 1869 will not apply. With reference to that point, the Moonsiff, after referring to certain decisions of an old date which are to a certain extent in conflict with decisions of a later date, gives a number of decisions of this Court which rule that such a suit will not lie, and the Moonsiff says, and we think very properly says, that it would be in his opinion the safest course to follow the principles laid down in the later rulings.

The Judge has substantially confirmed the ruling of the Moonsiff. He is also of opinion, without quoting any decisions at length, that the Moonsiff was right in holding that the later concurrent decisions of this Court supported the view taken by the Moonsiff.

In special appeal it is contended that the Lower Courts are wrong in holding that Act X of 1859 and Act VIII of 1869 do not apply, and that the cases referred to by the Lower Courts do not finally settle the question; that however applicable these decisions may be to cases under Act X of 1859, they are not applicable to cases under the later Act, namely Act VIII of 1869. This case has been brought to enhance the rent of the defendants, and although notice was issued under Section 18 of Act X, the suit itself was instituted, as already observed, after Act VIII of 1869 came into operation in the district of Howrah. We have been referred to a Government Gazette which notifies that the said Act would come into operation in the district of Howrah on the 18th of August 1870; the suit was instituted on the 18th of August 1870, and therefore there can be no doubt that it is governed by the later Act, namely, Act VIII of 1869. The suit is brought under Section 18 of that Act, and the words of that Section are almost word for word the same as those of Section 17 of the former Act.

The grounds upon which the notice proceeds are, 1st.—That the productive powers of the land have increased—it does not say that they have increased otherwise than by the agency or at the expense of the ryot, or in what way they have increased; it merely says that they have increased. 2nd.—That the quantity of land has been proved by measurement to be greater than the quantity for which rent has been previously paid. The question, therefore, is whether, under the rulings of this Court, such a suit can be brought under the provisions of that Section. Speaking for myself, I have repeatedly ruled, sitting with other learned Judges of this Court, that such a suit cannot be brought.

It is admitted that the land occupied by the defendants is not used by them for agricultural or for horticultural purposes or for any purposes incidental thereto. The land is used for a rope-yard, and it is not easy to understand how the productive powers of the land have been increased by the establishment of a rope yard on that land. The land, apparently from the statement of the defendants, is land which would be useless for agricultural purposes, as it is a strip of land on the border of the river, subject to tides and only useful for such purposes as that for which it has been used by the defendants. However, this is a question which is involved in the merits of the case. There are many decisions of this Court which have ruled that lands used for other purposes than for purposes of agriculture and horticulture are not lands liable to enhancement under Section 17 of Act X of 1859.

Amongst many other decisions it will be sufficient to quote two in Volume XI, Weekly Reporter,* by Justices L. S. Jackson and Markby, and there is also a very late case in Volume XVII,† before Justices Glover and Dwarkanath Mitter, when this point was fully considered, and although those learned Judges differed, the senior Judge Mr. Justice Glover was of opinion that there was no conflict of decisions, and although pressed by his learned colleague to refer the question to a Full Bench, he declined to do so, inasmuch as there was no conflict of decisions, and in doing so he was justified by the practice of this Court, because, when there is no conflict of decisions, the Full Bench have invariably refused to decide the points referred. We are told that there is a probability of the decision just alluded to being appealed against. If that is so, the point will be definitely settled; but as the law at present stands, and with reference to the rulings of this Court, we think it right to follow the consistent decisions of a later date, and we therefore uphold the decisions of the Courts below, and dismiss the special appeal with costs.

Glover, J.—I retain the opinion expressed by me in the case of Doorga Soonduree Dossee *versus* Bibee Oomdutoonissa. I therefore concur in dismissing the appeal with costs.

The 5th March 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Hoondees (drawn by Gomastahs on their Principals)—Local Custom—Liability of Drawers—Insolvency of Acceptor—Time given to Acceptor—Notice of Dishonor.

Case No. 793 of 1871.

Special Appeal from a decision passed by the Judge of Dacca, dated the 22nd April 1871, *reversing a decision of the Subordinate Judge of that District, dated the* 8*th November* 1870.

Huree Mohun Bysack and another (Two of the Defendants) *Appellants,*

versus

Krishno Mohun Bysack and another (Plaintiffs) *Respondents.*

Baboos Doorga Mohun Doss and *Nullit Chunder Sen* for Appellants.

Baboo Kishen Dyal Roy for Respondents.

In a suit to recover the balance due on a *hoondee* brought by the drawers against the drawees upon the insolvency of the acceptor, there was evidence not only that the drawers were merely the ordinary *gomashtahs* of the acceptor, but also that they had no interest whatever in the bill when drawn, that it was the local custom for *gomashtahs* in similar situations to draw bills on their principals without being thereby rendered liable for the defections of their principals, that the money when procured on the *hoondee* was applied solely to the purposes of the acceptor, that the drawees considered the acceptor as their only debtor by receiving part payment of the *hoondee* from him and giving him time to pay the remainder, and that the notice of dishonor was not sent to the drawers till ten months afterwards,—HELD that the drawers were not liable.

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* Pages 188 & 547.

† Page 151.

Glover, J.—THIS was a suit to recover the balance of 600 rupees due on a *hoondee* for Rs. 1000 drawn by the defendants Huree Mohun Bysack and Ram Churn Pal in favor of the plaintiffs, and accepted by the defendant No. 1, Sham Soondur Bysack. The *hoondee* is dated the 19th April 1869. When it became due, the plaintiff applied to the acceptor Sham Soondur Bysack, who, it may be stated here, wrote the *hoondee* with his own hand, and whose *gomashtahs*, the defendants Nos. 2 and 3, appellants before us, were living with him at the time, for payment. Sham Soondur was unable to pay the whole amount but paid 400 rupees on account at two different times; the drawee giving him time for the purpose and marking the payments as they took place on the back of the *hoondee*. Since then Sham Soondur Bysack has become insolvent, and the consequence is that the drawee of the bill has brought this suit for the balance due against the drawers Huree Mohun Bysack and Ram Churn Pal.

The defence set up by these defendants was that they were simply the *gomashtahs* of the principal defendant, Sham Soondur Bysack, that they had no interest whatever in the affairs of the mercantile establishment, and merely drew these bills in the ordinary course of their duties and entirely for the defendant's benefit.

The Court of first instance found that there was evidence of a custom prevailing in the town of Dacca where this transaction took place, that a *gomashtah* drawing bills on his principal was not bound to state on the face of the bill that he drew as *gomashtah*, and that it was sufficient if it was proved that he stood in that relation to the party on whom the bill was drawn and had no interest himself in the proceeds of the bill. He found, therefore, that the defendants were not liable.

The Judge on the contrary gave the plaintiff a decree on the ground that the *hoondee* on the face of it did not show that the drawers of the bill acted only in their capacity of *gomashtahs*; and that being so, they were, like all other drawers of Bills of Exchange, liable for the bill drawn by them, provided the acceptor either refused payment or was unable to pay.

In special appeal, the first point taken is that, by a local mercantile custom, a *gomashtah* drawing a bill of the description now in suit and not specifically stating on the face of it that he drew it as *gomashtah* is not liable; and that the Judge did not pretend to disbelieve the evidence of this local custom in Dacca.

Another objection taken is that, as the plaintiff had accepted Sham Soondur Bysack for his sole debtor by taking part payment of the *hoondee* from him and giving him time, he by his own act released the drawers from liability; and lastly it is objected that the defendants, the drawers, had no notice of the failure of payment within due and reasonable time.

With regard to the first point, we find that the Judge disposed of the case on the technical rules of English law, and took no notice of the evidence on the record as to the prevailing local custom. He decided against the defendants simply on the ground that the bill does not show that it was drawn by the defendants as the agents of Sham Soondur Bysack. It has been more than once decided by this Court that the local custom in such matters is to prevail, and that the Mofussil Courts are not bound by the strict technicalities of English law. In this case there is evidence of the most decisive character, not only to the effect that these defendants are ordinary *gomashtahs* of Sham Soondur drawing salaries of 8 and 6 rupees a month respectively, but also that they had no interest whatever in the bill when drawn, that it was the custom of *gomashtahs* in similar situations to draw bills on their principals without being thereby rendered liable for the defections of their principal, and also to the effect that the money when procured on the *hoondee* was applied solely to the purposes of Sham Soondur Bysack. On this last point, it is said that the first Court has found rather by implication than by a direct finding of fact; but on reading the judgment of the Subordinate Judge, we have no doubt that this was a distinct conclusion arrived at by him on the evidence.

A case to be found in the 1st Volume, Weekly Reporter, page 95, T. M. Pigue *vs.* Ram Jushunt, has been quoted in order to show that the drawers of a bill would not be exonerated by the failure of payment on the part of the acceptor. But this case, we observe, has nothing whatever in point with the present one. An agent under ordinary circumstances would be equally liable with his employer for bills drawn by him upon and accepted by that employer; but in this case the defendant Pigue had actually given a bond for the money due from him with reference to some bill transaction between him and Palmer and Co.

In the other case quoted to be found in Volume II, Weekly Reporter, page 301, the same defendant Pigue, appellant, *vs.* Ram Kishen, the point decided had reference to the notice of dishonor. No doubt there is in the body of the decision some remarks to the effect that an agent, unless he shows on the face of the bill of exchange that he drew it as agent, cannot set up the fact of agency to exonerate himself from liability; but that was not the point on which the decision proceeded, and appears to have been merely an *obiter dictum.* It was, moreover, a point which has reference solely to the technical procedure of English Law which does not apply where there is proof of a local custom. But there is also, we think, another point on which the defendants, appellants, are entitled to succeed in this appeal. It is quite clear that the plaintiff, the drawee, considered the defendant Sham Soondur Bysack as his only debtor, he received part payment of the *hoondee* from him and gave him time in which to pay the remainder, and under ordinary circumstances this alone would excuse the drawers from liability, because they were entitled to receive notice at the very first of Sham Soondur's failure to pay the money, and if they did not receive that notice they would, according to the ordinary rule of law, not be bound to make arrangements for the payment of the *hoondee;* and as to the notice itself the law is that notice shall be sent to the drawer of the bill at the time dishonor takes place. In this case the bill fell due on the 5th of Assar 1276, whereas no notice of its having been dishonored was sent to the defendants, drawers of the bill, till ten months after or in Jeyt of the following year. On the whole, we think that the plaintiff never considered the defendants (drawer of the *hoondee*) as his debtors, and that he knew, as every body else must have known, all the parties being in the same town of Dacca, that these two men were ordinary servants of Sham Soondur Bysack, and only drew this *hoondee* in the common discharge of their duties as *gomashtahs,* and there cannot be the slightest doubt that the plaintiff looked to Sham Soondur and to Sham Soondur alone as the person from whom he was entitled to recover his money.

Under these circumstances, we think that the decree of the Judge as against the appellants, defendants 2 and 3, is wrong and must be reversed. This appeal is, therefore, decreed with costs payable by the plaintiff, respondent. The decree of the Judge against the defendant No 1, Sham Soondur Bysack, will stand.

The 7th March 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Debutter Lands—Shebait or Trustee (Fraud by)—Son not liable.

Cases Nos. 748 and 948 of 1871.

Special Appeals from a decision passed by the Judge of Cuttack, dated the 15th March 1871, *affirming a decision of the Moonsiff of Dhaumnuggur, dated the 6th July* 1870.

Goluck Chunder Bose (one of the Defendants) *Appellant,*

versus

Rughoonath Sree Chunden Roy (Plaintiff) *Respondent.*

Baboos Obhoy Chunder Bose and *Umbica Churn Banerjee* for Appellant.

Baboos Chunder Madhub Ghose and *Nil Madhub Sen* for Respondent.

A person who succeeds his father as *shebait* or trustee of *debutter* lands, is not bound by any acts of his father done in fraud of the trust.

Kemp, J.—We do not think it necessary in these cases to call upon the pleader for the respondent. The case No. 948 was taken up first, and it is admitted that one judgment will govern both appeals.

This case was remanded by this Court to the Judge of Cuttack to find, 1*st,* whether the plaintiff's father had resigned the *shebaitship* of these endowed lands to the plaintiff; 2*ndly,* whether the plaintiff had proved possession, as he came into Court for confirmation of his possession, and, 3*rdly,* whether he was the *shebait* of the *thakoor* or not. The Judge has very carefully considered the case, and he found that the plaintiff's father did relinquish the *shebaitship* and the endowed lands to the plaintiff, that the plaintiff was in possession, and that the possession of Gobind Churn, the judgment-debtor of the special appellant, was a mere *benamee* possession.

The grounds taken in special appeal are, 1*st*.—That the relinquishment to the plaintiff by his father is found only on the written statement of the father, that the written statement of one defendant is no evidence as against a co-defendant, and therefore, there being no other evidence but that written statement, that point has not been established. 2*ndly*.—That both Courts having found that the holding of Gobind Churn, the special appellant's judgment-debtor, was a *benamee* one, the plaintiff cannot set up his father's fraud.

On the first point, it is very clear that there is evidence independent of the written statement of the plaintiff's father, and on that evidence the Lower Court, after carefully considering the whole case, has come to the deliberate conclusion that the plaintiff's father did relinquish the *shebaitship* and the endowed lands to the plaintiff.

On the second point, it appears that the *whole* of the property was endowed property. It is not therefore such a property as the plaintiff's father could sell burdened with a trust. It is resumed rent-free *debuttur* lands lands endowed and the proceeds of which are appropriated to the service of the idol, The plaintiff succeeds his father as trustee of that property, and he is not in any way bound by any acts of his father done in fraud of the trust.

The appeal must, therefore, be dismissed with costs. This judgment will govern Special Appeal No. 748 of 1871, which is also dismissed with costs.

The 7th March 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Act VIII of 1859 *s.* 360—*Costs* (*of first Court*) *Decree of Appellate Court.*

No. 17 of 1872.

Miscellaneous Appeal from an order passed by the Judge of Dacca, dated the 2nd October 1871, *affirming an order of the Subordinate Judge of that district, dated the* 31*st May* 1871.

Huree Kishore Roy and others (Objectors) *Appellants,*

versus

Mothoora Mohun Roy and others (Decree-holders) *Respondents*

Baboos Doorga Mohun Doss and *Nullit Chunder Sen* for Appellants.

Baboos Chunder Madhub Ghose and *Sreenath Banerjee* for Respondents.

Under s. 360 Act VIII of 1859 (which must be construed strictly) a judgment-debtor is only liable for the amount of costs which are specifically mentioned in the schedule attached to the Judge's order. Thus, where certain suits were decreed with costs in the first Court and dismissed with costs on appeal, but there was no specification in the Appellate Court's decree that the plaintiff, the losing party should pay the costs incurred by the other party in those suits in the first Court, it was held that the decree-holder could not take out execution for those costs.

Glover, J.—This appeal is on a question of costs. The appellant brought certain suits against a number of defendants for possession of land. Some of these suits he won in the Court of first instance and others he lost, the order of the Moonsiff being that the plaintiff should get a decree for certain plots of land, and with regard to other plots his suit should be dismissed, and that the costs of the cases should be paid proportionately according to the amounts decreed and dismissed.

Both parties appealed to the Subordinate Judge and the result was that the appeal of the plaintiff with regard to those portions of land which he had lost in the first Court, was dismissed and the appeal of the defendants was allowed; in other words, the plaintiff lost the whole of his cases with costs; and the question now is what are the costs which the other party is entitled to recover in execution of the final decree. The petitioner contends that he can only be liable under the provisions of Section 360 of the Civil Procedure Code for the amount of costs which are specifically mentioned in the schedule attached to the Judge's decree, and so far, we think, he is right. The words of the Section are that the decree in appeal shall state the amount of costs incurred in the appeal and by what parties and in what proportion such costs and the costs in the original suit are to be paid. Now unfortunately for the parties who succeeded before the Judge, there is no specification in the Judge's decree that the plaintiff, the losing party, is to pay the costs incurred by the other party in the first Court in respect of those suits which the plaintiff won in that Court; and as this Section of the Code of Civil Procedure must be construed strictly, we think that the decree-holder cannot take out execution for these costs.

The appeal of the judgment-debtor must therefore be allowed, and the order of the Lower Court on this point reversed.

The 7th March 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Small Cause Court—Special Appeal—Damages—Suit by Purchaser (to recover Money paid to save Estate from Sale in Execution of Decree.)

Case No. 936 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Beerbhoom, dated the 26th May 1871, affirming a decision of the Moonsiff of Gopalpore, dated the 7th September 1870.

Ramgutty Gangolly and others (Defendants) *Appellants,*

versus

Kuralee Pershad Gangolly (Plaintiff) *Respondent.*

Baboo Bama Churn Banerjee for Appellants.

Baboo Nil Madhub Sen for Respondent.

A suit to recover money as damages measuring the loss to which plaintiff was put by having to pay on behalf of defendant money which defendant had agreed to pay out of the purchase-money in order to save from sale in execution of a decree an estate which plaintiff had purchased from him, is a suit cognizable by a Small Cause Court, from whose decision no special appeal lies.

Glover, J.—A PRELIMINARY objection has been taken to the hearing of this appeal, on the ground that the suit being one of a nature of a Small Cause Court suit, no special appeal lies. It appears that the plaintiff bought a certain share of landed property from the defendant who was considerably involved, and against whom a number of decrees appear to have been passed. These decrees were, some of them, a burden upon the property purchased by the plaintiff, and on the purchase being agreed to it was arranged that the purchase-money should be applied to pay off these decrees for the satisfaction of which that estate might have been sold. One of these decrees, No. 36, was afterwards put in execution for a balance of money due on it. In that execution the land which the plaintiff had purchased was attached; and in order to save it from sale, he paid the sum of money which he now seeks to recover in this suit.

It is said by the special appellant's pleader that this was simply a contribution suit, and that, therefore, it was not of a nature cognizable by the Small Cause Court. This is a mistake. It is a suit to recover money as damages, these damages, measuring the loss to which the plaintiff was put by having to pay money on behalf of the defendant, which money the defendant ought himself to have liquidated from the proceeds of the purchase-money paid to him by the plaintiff.

It is contended that the money due on this particular decree, No. 36, amounting to 1,100 rupees, was paid off by the defendant at the time or shortly after the purchase was made, but it is clear that, in consequence of after-litigation, the sum due under that decree had swelled up considerably above 1,100 rupees, and for that excess execution was taken out on the plaintiff's property. It seems to us clear that the plaintiff's payment, in order to save that property from sale, was caused by the failure of the defendant to perform his part of the agreement or contract which was to clear the estate of the particular debt for which it might have been attached and sold under the decree No. 36 aforesaid. This being so, this case comes under the purview of Section 6 of the Small Cause Court Act; and being a suit against the decision of which no special appeal can be heard, this appeal is dismissed with costs.

The 7th March 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Remand—Fair Opportunity to Plaintiff to meet Defendant's Case.

Case No. 938 of 1871.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 7th June 1871, reversing a decision of the Moonsiff, dated the 1st March 1871.

Shib Pershad Pattuck (Defendant) *Appellant,*

versus

Nubo Kishen Mookerjee (Plaintiff) *Respondent.*

Baboo Nil Madhub Sen for Appellant.

Baboo Romanath Bose for Respondent.

HELD that the Judge was perfectly justified in remanding the case where the suit was instituted on the 9th February, the 24th fixed for trial, the issues recorded and defendant's written statement put in on the 25th, and the case decided the next day without a fair opportunity being given to the plaintiff to know the line of defence he had to meet.

Kemp, J.—WE think that the Judge has done right in this case to remand the suit

The case was instituted on the 9th of February. The 28th was fixed for the trial. On the 28th issues were recorded and the defendant's written statement put in. The case was decided the next day. As the Judge observes, this certainly was not fair to the plaintiff in a contested case as it was impossible for him to know what line of defence he had to meet, and we think that the Judge was perfectly justified in sending back the case in order to enable the plaintiff, respondent before us, to meet the case of the defendant. The appeal is dismissed with costs.

The 8th March 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Defaulting Putneedar—Service of Notice of Sale (under Regulation VIII. 1819 s. 8 cl. 2)—Reversal of Sale—Indemnity to Purchaser (by Zemindar).

Case No. 576 of 1871.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 24th February 1871, *reversing a decision of the Second Subordinate Judge of that district, dated the 22nd September* 1870.

Bykunt Nath Singh and others (Plaintiffs) *Appellants,*

versus

Maharajah Dheraj Mahtab Chund Bahadoor and others (Defendants) *Respondents.*

Mr. J. T. Woodroffe and *Baboos Kalee Mohun Doss, Hem Chunder Banerjee,* and *Ram Churn Mitter* for Appellants.

Mr. J. W. B. Money and *Baboos Jugodanund Mookerjee, Chunder Madhub Ghose, Romanath Bose,* and *Tarucknath Sen* for Respondents.

Personal service of notice of sale on a defaulting *putneedar* is not a sufficient service under Regulation VIII of 1819 s. 8 cl. 2. The notice should be stuck up in the Cutchery of the Collector, and a copy or extract of the notice published at the Cutchery or principal town or village upon the land of the defaulter.

The sale in this case having been reversed, the purchaser was held entitled under Section 14 to a refund of his purchase-money and to recover his costs from the zemindar.

Kemp, J.—THE special appellant in this case, the plaintiff below, is the *putneedar* of a certain *mehal* called Lohchapore. The defendants, special respondents, are the Maharajah of Burdwan, the zemindar, and the auction-purchaser.

The suit was to set aside a sale made at the instance of the zemindar, the Rajah, of a *putnee talook* belonging to the plaintiff. Damages were also claimed.

The first Court, the Subordinate Judge of Hooghly, Baboo Jugobundhoo Banerjee, found that the receipt of service of notice which was filed on behalf of the zemindar, the Rajah, was a forgery, and his decision on this point is not interfered with by the Judge on appeal. The Subordinate Judge further found that the requirements of Clause 2 Section 8 of Regulation VIII of 1819 had not been complied with in this case, inasmuch as no notice was stuck up in the Cutchery of the Collector and no copy or extract of the notice was published at the Cutchery or principal town or village upon the land of the defaulter. He, therefore, reversed the sale. On the question of damages, he found that the plaintiffs were clearly defaulters, and that it was gross neglect on their part that they did not enquire whether a suit under the Regulation was instituted against them within the prescribed time, and that they are bound to abide by the loss which has accrued to them in consequence of their own laches.

On appeal to the Judge by the zemindar, there being no cross-appeal by the *putneedar* on the question of damages, we find that the points raised in appeal are not the point upon which the Judge's decision turns, namely, whether personal service on the *putneedar* was sufficient; but the grounds of appeal were directed against the finding of the first Court on the question of fact, namely, whether the receipt of service of notice was a forgery or not. There were other grounds of appeal, but there was no such ground that personal service on the *talookdar* was a sufficient compliance with the requirements of the law. Now, as already observed, the Judge concurs with the first Court in finding that the receipt filed on behalf of the zemindar is a forgery. He says—"There is no reason to differ from the "Lower Court's rejection of this receipt "inasmuch as it is not attested in any way, "and that part of the evidence which relates "to the act of signature is not credible." The Judge goes on to state that, looking at all the probabilities of the case, he is of opinion that personal service on the *putneedars* has been proved, and he infers that the evidence as to personal service must be accepted because the *putneedars* knew that they were in arrears, because they knew their legal obligations with respect to their rents, and, lastly, with reference to the weakness of their excuses for not having tendered the arrears due before the 6th or 7th of Jeyt, namely, that their Mooktear at Midnapore said that the sale would not take place before the 10th of Jeyt. On these presumptions, the Judge overrules the decision of the first Court, and holds that the personal service having been proved, the object of the law has been fulfilled, that the defaulters had an opportunity of saving the estate, if so minded, and not having done so, the sale must be upheld. The decision of the first Court was therefore reversed.

The only question, we have to decide in this appeal is as to the finding of the Judge that the personal service on the *putneedar* was a sufficient service under the terms of Clause 2 Section 8 Regulation VIII of 1819. The Clause enacts that *Istahars* or notices of sale shall be stuck up in some conspicuous part of the Cutchery, that a similar notice shall be stuck up at the Cutchery of the zemindar himself, and a copy or extract of such part of the notice as may apply to the individual case shall be by him sent to be similarly published at the Cutchery or at the principal town or village upon the land of the defaulter. The Clause then goes on to enact that the zemindar shall be exclusively answerable for the observance of the forms above prescribed. It further enacts that if it shall appear from the tenor of the receipt or attestation of three substantial persons residing in the neighbourhood, that the notice has been published at any time previous to the 15th of the month of Bysack, it shall be a sufficient warrant for the sale to proceed upon the day appointed.

Now in this case it appears to us very clear that the first requirement of htis Clause of the law, namely, that the notice of sale shall be stuck up on some conspicuous part of the Cutchery of the Collector has not been carried out. It is admitted that the notice was not stuck up in the Cutchery, but that it was pasted into some book which it is said remains in charge of the *serishtadar*, and which is not accessible to the public without the permission of the *serishtadar*. It does not require much reasoning to see that that is not a compliance with the requirements of the law.

We also think that the copy or extract of the notice which requires to be stuck up at the Cutchery or at the principal town or village upon the land of the defaulter has not been so published as directed by law. The evidence of the two Peadahs of the Rajah, namely Shaikh Amanut and Ruhumoo *alias* Feloo in the case of Amanut goes to show that they went to Dasspore, and not to Ichchapore, although the notice was directed to be served at Ichchapore, and in the case of Ruhumoo *alias* Feloo, he deposes that he went to Dasspore, and that he did not go to the Ichchapore Cutchery; he also states that although he has served notices several times on this *putneedar*, he never went to the Cutchery; he does not certainly say Ichchapore Cutchery, but as he had already said that he did not go to Ichchapore, it may be safely inferred that he means that he never went to Ichchapore Cutchery.

The learned Counsel for the appellant has called our attention to many decisions in which it has been ruled that the requirements of Clause 2 Section 8 of Regulation VIII of 1819 must be strictly carried out, and that the responsibility of carrying them out according to the letter of the law is with the zemindar. We think it sufficient to refer on this point to a decision of the late Sudder Court of the 28th August 1849. That was a decision before three Judges who were very competent to pass an opinion upon the construction to be put upon the Regulation. Those learned Judges held that the duty of the zemindar under Clause 2 Section 8 of Regulation VIII of 1819 was an indispensable duty; that he is bound to serve notice on the defaulter, either at his Cutchery or at the principal town or village on the land of the defaulter, and they further give it as their opinion that the land of the *putnee* in arrear is what is meant in the Regulation by the words "land of the defaulter." We, therefore, think it very clear that the requirements of the law have not been complied with in this case, and that the sale must be reversed.

Mr. Money, who appears for the auction-purchaser who has been made a party to this suit, has called our attention to Section 14 of Regulation VIII, more particularly to the latter portion of the Section which enacts that—"the purchaser shall be made a party in such suits, and upon decree passing for reversal of the sale, the Court shall be careful to indemnify him against all loss at the charge of the zemindar or person at whose suit the sale may have been made."

We are informed that the purchase-money is still in the hands of the Collector. We, therefore, decree the special appeal, reverse the decision of the Judge, and restore that of the first Court. The plaintiff's costs of both Courts, including the costs of this Court, will be paid by the Rajah with interest. The purchaser defendant will also be entitled to recover his costs from the Rajah including the costs of this Court, and the purchase-money will be refunded to him. The plaintiffs and the purchaser will recover separate costs from the Rajah.

The 11th March 1872.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Abatement of Rent (not previously paid)—Act VIII of 1869 *B. C. s.* 19.

Case No. 941 of 1871.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 3rd August 1871, *reversing a decision of the Moonsiff of Sulkea, dated the* 15*th May* 1871.

Brojanath Koondoo Chowdhry and others (Defendants) *Appellants,*

versus

Unnat Ram Dutt (Plaintiff) *Respondent.*

Baboo Mohendro Lall Seal for Appellants.

Baboo Beeharam Mookerjee for Respondent.

A ryot who has held his land for a few months and has paid no rent at all, cannot sue for an abatement of rent on the ground that the land on measurement is less than the quantity mentioned in his pottah.

Glover, J.—IT appears to us that the plaintiff has no right to claim an abatement in this suit. He is a *mokurureedar* who took a pottah from the zemindar for 1 beegah 5 cottahs of land within defined boundaries and comprised in two plots at a rent of Rs. 12-5-5. Some four or five months after taking the pottah, he measured the land and found it to be 9 cottahs short. He accordingly sues for an abatement of the rent. Now the only law under which he can come is Section 19 of Act VIII of 1869 B. C. That Section says that a ryot with a right of occupancy can claim abatement of the rent previously paid by him if the area of the land has been "diminished by diluvion or otherwise." It is clear that the area of this land has not been *diminished* either by diluvion or otherwise inasmuch as it is in precisely the same state now as when it was leased to the plaintiff. The other Clause of the Section under which he might have come is the one which provides for an abatement if the quantity of land held by the ryot has been proved by measurement to be less than the quantity "for which rent has been previously paid by him." And if the plaintiff had paid his 12 rupees 5 annas 5 gundahs for 1 beegah 5 cottahs of land, he might have probably succeeded in this suit by showing that the land was not 1 beegah 5 cottahs in area, but he has only held the land for two or three months, and it is admitted that he has paid no rent at all, and it therefore appears to us that he has no right to come into Court for an abatement of his *jumma.* We observe further that, in the *kabooleut* executed by the plaintiff, he distinctly agreed to take the land as it stood, namely the quantity of land contained within certain boundaries as representing the land for which he agreed to pay a certain amount of rent.

The special appeal must, we think, be allowed and the judgment of the Lower Appellate Court reversed with costs.

The 11th March 1872.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Burden of Proof—Allegation of Lakheraj and Mokururee Title.

Case No. 919 of 1871.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 19*th May* 1871, *reversing a decision of the Moonsiff of Oomdah, dated the* 31*st January* 1871.

Huree Narain Roy and another (Plaintiffs) *Appellants,*

versus

Doorga Churn Deghooriah (one of the Defendants) *Respondent.*

Baboo Nil Madhub Sen for Appellants.

Baboo Rash Beharee Ghose for Respondent.

In a suit for confirmation of possession of certain *lakheraj* and *mokururee* land, and for a declaration that plaintiff has a *lakheraj* and *mokururee* title, the *onus* is on him.

Glover, J.—THIS seems to be a case of some hardship, as it has been put before us by the pleader for the special appellant, but it is one in which we manifestly cannot interfere under the law of special appeal.

The plaintiff being, as he says, in possession of certain *lakheraj* and *mokururee* lands, came into Court for confirmation of that possession, and to have it declared that he has a *lakheraj* and *mokururee* title; his cause of action being the rejection of a claim which he had made on the zemindar taking out execution in an Act X suit.

The first Court found for the plaintiff, considering that under the circumstances the *onus probandi* was upon the defendant, the zemindar. The Judge on appeal places the *onus*, and we think quite properly, on the plaintiff and finding that he was unable to prove either his *lakheraj* or his *mokururee* right, dismissed his suit.

The only substantial point taken in special appeal is that, as a matter of fact, the question of *lakheraj* and *mokururee* has been decided as between the plaintiff and defendant in a former suit, and that the Judge was wrong in allowing no weight to the decision in that suit, on the ground that the judgment had been reversed by the High Court, inasmuch as it had not been so reversed. It appears that the zemindar brought a suit for the resumption of the land now in dispute as being part of his *mâl* estate. The first Court dismissed it on the 18th of June 1860. On appeal to the Judge, this order was reversed, but the High Court on special appeal remanded the case, in order that it might be tried with reference to the precedent laid down in the case of Kheluch Chunder Ghose;* this precedent being that in cases where a zemindar sued for resumption of *lakheraj* land, it was on him to start his case and show that the land had paid rent to him as *mâl* at some time subsequent to the permanent settlement. Clearly, therefore, the decision of this Court reversed the decisions of both the Courts below, and remanded the case for a re-trial upon a fresh issue, the *onus* being placed on the plaintiff. The Judge was, therefore, right in saying that the original decision of the Moonsiff in favor of the ryot was reversed, and therefore was no evidence in favor of the plaintiff. Then again it is said that, after the remand, there was another decision which had the effect of declaring this land to be *lakheraj*. This decision was an order passed by the Moonsiff on the occasion of the zemindar bringing a fresh suit for resumption, to the effect that, as the case was not proceeded with by the plaintiff, it should be struck off on default, the defendant getting his costs. It is clear, from reading the decision of the Moonsiff, that there was no adjudication on the merits. This decision would probably be a bar to the zemindar's bringing another suit against the same party for resumption of these lands, but it will not supplement the plaintiff's weakness of proof. The plaintiff has chosen to come into Court (most unnecessarily it appears to us) for a declaration of his title, and cannot take this "striking off" as proof of it. He alleges and offers to prove that he holds rent-free under a certain *taidad*, and at a fixed rent under a *mokururee* pottah, and he was bound to prove these documents. The Judge finds as a matter of fact that he has not proved either of them.

The special appeal must be dismissed with costs.

The 12th March 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Limitation—Cause of Action.

Case No. 940 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Dacca, dated the 11th May 1871, affirming a decision of the Moonsiff of Naraingunge, dated the 19th September 1870.

Kalee Kishore Sen and others (Defendants) *Appellants,*

versus

Nilamber Sen (Plaintiff) *Respondent.*

Baboos Romesh Chunder Mitter and *Issur Chunder Doss* for Appellants.

Baboo Huree Mohun Chuckerbutty for Respondent.

Plaintiff brought a suit within the very verge of the period of limitation, but did not obtain a decree as it was held that no fresh order was required in that suit and that an order passed in a former suit was sufficient for the purpose of that case. Instead of appealing from that decision, he brought the present suit, which was held barred by limitation, his cause of action remaining intact.

Kemp, J.—This case is an illustration of the maxim that hard cases make bad law. There is no doubt, and it is admitted, that the plaintiff is entitled to an 8 annas share in this property. The defendant does not dispute that, but what the defendant says is this that the plaintiff's suit dating from his admitted cause of action is barred owing to the adverse possession of the defendants for a period of more than 12 years prior to suit. Now we have to look first to the cause of action which in this case admittedly arose on the 1st of Bysack 1260. The present suit is not instituted until the 23rd of Falgoon 1276; therefore clearly, unless something intervenes between these two dates taking the case out of the statute of limitation, the plaintiff's suit is barred. The plaintiff states in his plaint that, although ostensibly his cause of action arose on the 1st Bysack 1260 when he was ousted, he is entitled to date that cause of action from 1864 when the defendant's application to execute the decree obtained as between him and the plaintiff was struck off in default of prosecution. It is stated, and this appears to be also admitted, that the present defendant, special appellant, sued in 1860 in a suit No. 221 the present plaintiff to recover the costs incurred in improving the lands in dispute, the said improvements being described as *bhurat khurruck*, and on the 22nd November 1862 the plaintiff obtained a decree to the effect that the defendants were to remain in possession of the disputed lands until the plaintiff in the present case, the defendant in that case, paid the costs of filling-up, and that if the plaintiff did not pay these costs, he would be entitled only to the profits of his share in the lands as they stood before these improvements were made. In 1865 the plaintiff, not having in the meantime paid these costs, sued for possession of his share in the disputed lands, offering to pay the costs awarded to the defendants in 1862. In that suit of 1865 the plaintiff framed his suit on the same cause of action, namely the ouster of the 1st of Bysack 1260, and his suit then was brought within the very verge of the period of limitation, but however, it was just in time. He did not obtain a decree in that suit as it was held that no fresh order was required in that suit and that the former order which was passed in the suit of 1862 was all sufficient for the purposes of that case and that the former order must be carried out; the lands being then described as No. 1 in the suit and admittedly the disputed lands.

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* 2 W. R., 258.

The special respondent, instead of appealing the case to this Court, has brought the present suit which, as already stated, was instituted in Falgoon 1276; and therefore his cause of action remaining intact, namely the ouster on the 1st Bysack 1260, and the suit being brought in Falgoon 1276, it is undoubtedly, however hard the case may be, barred by the statute of limitation. We therefore, reverse the decisions of both the Lower Courts and decree the appeal with all costs.

The 15th March 1872.

Present:

The Hon'ble A. G. Macpherson and Dwarkanath Mitter, *Judges.*

Limitation—Suits for Shares in Joint Family Property—Act XIV of 1859 s. 1 cl. 13

Special Appeal from the 24-Pergunnahs.

Prosunnno Coomar Mookerjee and others (Defendants) *Appellants,*

versus

Shama Churn Mookerjee (Plaintiff) *Respondent.*

Baboo Mohesh Chunder Chowdhry for Appellants.

Baboo Shama Churn Mitter for Respondent.

In ruling that a suit to enforce the right to a share in certain property on the ground that it is joint family-property is barred under Act XIV of 1859 Section 1 Clause 13, it is not enough to find that the plaintiff had occasionally received money from the defendant, and that his sister continued to live in what had originally been the joint family dwelling-house, but there must be a distinct finding as to what payments (if any) have been made to the plaintiff within 12 years next prior to the date of the institution of the suit, by the person in possession or management of the property on account of the plaintiff's alleged share.

Macpherson, J. (*Dwarkanath Mitter, J.*, concurring).—One of the principal grounds of defence in this suit was limitation. The Lower Courts have found that the suit is not barred, the Subordinate Judge being of opinion that the plaintiff had occasionally received money from the defendant, and that his sister continued to live in what had originally been the joint family dwelling-house.

This is a suit to enforce the right to a share in certain property on the ground that it is joint family property. Such a suit must, under Clause 13 Section 1 Act XIV of 1859, be brought within twelve years from the death of the person from whom the property alleged to be joint is said to have descended, or from the date of the last payment to the plaintiff, or any person through whom he claims, by the person in the possession or management of such property or estate on account of such alleged share. The property alleged to be joint in this suit is said to have descended from Tarachand, and Tarachand died some fifty or sixty years ago. The plaintiff's case therefore must rest upon payments to the plaintiff, or some one through whom he claims, made on account of his alleged share by the person in the possession or management of the property within 12 years from the institution of the suit.

It is wholly denied on behalf of the defendants that any such payments have been made, and the finding of the Subordinate Judge is as follows: "It is manifest that Doorgamonee, the sister of the plaintiff, lives in the family dwelling-house of Tarachand, and that the plaintiff occasionally received money from the defendants. The witness says that the plaintiff received the said money as alms and not as the profit of a shareholder. It appears at first sight that the said assertions of the witnesses are invented for the benefit of the defendants, his brothers-in-law. In fact, by this it is manifest that the plaintiff resided in the family dwelling-house of Tarachand through his sister, and received money from the defendant as profit of the estate."

This finding is very vague, and does not indicate that any of the payments relied on were payments made within twelve years. And it is simply absurd to say that the plaintiff resided in the family dwelling-house through his sister, or by reason of the fact of his sister having lived there.

The case will be remanded to the Lower Appellate Court, which must find expressly and distinctly what payments (if any) have been made to the plaintiff within the 12 years next prior to the date of the institution of this suit by the person in possession or management of the property on account of the plaintiff's alleged share. It must be borne in mind that payments made to the plaintiff are not necessary payments made on account of his alleged share, and the Court, if it finds that any payments were made, must find on account of what share, in what property, and by whom those payments were made. It is the more necessary to consider in respect of what property any payments which may be proved were made, because there are two classes of property which are the subject of the present suit. The one is property which originally belonged to Tarachand, and the other is property which does not form part of the original property of Tarachand, but which has been subsequently acquired. If the Lower Appellate Court shall find as a fact that any payments have really been made to the plaintiff on account of his share in any joint property, the Court must consider carefully what class of property is affected by the payment proved, bearing in mind the separation in residence which admittedly has taken place between the plaintiff and the others. Finally, the Court must, with reference to the admitted long separation in residence between the plaintiff and the defendants (other than the son of the nephew, the plaintiff), decide to what extent the plaintiff is now joint in as regards these defendants. Costs will follow the result of the remand.

The 15th March 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Suit for Rent by defined Share-holder—Proof of separate Collection and Payment of Rent—Notice—Act X of 1859 *s.* 13.

Case No. 682 of 1871 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Dacca, dated the 21st March 1871, *affirming a decision of the Deputy Collector of Manickgunge, dated the 28th November* 1870.

Salehoonissa Khatoon (Defendant) *Appellant,*

versus

Mohesh Chunder Roy and others (Plaintiffs) *Respondents.*

Baboos Sreenath Doss and *Chunder Madhub Ghose* for Appellant.

Baboos Kalee Mohun Doss, Doorga Mohun Doss, and *Nullit Chunder Sen* for Respondents.

A suit for rent by the 15 annas 6 pie shareholders was held to be maintainable where there was no dispute as to the extent of plaintiffs' share, but they set forth distinctly in their plaint the extent of their share and that of their co-sharer, where the co-sharer was made a defendant and no objection made by him as to the extent of their respective shares, nor did the ryot defendant contend in his written statement that the plaintiffs' share was not what it was said to be, namely 15 annas 6 pie, and where there was a clear finding by the first Court that the 6 pie shareholder had collected and enjoyed the rents of his share separately and that the ryot defendant had paid the rents separately for this 6 pie share.

Where a decree of 1848 gave plaintiffs the right to assess and to receive the rents for each year according to the assessment made for that particular year, a notice under Section 13 Act X of 1859 was held not necessary when the rent found assessable for the years for which rent was claimed varied from what was found assessable in 1848.

Kemp, J.—The defendant is the special appellant in this case. It appears that the special respondents, so far back as in the year 1848, obtained a decree entitling them to assess the lands held by the special appellant. The plaintiffs are in this position that, although they are admittedly the zemindars and the defendant admittedly their tenant, the latter has been able to keep his landlords at arm's length for 23 years, and has not during all that time paid one pice of rent. The plaintiffs in a former suit in which they attempted to recover the rents due according to the assessment which had been made upon the decree of the Civil Court, were foiled because their case was barred under the statute of limitation. Their present suit is brought for the rents of the years 1272, 1273, and 1274. They state that they are the 15 annas 6 pie shareholders and that the other 6 pie shareholder not having joined with them in the suit, has been made a co-defendant with the tenants.

The first Court, in a very careful decision on the objection raised by the defendant that this suit on the part of the plaintiffs who were fractional shareholders would not lie as the defendant had not paid them rent separately and the plaintiffs had not collected their rents separately for their 15 annas 6 pie share, came to this conclusion, namely, that there were proceedings on the record which showed that the 6 pie share of the co-defendant is distinct, and that this co-defendant did recover their rents separately, and therefore the objection as to the frame of the suit was overruled by the first Court. The Deputy Collector then proceeds to comment upon the hardship of the plaintiff's position, in which remarks we entirely concur, and he then goes on to say that to do justice to the plaintiffs it is left to the Court by the best means in its power to determine what amount of rents the defendants received and enjoyed during the three years, namely, the three years for which rent is claimed. Accordingly, an Ameen was deputed by the Deputy Collector to report what amount of land out of the entire area of the tenure was cultivated during each of the three years. This investigation was made in the presence of both parties and the result was embodied in a statement annexed to the *roedad* of the Ameen. Objections as usual were raised by the defendant with reference to the enquiry of the Ameen, and one of them is strangely inconsistent with the theory set up by the pleader for the defendant in this Court, namely, that lands other than the lands of the defendant's tenure had been measured by the Ameen and included as belonging to the tenure of the defendant. The objections were considered by the first Court to be groundless. The Deputy Collector says that the Ameen for the purposes of this suit had enquired and ascertained what amount of the decreed area was cultivated during each year, the quality of the land, and the different sorts and different rates, and it was found on these calculations that for the year 1272 Rs. 1,561, 1 anna 6 pie, for the year 1273 Rs. 1,558, 5 annas, and for the year 1274 Rs. 1,555-7-9, were due by the defendant, or a total of Rs. 4,674-14-3. From this sum the 6 pie share of the co-defendant was deducted and also a 20 per cent. allowance as ***malikana*** and ***surunjamee*** as per order of the Civil Court of 1858, and the total amount decreed to the plaintiffs was Rs. 3,623, 1 anna, 5 pie.

On appeal, this decision was upheld by the Judge of Dacca, Mr. Abercrombie. He also overruled the objections as to the frame of the suit; and with reference to the defendant's objections to the Ameen's proceedings, he says that he sees no fair reason for doubting their correctness or supposing that they were not honestly conducted. The appeal was therefore dismissed by him.

Three grounds are taken before us in special appeal; the first ground being that, as there is no proof that the plaintiffs have as 15 annas 6 pie shareholders ever received the rent of their share separately from the defendant, or that the defendant ever paid rent in separate proportion to the separate shareholders, the suit under various precedents quoted by the special appellant's pleader should have been dismissed. There are also precedents the other way, which have been brought to our notice on the other side, but this case is not at all on all fours with any of those cases. In this case there is no dispute as to the extent of the plaintiff's share; he sets forth his share distinctly in his plaint, and he also defines the extent of the share of his co-sharer. That co-sharer was made a defendant, and no objection is made by him to the statements of the plaintiffs as to the extent of their respective shares, nor does the defendant, the ryot, contend in his written statement that the plaintiffs' share is not what it is said to be, namely, 15 annas 6 pie, and then there is a clear finding by the first Court that the 6 pie shareholder has collected and enjoyed the rents of his share separately and that the defendant has paid the rent separately for this 6 pie share. Therefore, the present case is clearly one not governed by any of the decisions brought to our notice. We, therefore, concur with both the Courts below in overruling this objection.

The next objection is that as in 1848 the terms of the decree were that the plaintiffs shall, at all times, be entitled to measure and assess the lands of the defendant, and that whatever was found to be the proper assessment for each year they were to recover from the defendant minus 20 per cent. for *surunjamee* and *malikana* ; therefore, as the rent which has now been found to be assessable for the years 1272, 1273, and 1274 varies from what was found assessable in 1848, a notice was requisite under Section 13 of Act X of 1859.

We think, that there is no force whatever in this objection. In the first place, it was not taken in the Courts below, and in the next place it is quite clear that the decree of 1848 gives the plaintiffs the right not disputed hitherto, to assess and to receive the rent for each year according to the assessment made for that particular year.

The next ground attacks the Ameen's investigation, and the pith of it is that the Ameen, instead of ascertaining what lands were cultivated in the years 1272, 1273, and 1274, and then classifying these lands and after such classification applying to the different sorts of lands the rates fixed by the decree and the former Ameen, has contented himself with measuring off certain *puteet* lands and *nil* lands, and without any attempt at classifying the remaining cultivated lands, has simply adopted the rates of the former Ameen and the quantities of land of each quality assumed by that officer on a former occasion during an enquiry which had no reference to the years in dispute. This objection appears at first sight a plausible one ; but when the proceedings of the Ameen are carefully considered, it really amounts to nothing. The Ameen went to the Mofussil ; he first ascertained what quantity of lands were *puteet* during the years in suit ; there was a difference of opinion in the matter, the plaintiffs stating that a certain quantity was *puteet*, and the defendant contending for a much larger quantity. Evidence was adduced on both sides which, as often happens, supported the respective allegations of the parties, and the Ameen not satisfied with this, took the evidence of disinterested parties and found that the statement of the plaintiffs with reference to the *puteet* lands was correct. The Ameen then having found what lands were *puteet*, proceeded to draw up a tabular statement in which the cultivated lands for each of the years 1272, 1273, and 1274 are entered separately. He also gives a *kussumwaree* statement of these lands, and he then throws upon each description of land the rates already approved of by the Court. We think that, in doing this, the Ameen carried out the orders of the Court, and that both Courts were perfectly justified in coming to the opinion they have expressed, that the objections of the defendant to the Ameen's proceedings were not worthy of notice.

We think that there has been a fair enquiry in the matter, and looking to the conduct of the defendants in withholding the rent from the plaintiffs in the way they have done, we certainly are not disposed to stretch a point in their favor. On the whole case, we think that the decision of the Courts below ought to be affirmed, and we dismiss the special appeal with costs.

The 21st March 1872.

Present :

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Sale in Execution of Decree—Certificate (Effect of)—Rights and Interests of Father and Minor Sons—Rights of Purchaser.

Case No. 829 of 1871.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 24th March 1871, modifying a decision of the Subordinate Judge of that District, dated the 17th August 1870.

Sirdar Dyal Singh (Plaintiff) *Appellant,*

versus

Baboo Ram Buddun Singh and others (Defendants) *Respondents.*

Baboos Kalee Mohun Doss and *Romesh Chunder Mitter* for Appellant.

Baboos Mohesh Chunder Chowdhry and *Chunder Madhub Ghose* for Respondents.

A sale certificate which in express terms passes to the purchaser the rights and interests of a father, does not necessarily transfer to him the interests of his minor sons. But if the minor sons have benefited to any extent by the decree or by the sale in execution of that decree, to that extent, the purchaser has an equitable claim against the minor sons.

Markby, J.—This suit was brought by Sirdar Dyal Singh to recover one Saham out of a property divided into five Sahames. The claim of the plaintiff was founded upon a sale in execution of decrees for rent given in the Collector's Court under Act X of 1859. The decrees were dated 23rd September 1862 and the 9th June 1868, and the sale took place on the 1st December 1864. That share is now held by a father and three sons, who are all defendants in this suit. It appears that the property, or portions of the property, the share of which is now claimed by the plaintiff, was mortgaged to the plaintiff or to person through whom he claims first for Rs. 35,000 on the 19th March 1854, then for Rs. 10,000 on the 25th March 1854, and then for Rs. 4,500 on some date in October 1854. The defendant Ram Buddun, the father of the other defendants, was a party to all the three mortgages, and it does not seem to be disputed, at any rate there is no doubt, that the sons, the other defendants, would take their interests in the property subject to their due proportion of the incumbrances thus created by their father. These mortgages were in the nature of usufructuary mortgages, although the creation of them is somewhat complicated by the attempt made to evade the usury laws then in force; but in contemplation of law, the mortgagee was in possession under them as usufructuary mortgagee. In 1860, for what purpose is not very clearly stated, Ram Buddun, in the name of his servant, but undoubtedly for his own benefit, took a lease of the mortgaged property from the mortgagee, and he became by a separate instrument surety for the payment of the rent. Subsequently in September 1862, and again in June 1868, decrees were obtained against Ram Buddun for instalments of rents for which he had become liable, nominally as surety, but really on his own account. It was at a sale in execution of these decrees that the plaintiff purchased.

On the 10th February 1868, that is, after the first of the last mentioned decrees had been obtained, but before the second decree, Ram Buddun commenced a suit to recover possession of the property, on the ground that the incumbrances had been paid off by the usufruct, and the payment of the rent; and eventually in July 1866, he obtained a final decree for possession in his favor, and he and his sons are now in possession under that decree. It may be observed that this suit, which I will call the redemption suit, commenced *before* the sale under which the plaintiff claimed, but the final decree was not given until *after* it.

The first Court gave the plaintiff in this suit a decree. The second Court has reversed that decision on grounds which I shall notice presently.

Now the plaintiff, coming up here in appeal in the first instance, sought to put himself in a position which would avoid the discussion of several questions raised before us by saying that the sale at which he purchased, and on which he now founds his claim to recover, was a sale under Act XI of 1859 and Act X of 1859, and that therefore he had nothing to do with any question relating to incumbrances, because under those laws he purchased the property clear of all such incumbrances. But that argument has been disposed of by the fact admitted in this case that this was not a sale of the tenure but of "the rights and interests of Ram Buddun;" and whatever interpretation we may put on these words, they will not enable the plaintiff to claim any benefit under the provisions of the law relating to a sale of a tenure for arrears of rent.

Having disposed of this question, we now come to the other questions which require consideration in this appeal. The *first* question to be considered is whether, as regards Ram Buddun's own share in the property which was vested in him at the date of the sale, that share passed to the plaintiff under the sale in execution of December 1864. It is said that it did not for two reasons: first, because there was an irregularity in the conduct of the sale; and, secondly, because there was no debt for which the property was liable to be sold. Now, looking to the time which has elapsed since the sale took place, and the fact that no objection was taken to the sale, or, if taken, was taken too late to be entertained, I doubt if we now ought to go into the question of irregularity; but even if we ought to go into that question, I do not think there is any such irregularity found to exist as would vitiate the sale. I do not understand the Judge of the Lower Appellate Court to find that there is any such irregularity as would vitiate the sale, but under the circumstance she thinks that there is some reason in equity why the plaintiff should not have the advantage of the sale. Now, as regards Ram Buddun alone, I am at a loss to see what equitable claim he has to deprive the plaintiff of the advantage of his purchase. Ram Buddun managed his own affairs in the way he thought most proper, and there is not a suggestion of any improper dealing by the plaintiff in regard to Ram Buddun. I think that Ram Buddun should stand or fall by his own strict rights. His interests having been sold, and they having been paid for at a considerable price by the plaintiff, I see no ground why the plaintiff should not have the advantage of his purchase.

As to the other objection, *viz.* that there was no debt outstanding at the time of the sale, the Judge does not find distinctly that there was no such debt. He only says here again that the defendants generally have some equitable right which defeats the plaintiff's claim. Now, not only would the remark I have just made as to Ram Buddun's equity apply here also, but it is clear that this is an objection which could not be taken by Ram Buddun consistently with equity, because he is now in possession under the decree in the redemption suit; and as I shall show when I come to deal with that subject more at length, the decree in the redemption suit was based on the hypothesis that the decree in the rent suit was a good and a valid decree. It does not, therefore, now lie in Ram Buddun's mouth to say that that decree cannot be enforced against him. Therefore, as regards Ram Buddun's own share in the property, such as it was at time of the sale, I do not see why the plaintiff should not have a decree for possession.

Then we come to the case of the minors. I think it is clear, from the judgment of the Lower Appellate Court, that it has mixed up the case of Ram Buddun and that of the minors. They appear to me to stand on very different grounds. It is contended, in the first place, that the sale of Ram Buddun's rights and interests in execution of the decree passed, not only the interests of Ram Buddun, but the whole interest of the family It is admitted that the sons took a vested right in the property at their birth, but it is said that, as the debt for which the decree was passed was a charge on the estate, the execution-sale passed to the purchaser the rights and interests both of the father and the sons, because it was a debt which the sons were bound to discharge. It is said that this was the same thing as if Ram Buddun had made a private alienation of the property to meet the necessary expenses and debts of the family which both he and the sons were bound to discharge. These arguments no doubt are well-founded in some respects, but the real question which we have to consider is the true construction of the sale proceeding. It may well be that a father has a right to deal to some extent with the interests of his minor sons, as well as his own, but it does not follow from that, that a conveyance by him of his own rights must necessarily pass the rights of his son also. So it may be that, had the decree-holder in this case sought to bring to sale not only the rights and interests of Ram Buddun, but the whole interests of the family, the sale would have been a good sale of the whole property. But what we have to consider is the true construction of the sale proceedings; and I am of opinion that under it the rights and interests of the father only passed to the purchaser, and I see no reason to hold, nor has any case been quoted to show that we ought to hold, that, when a sale certificate in express terms passes to the purchaser the rights and interests of the father, it transfers to him not the interests of the father alone, but also of his minor sons.

There arises then the further question as to whether, having put this construction on the sale proceeding, we shall at once dismiss the plaintiff's suit as against the minors. Under ordinary circumstances, no doubt, we should have done so, but in this case to some extent the minors have had the benefit of the decree for rent of 1862 and of the sale in execution of that decree. I do not mean to say that the effect of this is to alter the construction of the sale certificate, but it does, I think, raise in favor of the plaintiff a foundation for an equitable claim against the minors which he has a right to insist on before having his suit totally dismissed as against them.

It appears that the suit of 1863 to which I have already referred was a suit for possession of the mortgaged properties brought by Ram Buddun, based on the allegation that the mortgages had been satisfied. The Lower Courts held that they had been so. The case came up in special appeal, and it was still contended by the appellant that the mortgage-debts had not been satisfied. Mr. Justice Bayley deals with this as the principal objection, and speaking of the decree passed in the first of the rent suits, said:—"I hold that a decree which professes to "transfer a certain sum from the judgment-"debtor to the judgment-creditor does do "so, unless the judgment-creditor can show "that he could not realise from want of "assets in the debtor, or for other reasons. "In this case, the defendant does not attempt "to show this." In this view, this Court in special appeal upheld the finding of the Lower Appellate Court that the mortgage-debts had been paid, because it assumed that this decree had been satisfied. The fact, however, now turns out to be that the decree had not then been satisfied, and the assumption of the Court therefore, though perfectly justifiable under the circumstances, was not an assumption founded in truth ; but nevertheless the defendants have had the advantage of that assumption, for it was through that assumption that they obtained a final decree for possession, and therefore it is through that assumption that the defendants now hold their shares. If that assumption had not been made, it might be that money would still be found to be due under the mortgages, and the infants would still be liable, and the benefit of the decree for possession in the redemption suit of 1868 would be taken away from them. For these reasons, it seems to me that, if the minors claim the benefit of that decree for possession, if they claim to assert that the whole sum due under the three mortgages has been paid off, and that under this decree they are entitled to hold possession of the property clear of all incumbrances, then they are bound to make the assumption on which that decree was based a true assumption, that is, I think they are bound, so far as that decree of September 1862 had not been satisfied, to pay it off.

As regards the eldest of the three sons, therefore, who was alive when the sale in execution took place, there must be a declaration that his interest did not pass, but there must be an enquiry as to what sum still remains unpaid under the decree for rent of 1862, and what proportion of that sum is due from this son, and this he will have to pay. This disposes of the case as regards Ram Buddun and his eldest son, except on one point which I forgot to notice in its proper place.

It was contended both as regards Ram Buddun and all his sons that the decree of this Court in the redemption suit, dated the 31st July 1866, giving possession of the property to the plaintiff in that case, was final and conclusive: and that the plaintiff could not go behind it and rely on a title which he obtained in December 1864, that is, prior to the final decree in the redemption suit and pending the litigation ; and in support of this position, a decision of Mr. Justice Bayley and myself reported in V Bengal Law Reports,* but much more intelligibly in the Weekly Reporter,† is relied on. That case merely held that the decree was conclusive, until it was set aside, as between parties to the decree in respect of any title which they claimed prior to the decree, but I do not think that that case has any application whatever to the present, which is one of very peculiar circumstances. In this case, during the pendency of the litigation in the redemption suit, certain events happened *within the knowledge* of both the parties. Either party might have brought these events to the knowledge of the Court, but did not choose to do so. On the contrary, they allowed the Court to proceed on a wrong assumption of fact ; and whatever may have been the motives which led to this concealment, I think we must now take it that there was a tacit agreement to conduct that litigation as if the events in question, namely the sale in execution, and the purchase by the plaintiff, had not happened. It is entirely different from the case reported in V Bengal Law Reports ; there also certain events happened during the pendency of the suit ; but they were brought before the Court ; and in consideration of them, parties were added to the suit, after which the suit stood just as if the events had happened prior to the commencement of the suit. This, therefore, disposes of the case of Ram Buddun and of the eldest son.

As regards the youngest son, it is admitted that, at the time of the sale, he was not born. Therefore the property being vested in Ram Buddun and the sons who were born at the time, he can raise no objection to the sale ; but as he gets the benefit of the decree in the redemption suit, he will have to contribute to pay off the first rent decree.

There remains then the second son, and our judgment in his case will depend upon this further enquiry. The first Court held that he was *not born* at the time of the sale. The defendants in dissatisfaction of this finding appealed to the Lower Appellate Court, but that ground of appeal has not been disposed of by the Lower Appellate Court. The case must, therefore, go back to the Judge to state whether or no he confirms the finding of the first Court that the second son Sookdeo was not born at the time of sale. *If* it is found that *he was born*, the judgment which has been given as regards the eldest son equally applies to him. *If*, on the contrary, it is found that he was *not born* at the time, his case falls within the category of that of the youngest son. The finding of the Judge will have to be sent up to this Court.

There has been a further question raised as to whether or not it is equitable that the plaintiff should recover from the defendants the sums of Government revenue which he paid in excess of the share which would fall to his lot in respect of that portion of the property which he recovers. I think it is impossible for us to deal with that question in this suit, and that it will be sufficient for us to say that we reserve to the plaintiff any right which he can establish in respect of any such excess which he may have paid.

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* p. 321.

† 13 W. R., 157.

As to the costs, I think, looking to the result as regards each party to this suit, the plaintiff having got less than what he claimed, and the defendants having put forward certain claims which they could not establish, that the ends of justice require that each party should bear their own costs of this litigation in all the Courts. A final decree will be drawn up when the Judge has decided whether or no the second son was alive at the time of the execution-sale, and when it has been ascertained what is due under the decree of 1862. The case is adjourned for three months for the purpose of making these enquiries, and we shall expect diligence to be shown, so that the suit may then be ready for final determination.

Bayley, J.—I concur in this order.

The 14th March 1872.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Review of Judgment—Discovery of new Matter (Proof of).

Case No. 920 of 1871.

Special Appeal from a decision passed by the Deputy Commissioner of Maunbhoom, dated the 9th May 1871, affirming a decision of the Moonsiff of Chatna, dated the 25th November 1869.

Nudar Chand Bhooya (one of the Defendants) *Appellants,*

versus

Reedoy Mundul (Plaintiff) *Respondent.*

Baboo Grish Chunder Ghose for Appellants.

Baboo Mohendro Lall Mitter for Respondent.

A Judge admitting a review of judgment on the ground of the discovery of new evidence must first satisfy himself on legal evidence (not upon an unverified petition nor even perhaps upon a simple affidavit) that the new matter was not known to the applicant or could not be adduced by him when the decree was passed.

Glover, J.—THE substantial question for decision in this special appeal is whether the Deputy Commissioner has acted according to law in admitting a review of judgment.

The circumstances are as follows. Plaintiff sued for possession of land leased to him by Harradhun Doss in the year 1276 B. S., and of which the defendants Suroop Bhooya and others kept him out of possession.

These defendants claimed to hold of the same Huradhun Doss on a lease granted in 1261 B. S., and denied the power of the zemindar to oust them, they having by a tenancy of more than twelve years obtained a right of occupancy.

The zemindar who was made what is called a *pro formâ* defendant supported the plaintiff's case; the lease to the defendants was for four years only, on the expiry of which the land was given to the plaintiff.

The Moonsiff decreed the suit in favor of the plaintiff. But the Deputy Commissioner on appeal reversed that decision holding that the pottah of defendant was genuine and that their possession for more than twelve years was clearly proved.

An application was made for a review of this judgment, and the Deputy Commissioner (not the officer who had passed the decision on appeal) admitted it on the ground that the new evidence filed by the plaintiff proved that the defendants could not have been as they alleged in possession of the land in 1260-62, and that their story of long uninterrupted possession from that year 1261 was false. The Deputy Commissioner, therefore, reversed the order of his predecessor and confirmed the original decision of the Moonsiff.

Now, if the Deputy Commissioner admitted the review on grounds that are good in law, this Court would have no jurisdiction to interfere, or to say that the review ought not to have been granted.

The petitioner for review, Reedoy Mundul, based his application on the discovery of new evidence, which he said was on the record of an Act IV of 1840 case, and he produced an authenticated list of the documents then filed, to prove that these documents were on the Act IV record. These documents were produced at the hearing, and, as before mentioned, decided the case in favor of the applicant for review.

The rule of law we take to be that a Judge ought not to admit a review for the purpose of receiving fresh evidence in a suit, until he is satisfied by legal evidence that the new matter was not known to the applicant or could not be adduced by him when the decree was passed. The point has been ruled in this sense in Dwarknath Chowdhry *vs.* Kishen Lall Chowdhry, Marshall, 558; Shumseer Ali Khan *vs.* Ram Chunder Goopto, II Weekly Reporter, 174; Nuffur Chand Pal *vs.* A. D. Sandes, X Weekly Reporter, 432; Khelat Chunder Ghose *vs.* Pran Kristo Roy (which expressly followed the former ruling) XII Weekly Reporter, 461; and Omrao Thakoor *vs.* Gocool Mundul, XVI Weekly Reporter, 7. We may, therefore, lay it down as settled law that a Judge admitting a review on the ground of the discovery of new evidence, must first satisfy himself, on legal evidence that the applicant has brought himself within the Section, in other words, must insist on the fact of the applicant's ignorance or inability being strictly proved.

Now in this case this proof is altogether wanting, indeed the Deputy Commissioner does not seem to have asked for it. The plaintiff filed a simple unverified petition, and on it the Judge acted. No attempt was made to prove that the plaintiff was previously unaware of the existence of certain documents on the record of the Act IV suit, or that being aware he was unable to procure them. He did not even give the pledge of his own deposition. It may be doubted indeed whether a simple affidavit would have been sufficient, but the plaintiff gave no evidence at all on the points required. And that being so, we think that no application on his part for a review of judgment could have been legally obtained.

It is not necessary for us to comment on the facts of the petitioner's application, but it is open to remark that if the plaintiff knew of the Act IV proceeding at all, there was no apparent reason why he should have been ignorant of these particular documents, and also (a point, which seems to have escaped the Deputy Commissioner) that Reedoy Mundul was himself a defendant in the Act IV suit, and, being in that position, would have found it hard to explain his ignorance of the new matter he wished to bring forward, or his inability to adduce it when the suit was originally tried.

The pleader for the special respondents endeavoured to show that the review was not admitted by the Deputy Commissioner on the ground of new evidence alone, but on other grounds also, which would bring it within the meaning of the words "good and sufficient reason" of Section 376 of the Code of Civil Procedure, in which case there would be no appeal against the order admitting the review. It seems clear to us, however, that the Deputy Commissioner had no other reason for admitting the application than this so-called new evidence. He says—"Plaintiff has applied for a review of judg-"ment urging that he had procured fresh "documents that bore on the case, and that "these would prove that the pottah filed "by the defendant was a forgery, and that "the *kabooleut* given by him to the *pro-"formâ* defendant in 1271 for four years was "a true document,"—in other words, that the pottah and *kabooleut* in question on which the original judgment was in great part based would be shown by the new evidence to be then filed to support the plaintiff's case instead of damaging it.

It is not contended that the Deputy Commissioner had begun to take a different view of the importance of this pottah and *kabooleut* irrespective of the new evidence sought to be filed, or that he had the least intention of reviewing the judgment of his predecessor on any other ground than that of new evidence.

We are, therefore, of opinion that this appeal should be allowed, and that the judgment of the Deputy Commissioner passed after the admission of the review should be set aside. As we take this view of the case, there is no necessity for our going into the question as to how far the new evidence was binding on the defendants.

The special respondent will pay all costs.

The 21st March 1872.

Present:

Sir James W. Colvile, Lord Justice James, Sir Montague E. Smith, and Sir Robert P. Collier.

Inheritance — Adoption — Decree — Execution — Representative of a deceased Person — Sale (under Act XI of 1859) — Decree (inter partes and in rem).

*On Appeal from the High Court at Calcutta.**

The General Manager of the Raj Durbungah, under the Court of Wards,

versus

Maharajah Coomar Ramaput Singh.

Appellant brought a suit under Act X of 1859 for rent due by a deceased person against his widow as widow and guardian of her infant son, but obtained a decree against the widow only as sole heiress and representative on the ground that the son having been adopted into another family was not the heir of his father. Difficulties having been interposed in the way of executing that decree, he brought a suit in the Civil Court and obtained a decree affirmed by the High Court, the result of which was to affirm that the son was the hear of his natural father. In execution of the Collector's decree, the estate of the deceased was sold under Act XI of 1859, the certificate of sale making a distinct reference to the Civil Court's decree. HELD that the estate of the deceased was sold in execution for his debts, and that the interest of his widow, the registered proprietor and ostensible owner of the estate, as well as of his son, if he had any interest, was bound by that decree; that the decree obtained by appellant in the Civil Courts was a mere decree *inter partes* and not a decree *in rem*; and that, as between appellant and respondent (who had obtained a decree in the Civil Court against the deceased in his lifetime, but now only sought to enforce it against the widow and the infant son, and to impeach the sale in execution of appellant's decree), the appellant was entitled to, and could not be deprived of, the benefit which had resulted to him from his greater diligence in enforcing his demand.

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* From the judgment of Kemp and Glover, JJ., dated 28th May 1869.

THESE proceedings certainly illustrate what was said by Mr. Doyne, and what has been often stated before, that the difficulties of a litigant in India begin when he has obtained a decree. When, however, the actual question which is at issue between the appellant and the respondent on this appeal is eliminated from the rest of the record, it does not appear to their Lordships to present any very great difficulty.

The appellant and the respondent had each, it must be assumed, a good claim against the estate of the deceased Gourpershad. The respondent had obtained a decree according to the practice then existing in the Civil Court in the lifetime of Gourpershad. The appellant, pursuing his remedy for rent under Act X of 1859 in the Collector's Court, had obtained a decree for the arrears of rent in respect of which he sued against the widow as the widow of the deceased and the guardian of her infant son. It was a suit brought against those who were supposed to be the representatives of the debtor, Gourpershad. In that suit the case set up by the defendants was that the infant was not the heir of his father, that he had been adopted into another family, and that consequently the widow was the sole heiress and representative. The decree was against the widow in that capacity. It declared that the son was not liable, and ended with a declaration, which clearly pointed to the realization of the demand out of the estates of the deceased Gourpershad, and showed that the decree was made against the person supposed to be the heir and representative of Gourpershad. Other difficulties being interposed in the way of executing that decree, the respondent thought it necessary to go to the Zillah Court in order to get rid of certain deeds as well as of the alleged ***kritima*** adoption of Hurpersad, the son, and he succeeded in obtaining a decree, which was afterwards affirmed by the High Court, the result of which may be taken to be to affirm that Hurpersad was the heir of his natural father. The execution of the Collector's decree had in the meantime been suspended. When the decree of the Civil Court became final, an intimation was sent to the Collector that the stop-order which had been put upon the execution should be removed, and that the execution might go on. Execution of that decree was accordingly had under the conjoint provisions of Act X and Act XI of 1859, and perhaps it is owing to the operation of those statutes, and in particular to the fact that the execution took place under Act XI of 1859 by putting up the property for sale in the same way that an estate would be sold for arrears of revenue, and did not proceed under the ordinary Civil Code Act VIII of 1859, that some of the confusion and difficulties which have taken place in this case have arisen. However that may be, the estates in question were sold under the Collector's order, and purchased by the judgment-creditor. That took place in November 1867. In the meantime certain proceedings had taken place in the suit of the respondent. The respondent had originally applied for execution of his decree obtained in the lifetime of Gourpershad against the widow and the infant son. He was met by the same allegation that had been made in the appellant's suit, that Hurpersad had no interest in his father's estate, and a miscellaneous order was made, which held that Hurpersad was not liable for his father's debt, and treated the widow as the sole representative. Afterwards, the respondent attempted to get the benefit of the decree which had been obtained by the appellant, and to proceed against Hurpersad, and on that occasion the appellant intervened as an objector. The Judge disallowed the objection, but, at the same time, held that the former execution proceedings were invalid, and directed them to be struck off the file. The respondent then commenced other proceedings against Hurpersad, and although there was no formal discharge of the miscellaneous order, the Judge appears to have considered that as swept away with the former execution proceedings and no longer operative, and directed a sale in execution, which, if there were nothing else in the way of it, would probably have been regular against Hurpersad as the heir of his father. However, when the respondent was proceeding to carry out that order, the appellant came in and objected that the estates had already been sold under his decree, and had been purchased by him, and that in fact they could not be any longer sold as the estates of Hurpersad. That objection prevailed, and the result was that the respondent's only remedy was to bring the regular suit out of which this appeal has arisen.

From the above statement it is clear that, unless there be some fatal irregularity in the mode in which the decree of the appellant was obtained or drawn, or some fatal irregularity in the mode in which that decree has been prosecuted, the estates have been regularly sold, and that the suit of the respondent, seeking to set aside the order for sale and to get the benefit of his own execution as against Hurpersad as the heir of his father, must fail.

Their Lordships are of opinion that no case has been made upon which they can say that there has been that irregularity in the proceedings before the Collector and the sale which took place, which would justify them in setting aside the sale, and upon that point they must differ from the Judges of the High Court. The proceedings took place under Act XI of 1859, and that Act appears to contemplate that the estate should be put up for sale, and that the person whose interest should be nominally sold should be the registered proprietor. In this case, so far as the proceedings show, it appears that the widow was the registered proprietor. But the case does not rest there, because in the certificate of sale there is a distinct reference to the decree obtained by the appellant from the Zillah Court, and therefore the whole proceeding, if fairly looked at, amounts to this,—that the estate of Gourpershad was sold under that decree in execution for his debt, and that the interest of his widow the registered proprietor and ostensible owner of the estate, and also the interest of his son, if he had any interest, was bound by that decree. If that be so, the question arises whether the respondent, the plaintiff in the suit below, has any ground upon which he can come in and impeach the sale? It appears to their Lordships that he can claim only what interest remained in Hurpersad, and that substantially the proceedings would be a bar to any claim on the part of Hurpersad. It is unnecessary to consider whether in any question between the respondent and Hurpersad, who in this suit came in and continued to dispute his heirship, the decree in the suit which had been obtained by the appellant would be any binding adjudication between the respondent and Hurpersad. It appears to their Lordships clearly to be a mere decree *inter partes* and that there is no ground for giving it the effect of a decree *in rem*, which is the effect which one passage in the judgment of the High Court appears to attribute to it. But without going into that, it seems sufficient to their Lordships for the determination of this appeal to say that there was in their judgment no substantial irregularity in the sale before the Collector, and that therefore, as between the appellant and respondent, the appellant is entitled to and cannot be deprived of the benefit which has resulted to him from his greater diligence in enforcing his demand.

Their Lordships also desire to add that they are unable to see any substantial distinction between this case and that reported p. 614, *Marshall*. They entirely agree in the principles expressed by Chief Justice Peacock in that case, and think that they govern the present case.

The result, therefore, must be that their Lordships will humbly recommend to Her Majesty that this appeal be allowed, the judgment of the High Court reversed, and the judgment of the Lower Court affirmed. The costs of the appeal will, of course, follow the result, and the appellant will be entitled to the costs of the appeal in the Court below.

The 21st March 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Contribution—Government Revenue—Zemindar—Putneedar—Dur-putneedar.

Cases Nos. 264, 268, and 269 of 1871.

Regular Appeals from a decision passed by Subordinate Judge of Beerbhoom, dated the 24th August 1871.

Radha Madhub Dutt and others (Defendants) *Appellants,*

versus

Ram Runjun Chuckerbutty (Plaintiff) *Respondent.*

Baboos Unnoda Pershad Banerjee, Mohesh Chunder Chowdhry, and *Obhoy Churn Bose* for Appellants.

Baboo Mohinee Mohun Roy for Respondent.

HELD that plaintiff who held partly as zemindar, and partly as *dur-putneedar*, was entitled to look to his co-sharers in the zemindaree for contribution of Government revenue paid by him to save the entire estate from sale, and that the fact of his being a sharer in the *dur-putnee* could not bind him to recover his over-payments from the *putneedars.*

Glover, J.—We do not think it necessary to call upon the respondent's pleader in this case, having no doubt that the judgment of the Court below is right, and should be affirmed.

The suit was for contribution. The plaintiff is a shareholder in the estate (by inheritance) to the extent of 8 annas 13 gundahs 1 cowree 1 krant. He purchased from Monoruth Dey a further share of 8 annas 13 gundahs 1 cowree 1 krant in the zemindaree, and also a *dur-putnee* right belonging to the same individual of 6 gundahs 2 cowries 2 krants, so that he held in all 7 annas 6 gundahs 2 cowries 2 krants as zemindar, and 6 gundahs 2 cowries 2 krants as *dur-putneedar.*

To save the estate from sale, plaintiff, or to speak more correctly, the Court of Wards for him, for he was a minor at the time, paid the whole of the Government revenue from January 1865 to June 1868, or Rs. 8,039-14-8 in excess of the amount due upon his share, and he now claims to recover from the several defendants the amounts due on their respective shares.

There is no contest as to the amount of the plaintiff's share in the estate, nor substantially as to the interest held by the several defendants. The objection taken by the appellants is that the share for which they would ordinarily have been liable was leased out in *dur-putnee* and that the *dur-putneedars* were the parties who had covenanted to pay the Government revenue, and it was to them that the plaintiff was bound to look for his money ; and an argument against him was drawn from the fact that the plaintiff himself was the purchaser of a fractional share of the *dur-putnee*, and as such paid his quota of Government revenue direct to the Collector.

We think that the plaintiff is clearly entitled to look to his co-sharers in the zemindaree, and that the fact of his being a sharer in the *dur-putnee* cannot bind him to recover his over-payments from the *putneedars.* He was no party to the arrangement, and is not to suffer because the persons to whom the Bose defendants gave the under-tenure failed to act up to their engagement. There is no denial of the fact that the plaintiff has paid more than his share of the Government revenue, and thereby saved the entire estate from sale, or that the defendants are his co-sharers and as such liable to re-imburse the money. They cannot get rid of their responsibility by making over their shares in *putnee* to others.

The three appeals are dismissed with costs.

The 21st March 1872.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Act VIII of 1869, *B. C., s.* 52—*Payment into Court with Protest—Ejectment.*

No. 24 of 1872.

Miscellaneous Appeal from an order passed by the Judge of Hooghly, dated the 5th October 1871, *affirming an order of the Moonsiff of Sulkea, dated the* 14*th July* 1871.

Sreeshteedhur Dey (Decree-holder) *Appellant,*

versus

Doorga Narain Nag (Judgment-debtor) *Respondent.*

Baboos Mohendro Nath Seal and *Taruck Nath Dutt* for Appellant.

Baboos Oopendro Chunder Bose and *Bhowanee Churn Dutt* for Respondent.

Payment into Court by a judgment-debtor, within 15 days from the date of decree, of rent, interest, and costs, with a protest as to the sum improperly charged against him as interest, is a sufficient payment, under Section 52 Act VIII of 1869 B. C., to save him from liability to be ejected from his tenure.

Glover, J.—The special appellant in this case got a decree against Doorga Narain Nag for arrears of rent and for ejectment in consequence of those arrears. The decree was dated the 4th of May 1871, and the question we have to decide is what was the effect as regards the decree-holder of the deposit of rent, interests, and costs made by the judgment-debtor under Section 52 of Act VIII of 1869. The debtor paid the money into Court, making at the same time a protest in respect of a sum of 87 rupees which he said was improperly charged against him as interest. The Judge considered that the judgment-debtor ought not to have been saddled with interest inasmuch as the original decrees which were incorporated in the claim under Section 52 for *khas* possession of the land, did not specify that interest was to be given. But he thought also that, as the decretal order, however wrongly drawn up, did give interest, the decree-holder was justified in taking out execution for it unless the judgment-debtor could in the meantime obtain the amendment of the decree. For the rest, the Judge considered that the payment into Court by the judgment-debtor was a sufficient payment under Section 52 Act VIII of 1869 B. C., to prevent the decree-holder entering into *khas* possession of the land. This is the question upon which the principal argument has been addressed to us. There was a question of interest also, but the chief contention was as to the sufficiency of the payment made by the judgment-debtor. It was contended by the pleader for the special appellant that payments of this sort must be made absolutely without condition, and that the mere fact of there being a protest added by the depositor was sufficient to make the payment invalid so far as to protect the land held by the ryot.

In this case the petition of the judgment-debtor putting in the money is dated the 8th May 1871. On the 26th of the same month, the decree-holder applied for permission to take out the money deposited, and on the same day (apparently) an order on this petition was passed by the Deputy Collector to the effect that the decree-holder was only entitled to the principal which he might have, that the judgment-debtor was not bound to pay interest, and that his objection to paying it was a valid objection. The words of Section 52 are that "in all cases of such suits "for ejectment of a ryot or cancelment of a "lease the decree shall specify the amount of "the arrear, and if such amount together "with interest and costs of suit be paid into "Court within 15 days from the date of the "decree, execution shall be stayed." Now there is no question as to the ryot's payment into Court within 15 days from the date of the decree against him of the amount of his arrear together with costs and interest ; and his protest was absolutely ineffective against any claim made to the entire amount by the creditor ; nor could it prevent the whole of the money being paid away by the Collector if he thought proper to pay it. It seems to me, therefore, that the deposit of the arrear with interest and costs by the ryot was a substantial compliance with the provisions of the Section, and that this was not affected by the particular line of action taken afterwards by the Collector. The ryot did, as it seems to me, what the law required of him, and ought not to be prejudiced by any subsequent and possibly improper action on the part of the Revenue authorities.

A good deal was sought to be made of the similarity between cases of this kind and deposits made to prevent the sale of mortgaged property, and various precedents were quoted to show that such payments must be altogether unconditional, but I see no analogy between the two cases, for here we have the plain words of the law. It appears to me, therefore, that the tenant, by paying as he did the amount of his arrear with costs and interest into Court, protected himself from having his tenure taken away from him. And that being my opinion, it is unnecessary to go into the question of interest. Possibly in this respect, the Judge's decision that the Court was not able to go behind the decree of the Moonsiff although the latter was palpably wrong in granting interest on sums upon which no interest had been given in the original decree, was incorrect.

The appeal must be dismissed with costs.

Kemp, J.—I concur in this judgment. It is very clear from the petition of the decree-holder, dated the 26th of May 1871, that he himself admitted that the decrees which had been obtained against the special respondent, the ryot, did not carry interest inasmuch as in that petition he distinctly asked the Court to give him back these decrees in order to enable him to apply to the proper Court for an amendment of these decrees in the matter of interest. It is also further clear that in applying to execute the decree which he subsequently obtained, and in which interest was improperly awarded by the Moonsiff as admitted by the Judge inasmuch as the former decrees contained no provision to that effect, the decree-holder when called upon to appear on the day fixed was absent, and the Court which had to dispose of that application observes that, on referring to the decree, it appears that no interest was awarded in the original decree of the Collector's Court, and that the judgment-debtor very properly raised objections to that effect, and the petition was struck off the file for default.

Now the ryot, it is admitted, paid into Court the whole amount due under the decree including costs and interest. He raised an objection with reference to the small sum of 37 rupees on account of interest, and what he said was this, I pay in the money, namely Rs. 37 per interest, but I am not liable for the same under the decree inasmuch as that decree is silent as to any liability on the score of interest, and he asked for a determination of that question. That question was disposed of by the Collector on the 30th May 1871; in this way that the decree-holder take out the money "सूद बादम," that is, with the exception of interest.

I, therefore, think that, as clearly shown in the judgment of Mr. Justice Glover, the ryot has fulfilled the spirit of Section 52 of Act VIII of 1869 B. C., and has thereby saved himself from liability to be ejected from his tenure.

I confirm the decision of the Lower Court and dismiss the special appeal with costs.

The 21st March 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Appeal to Privy Council—Security from Decreeholder—Release of Surety—Jurisdiction—Appeal.

No. 9 of 1872.

Miscellaneous Appeal from an order passed by the Judge of Dacca, dated the 11*th October* 1871.

Abedoonissa Khatoon (Decree-holder) *Appellant,*

versus

Ameeroonissa Khatoon and others (Judgment debtors) and another (surety) *Respondents.*

Mr. J. S. Rochfort and *Baboo Kashee Kant Sen* for Appellant.

Baboo Nullit Chunder Sen for Respondents.

A District Judge has no jurisdiction to release a surety from security taken from him by the High Court to enable a decree-holder to take out execution of his decree pending an appeal to the Privy Council.

No appeal will lie from such an order of release by the Judge, although it is an improper one.

Kemp, J.—It appears in this case that Abedoonissa Khatoon, the appellant, has obtained a decree against Ameeroonissa Khatoon, the widow of Abdool Ali. The decree thus obtained has been appealed to the Privy Council, and Abedoonissa Khatoon being anxious to take out execution pending the appeal to Her Majesty in Council, was directed to furnish security. Upon this Mr. J. P. Wise came forward as security for Abedoonissa and his security was accepted. Subsequently, for reasons which are not apparent and have not been stated to the Court, Mr. Wise applied to the Court to release him from the security-bond, and the Court allowed this, apparently without giving any notice to Abedoonissa. After releasing Mr. Wise, the Judge of Dacca directs all proceedings for delivery of possession to Abedoonissa to be stayed, and the *Nazir* to report the progress made by him up to date, and a notice to be given to the decree-holder Abedoonissa that she must furnish fresh security, and the execution case to be struck off until such fresh security is given.

We do not think that any appeal will lie to this Bench against this order of the Judge, although we consider the order to be an improper one. We think, that the Judge had no jurisdiction to release the security and that that could only be done by the High Court under whose directions the security was taken. We, therefore, dismiss this appeal with costs, and direct the decree-holder to apply to the Judge in charge of the Privy Council Department.

Mr. Wise and Ameeroonissa will recover separate costs.

The 21st March 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Ejectment—Sale in Execution of Decree—Possession (Symbolical and Manual)—Limitation—Cause of Action.

Case No. 1043 of 1871.

Special Appeal, from a decision passed by the Judge of West Burdwan, dated the 4*th August* 1871, *reversing a decision of the Moonsiff of Ooudah, dated the* 15*th March* 1871.

Boydanath Mookerjee (Plaintiff) *Appellant,*

versus

Sreeshteedhur Chuckerbutty and another (Defendants) *Respondents.*

Baboo Nil Madhub Sen for Appellant.

Baboo Grish Chunder Mookerjee for Respondents.

Plaintiffs purchased the rights of B at a sale in execution of a decree in 1274 and obtained symbolical possession, but, on attempting to take manual possession in 1276, were ejected by defendant. HELD that plaintiffs' cause of action arose from the ouster in 1276.

Kemp, J.—The plaintiff is the special appellant. This is a suit for possession of a two-third share of 13 beegahs 1 oottah of *jummai* land in *mousah* Chunder Kona. The issues below were whether the suit was barred by the law of limitation or not; 2nd, whether the defendants ousted the plaintiff from the land in suit; and 3rd, whether the plaintiff is entitled to distinct possession of the alleged share or not.

The first Court has very clearly found that the Burrals obtained a decree for the share in question on the 14th of Pous 1272, that the plaintiff purchased the Burrals' rights at a sale in execution of a decree in the month of Kartick 1274, that they were put in symbolical possession in Chyet 1274, and that on attempting to take manual possession in Bysack 1275, they were ejected by the defendant. The possession of the Burrals in the years 1273, 1274, and 1275 appears to have been admitted. The Moonsiff, therefore, was of opinion that the suit was not barred, and gave the plaintiff a decree. On appeal, the Judge appears to have found every thing for the plaintiff. He says:—"It "is proved by both parties that Anundo and "Omunto Burral were in possession in 1275 "although they had not taken out execution "of their decree; and he further held that "the fact of their having taken possession "otherwise than by the agency of the Court "would not destroy their title, and plainitiffs "having purchased that title would not be "barred, by limitation." And yet, strange to say, after coming to this finding, the Judge throws out the plaintiff's suit as barred, because, he says, the possession of the Burrals was not a lawful one in 1275 inasmuch as, according to the plaint, their rights had lapsed by the sale to the plaintiffs in 1274. Now the plaintiffs no where state in the plaint that they were in possession before Bysack 1275. What they say is that they purchased the rights and interest of the Burrals and obtained possession *bdusmessub*, and that it was only when they went to take manual possession that they were ousted.

It is clear, therefore, on the finding of the Judge himself and of the first Court that the Burrals were in possession in 1275 although they had not taken out execution of their decree; and they having a title which could pass to the plaintiffs and the plaintiffs having been ousted in 1275, the suit is within time.

The decision of the Judge must, therefore, be reversed and the decision of the Moonsiff decreeing the plaintiff's case restored with all costs payable by the respondents.

The 22nd March 1872.

Present:

The Hon'ble F. B. Kemp and F. A Glover, *Judges.*

Act VIII of 1859 *ss.* 352 *and* 354—*Remand—Irregularity—Special Appeal.*

Case No. 979 of 1871.

Special Appeal from a decision passed by the Additional Judge of Dacca, dated the 7th June 1871, *reversing a decision of the Moonsiff of Lookragunge, dated the* 27*th February* 1871.

Gunga Monee Dossee (Defendant) *Appellant,*

versus

Issur Chunder Shaha and others (Plaintiffs) *Respondents.*

Baboo Bhuggobutty Churn Ghose for Appellant.

Baboos Kalee Mohun Doss, Doorga Mohun Doss, and *Nullit Chunder Sen* for Respondents.

Where a Judge, instead of remanding a case under Section 352 Act VIII of 1859, when the Moonsiff had not disposed of the case upon any preliminary point, ought to have disposed of it under Section 354, keeping the case on his own file, and ordering the Moonsiff, after taking the necessary evidence and deciding any issue fixed by him, to send up his finding with the evidence to his Court, and then proceeding to try the case as an appeal,—Held that the irregularity was not one which affected the merits of the case or the jurisdiction of the Court, so as to justify interference with the Judge's decision in special appeal,

Glover, J.—One of the defendants, Gunga Monee Dossee, No. 3, is the special appellant in this case. It appears that there was an *ijarah* held by four sharers in proportions of four annas each. The plaintiff's father had one share; the defendant Gunga Monee a second; Woodoy Chand, father of the defendants 4 and 5, and husband of the defendant No. 6, a third; and Gopeenath, the husband of the defendant No. 7, a fourth. The defendant Gunga Monee is said to have executed certain *ekrars* on the 23rd Bysack 1269, whereby she relinquished portions of her 4 annas share. She is said to have given a 1 anna 6 gundahs 2 cowries 2 krants to the plaintiff Issur Chunder and Woodoy Chand, and 13 gundahs 1 cowree 1 krant to Gopeenath Shaha; the consequence of which was that the plaintiff's share became 4 annas 13 gundahs 1 cowree 1 krant. He added to this by purchasing a 3 gundahs 3 cowries

1 krant 2 dunts from the share which Gunga Monee had relinquished to Gopeenath, and ended by being the owner of a 4 annas 17 gundahs 2 krants 2 dunts. Sometime after this arrangement was made, the proprietary right in the zemindaree was sold by Government, and was bought by the original shareholders in the name of their family servant Boydonath Chuckerbutty, and the property remained in their possession jointly. The plaintiff in this case sued the defendant No. 3 a ryot on the estate for his share of the rent calculated on a 4 annas 17 gundahs 2 krants 2 dunts' share. The defendant, Gunga Monee, intervened, and the consequence was that the plaintiff lost his suit as regards the excess, and got a decree only for his original share of the rent, namely 4 annas. And he now sues to establish his right to the 17 gundahs 2 krants 2 dunts which he claims by the relinquishment of Gunga Monee over and above his 4 annas' share.

The Moonsiff found that the *ekrars* were not genuine, and dismissed the plaintiff's suit.

The Judge, in a decision which is not very clear, found that, although there may be some doubt as to the execution of the *ekrars* by Gunga Monee, still he considers that she knew perfectly well and agreed to what was done in respect of them, and that the *ekrars* formed very strong evidence as to what was the intention of the shareholders in respect of their different shares. He, therefore, remanded the case to the Lower Court for trial on the merits, and he ordered the Moonsiff to determine what the proportionate shares were which Boydonath Chuckerbutty was commissioned to buy for the defendants.

The objection taken in special appeal is that the Judge had no right to remand this case under Section 352, inasmuch as the Lower Court had not disposed of the case upon any preliminary point; and no doubt, so far the special appellant has right on his side, for the Moonsiff did not decide the case on any preliminary point, but on the merits. But although the Judge was wrong in remanding the case under Section 352, it is clear that, from the view he took of the case, he would have been justified in disposing of it under Section 354. If he considered that there was a question of fact essential to the right determination of the suit upon the merits which the Moonsiff had not determined, he, under the Section in question, had the right to direct the Lower Court to determine that question. What he ought to have done, however, was to have kept the case on his own file, and have ordered the Moonsiff, after taking the necessary evidence, and deciding the issue fixed by him, to send up his finding, with the evidence, to his Court, and then proceed to try the case as an appeal. But although there is this amount of error in the Judge's decision, we do not think that we should be justified in interfering with it in special appeal, inasmuch as the irregularity has not in any way affected the merits of the case, or the jurisdiction of the Court.

We come to this decision with the less reluctance, because we find, as a matter of fact, that the case has been decided after remand by the Moonsiff in favor of the plaintiff, and that the present special appellant has appealed again to the Judge against that decision. It would be useless, therefore, at this stage of the case to make any further orders in the matter. We dismiss the special appeal with costs.

The 22nd March 8872.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Act VIII of 1859 *s.* 15—*Declaratory Decree—Cause of Action—Fraudulent Thakbust Proceedings—Remand—Demolition of Building (Privy)—Evidence—Acquiescence—Consent.*

Case No. 976 of 1871.

Special Appeal from a decision passed by the Additional Judge of Dacca, dated the 21st June 1871, *reversing a decision of the extra Moonsiff of Naraingunge, dated the 16th December* 1870.

Brommo Moyee Debia Chowdhrain and others (Defendants) *Appellants,*

versus

Koomodinee Kant Banerjee Chowdry and others (Plaintiffs) *Respondents.*

Case No. 977 of 1871.

Special Appeal from a decision passed by the Additional Judge of Dacca, dated the 21st July 1871, *affirming a decision of the Moonsiff of Naraingunge, dated the* 10*th December* 1870.

Buroda Kant Banerjee Chowdhry and others (Plaintiffs) *Appellants,*

versus

Koomodinee Kant Banerjee Chowdhry and others (Defendants) *Respondents.*

Baboos Doorga Mohun Doss and *Nullit Chunder Sen* for Appellants.

Baboos Chunder Madhub Ghose and *Kashee Kant Sen* for Respondents.

The plaint in this case having disclosed that certain *thakbust* proceedings were carried on by defendants in collusion with their co-sharer and in fraud of the plaintiffs,—Held that the plaintiffs had made out a sufficient cause of action for a declaratory decree under Section 15 Act VIII of 1859.

The Judge, after disposing of the case, on the only point in which the Moonsiff had decided, *viz.* whether there was a cause of action, and having satisfied himself that there was not sufficient evidence on the record to enable him to pass a proper decision upon the merits, was held clearly right in remanding the case to the Moonsiff.

In a suit for the demolition of a privy erected in plaintiff's land, it having appeared that plaintiff was aware of the erection of the privy and had allowed it to be completed and to remain standing for at least seven years, his consent was refused.

Kemp, J.—These cases have been heard together. We think it will be more convenient to give separate judgments.

In special appeal No 976 the defendants below are the special appellants, and in special appeal No. 977 the plaintiffs below are the special appellants. In special appeal No. 976, the points raised in special appeal are 1*st*,—That the Judge was wrong in law in holding that the plaint discloses a sufficient cause of action, 2*ndly*,—That even admitting that the plaint does disclose a sufficient cause of action, the Judge acted irregularly in remanding the case to the first Court.

From the number of decisions which have been quoted by the Moonsiff in his judgment as well as by the pleaders on both sides during the course of the argument, it is very clear that the construction to be put upon Section 16 of Act VIII of 1859 is attended with much difficulty, and the number of decisions which have been referred to during the course of the argument and more particularly by the Moonsiff shows that the decisions on this subject are not in perfect harmony.

Looking to the plaint itself, it is clear that the plaintiff's statement was that their cause of action was the *thakbust* proceeding which took place on the 5th of Jeyt 1266, and if we were to look to that fact alone, no doubt the delay between the date of the *thakbust* proceeding as stated by the plaintiffs and the institution of the present suit on the 7th of Srabun 1277 is very great, but the plaint also says that the defendants in collusion with their co-sharer Brojo Soondar Banerjee fraudulently demarcated certain lands as a portion of the defendants' *talook* without the knowledge of the plaintiff. Further, the plaintiff says that his title is threatened in future by these proceedings, and it is very clear from the action of the defendants themselves that it is more than probable that some injury may be inflicted on the plaintiff unless such a course be stayed by a declaratory decree. Two days before the institution of the present suit, the defendants instituted a suit for the purpose of having a *pucca* privy erected upon a portion of the land in dispute demolished. In that suit they alleged that the land upon which the privy stood belonged to them exclusively, that it was not joint land, that their title to it had been put in issue as between them and Brojo Soondur Banerjee above alluded to, and that their title had been formally declared by the *thakbust* award. It is therefore very clear to us that, from the action of the defendants in that suit, they relied upon the *thak* award as evidence of their title to these lands as their exclusive property. The plaintiff's title was therefore clearly invaded by that hostile act on the part of the defendants. Therefore we think that, looking to these proceedings and also to the fact that the plaint does disclose that these *thakbust* proceedings were carried on by the defendants in collusion with Brojo Soondur Banerjee and in fraud of the plaintiffs, the plaintiffs have made out a sufficient cause of action. We therefore concur with the Judge in his finding on that point.

With reference to the second point, we are told during the course of the argument that not only has the suit been remanded, but that it has been decided on remand by the Moonsiff, in favor of the plaintiffs, special respondents; but be that as it may, the Judge after disposing of the only point which the Moonsiff had disposed of, namely the question whether there was a cause of action or not, satisfied himself there was not sufficient evidence on the record to enable him to pass a proper decision between the parties upon the merits of the case. We think, therefore, that he was clearly right in remanding the case to the Moonsiff, and we dismiss the special appeal with costs.

We now come to the special appeal No. 977, in which the parties change places. The plaintiffs in that case are the special appellants, and the defendants special respondents. The suit was to have the privy already alluded erected upon a very small bit of land about four cowries demolished. Both Courts have concurrently held that this privy has been erected for many years, seven years or so, with the consent of the plaintiffs in that suit. The first Court found that the land was joint property, and that the plaintiffs had consented to the erection by the defendants of the privy in question; the second Court, although it has not distinctly come to a finding as to whether the property was joint or separate, has clearly found that, whether the land whereon the privy stood was joint property or not, the house could not be demolished, and the reason he gives for this is that he finds on the evidence that it was beyond the possibility of doubt that the plaintiffs had been aware of the fact that that privy was erected, that they allowed it to be completed and to remain standing for many years, say seven years at least. We think that the Judge was perfectly justified in inferring the consent of the plaintiff which was also proved by the evidence in the case.

We, therefore, dismiss this special appeal also with costs payable by the special appellants.

The 23rd March 1872.

Present:

The Hon'ble H. V. Bayley and F. B. Kemp, *Judges.*

Possessory Award (under s. 15 Act XIV of 1859)—Title (Suit to establish)—Limitation.

Case No. 24 of 1871.

Application for review of judgment passed by the Hon'ble Justices H. V. Bayley and G. C. Paul, on the 5th July 1871, *in Regular Appeal No.* 228 *of* 1871.

Eshan Chunder Banerjee and others (Defendants) *Petitioners,*

versus

Zumudurooniesa Khatoon (Plaintiff) *Opposite Party.*

Mr. Piffard and *Baboos Unnoda Pershad Bannerjee, Chunder Madhub Ghose,* and *Sreenath Banerjee* for Petitioners.

Mr. Woodroffe and *Baboos Sreenath Doss* and *Romesh Chunder Mutter* for Opposite Party.

Plaintiff's title to the property in dispute having been invaded by an award under Section 15 Act XIV of 1859, the present suit was brought to establish that title, and held to be governed by the limitation of 12 years from the date of the award.

Kemp, J.—THIS is an application on the part of the defendant for a review of the judgment of this Court dated the 5th of July 1871. The main grounds are:—

1st.—That the Court has not put a proper construction on the decree dated 12th December 1862.

2nd.—That if there is any ambiguity in the said decree, it can be cleared up by a reference to the plaint, the judgment, and the petition to execute the decree.

3rd.—That at any rate, as against the petitioner Khema Debee, who was no party to the decree aforesaid, the plaintiff is not entitled to recover, without proving her title irrespective of that decree.

The history of this case is to be found in this Court's decision of the 5th July 1871.

Mr. Piffard, who has been heard for the applicant for review, during the argument raised three distinct pleas of limitation, namely, 1st, that the suit is barred because not brought within one year from the date of the award under Section 15 Act XIV of 1859; 2nd, that it is barred under Section 77 Act X of 1859; 3rd, that it is barred under the six years' period of limitation.

The second plea was abandoned by the learned Counsel. We may observe that the plea that the plaintiff's suit is barred is not raised in the petition of review. Be that as it may, it is clear that the present suit, which is to establish the plaintiff's title, need not be brought within one year from the date of the award under Section 15 Act XIV of 1859. It is then contended that this being a suit to enforce a decree passed in 1862, the period of six years applies and that the suit is beyond time. This plea was not taken in the Court below, nor in the petition for review, but is raised for the first time in the course of the argument in this very late stage. We may observe that this suit is not to enforce the decree of 1862, but to establish the plaintiff's title in the disputed property to which the period of six years is not applicable but twelve years. The title of the plaintiff, it is alleged, has been invaded by the award under Section 15 Act XIV of 1889, and the present suit to establish that title has admittedly been brought within 12 years from the date of the award.

All pleas put before us in bar are thus overruled.

We now come to what is the turning point in the case, namely the real meaning of the decree of 12th December 1862. Did that decree, reading the decretal order by the light of the plaint, the decision and the proceedings in execution, decree to the plaintiff a 4 annas 1 gundah 1 cowree 1 krant share in the *mousahs* or

kismuts, which were the subject of that suit, or the ***mousahs*** or ***kismuts*** in their entirety.

The contention of the applicants for review is that the decree of 1862 was for only a 4 gundahs 1 cowree 1 krant share in the properties which formed the subject of that suit. The opposite party, on the other hand, assert that the decree was for 16 annas.

We are of opinion that the contention of the applicant for review is correct.

Taking first the plaint in the suit of 1862, we find that, after reciting the fact of the plaintiff's purchase at auction, the plaint proceeds thus. We translate literally:—"I am "entitled by law to obtain possession in my "*purchased share*, and on my attempting "to take possession in the month of Assar, "the principal defendants, setting up an al-"legation of a lease, did not give me pos-"session of my *purchased share* of the sub-"joined ***kismuts***." Now the extent of the share purchased by the plaintiff was 4 gundahs 1 cowree 1 krant. Therefore, according to the terms of the plaint, she was asking for possession of a share to that extent in the ***kismuts*** which formed the subject of her suit in 1862.

In the decision of 1862, the claim of the plaintiff is thus set forth, *viz.*, "for posses-"sion of the plaintiff's purchased share in the "***kismuts*** mentioned in the plaint which "the defendants have withheld delivery of "possession of, on the allegation of a lease." Here again it is clear that a share in the ***kismuts*** equal to 4 gundas 1 cowree 1 krant is intended. The decretal order is to this effect:—"The case is decreed, the "plaintiff will obtain possession of the land "claimed according to the real circumstances "of her claim." Then in the *(tupseel)* de-"tail of the ***kismuts***, we find the following, তপশিল কিসমতহায়, *i. e. in* the following ***kismuts***. The decretal order is to be read and construed by "the real circumstances or meaning of the plaint," and it appears to us to be clear that the plaint refers to only a 4 gundas 1 cowree 1 krant share of the ***kismuts***.

Then, looking to the conduct of the plaintiff in the execution stage, we think it is still more clear that she construed her decree as we have done, for we find, on referring to the application she made to execute the decree of the 12th December 1862 in column 6 of the tabular statement which it is directed must accompany all applications to execute a decree, the following entry under the head "nature of the decree," namely "a decree for obtaining possession "of a ***rukum*** which means share or proportion "of 4 gundas 1 cowree 1 krant of ***kismut*** "Pookur Par, &c., 21 ***mousahs***."

Being, therefore, of opinion that the former construction put upon this decree was incorrect, we reverse the decision of this Court dated the 5th July 1871, and decree this appeal, reversing the decision of the first Court with costs.

The 26th March 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Ameen (Power of)—Title—Possession.

Cases Nos. 748 and 749 of 1871.

Special Appeals from a decision passed by the Judge of West Burdwan, dated the 17th March 1871, reversing a decision of the Subordinate Judge of that district, dated the 15th December 1870.

Shibo Soonduree Debia and another (Plaintiffs) *Appellants,*

versus

Ram Chunder Sircar and others (Defendants) *Respondents.*

Baboo Bunshee Dhur Sen for Appellants.

Baboo Bama Churn Banerjee for Respondents.

An Ameen has no power to try the question of title or possession.

Kemp, J.—THESE two appeals are admittedly governed by one and the same judgment. It appears that the plaintiffs originally sued for damages for certain trees which they alleged had been cut down by the defendants. By direction of the Court, the plaintiffs were directed to put in a sufficient stamp fee to cover the question of title, and this the plaintiffs did. The first Court found that the plaintiffs had proved their case and gave them a decree. On appeal, the second Court came to a different conclusion and held that the plaintiffs had not proved their possession within twelve years and therefore dismissed the suit.

The grounds of special appeal are that the Lower Appellate Court was wrong in law in holding that the Ameen had no power of investigating into title and possession, and that the Lower Appellate Court, in trying the question of possession, had not taken into consideration the evidence recorded by the Ameen.

On referring to the decision of the Judge, we find that, after setting forth the grounds of appeal, the Judge holds that the Ameen had no power to investigate into title or possession, and we think that this is correct, for on reading the Ameen's *roedad* we find that the Ameen asked the Court for permission to enquire into the question of title by inspection of documents and was distinctly told not to do so. We further find from that *roedad* that all the Ameen said was that so many trees had been cut down by the defendants. The Judge has not altogether overlooked the evidence taken before the Ameen, for he says it is evident that it is not good evidence of title or possession, and the Judge was perfectly right in saying that the Ameen was not empowered to try the question of title or possession. Then with reference to the witnesses which the plaintiff examined in Court, the Judge finds that their evidence was contradictory and doubtful, and that they do not prove the plaintiff's possession, and further the Judge says that the man who is said to have been the appointed guardian or chowkeedar of the jungle, as well as the *gomashtah* who is said to have forbidden the cutting of the trees by the defendants, are not produced by the plaintiff as witnesses, and then the Judge sums up by saying that the plaintiffs have not proved their possession within twelve years prior to suit.

We see no reason to interfere with this decision which is not wrong in any point of law, and we therefore dismiss the special appeal with costs.

The 27th March 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Putnee (Sale of, for Arrears of Rent)—Security by Purchaser—Remedy of Zemindar—Regulation VIII of 1819 *ss.* 5 *and* 7*—Grant of Durputnee.*

Case No. 1048 of 1871.

Special Appeal from a decision passed by the Additional Judge of Hooghly, dated the 15*th June* 1871, *reversing a decision of the Subordinate Judge of that district, dated the* 17*th April* 1871.

Joy Kishen Mookerjee (Plaintiff), *Appellant,*

versus

Jankeenath Mookerjee (Defendant) *Respondent.*

Baboos Anund Chunder Ghossal and *Chunder Nath Bose* for Appellant.

Baboos Hem Chunder Banerjee and *Umbika Churn Banerjee* for Respondent.

A zemindar cannot bring a suit in the Civil Court to compel the purchaser of a *putnee* on his estate sold by auction for arrears of rent, to furnish security for the amount of half the yearly *jumma*. If the purchaser of the *putnee* is not willing to give security for the payment of his rent, the zemindar's remedy is, under Regulation VIII of 1819, ss. 5 and 7, to appoint his own *sezawal*, or Collector, and deduct his own rents from the collections before handing over the surplus to the *putneedar*, who moreover, is declared by Section 7 to take all the risk of the attachment.

This remedy of the zemindar is not affected by the grant by him of a *dur-putnee* to a third party.

Glover, J.—THE question for decision in this special appeal is, can a zemindar bring a suit in the Civil Court to compel the purchaser at auction of a *putnee* on his estate to furnish security for the amount of half the yearly *jumma*?

The defendant who bought the *putnee* in question at a sale for arrears of rent, and who has since, we are told, sublet the estate in *durputnee*, contends that the plaintiff has no cause of action, and that his only remedy is the appointment of a *sezawal* under Section 7 Regulation VIII of 1819.

The Subordinate Judge considered the plaintiff justified in bringing the suit, and on the merits decreed in his favor. He made defendant that is, liable for security, and in default authorized the plaintiff to proceed under Section 7.

The Judge thought that the Civil Court could give no relief, and dismissed plaintiff's suit.

We are of opinion that the Judge was right. A Civil Court can take cognizance of all suits of a civil nature where no bar in the shape of special legislation exist; but where a special law gives a particular remedy, a litigant is bound to avail himself of that remedy. In this case, Sections 5 and 7 of the *putnee* Regulation (VIII of 1819) give the zemindar power to take the collections of the estate into his own hands, and so to do away with all further necessity for security. If the purchaser of a *putnee* is willing to give security for the payment of his rent, well and good; if not, the zemindar has the most ample remedy in his own hands, for he appoints his own *sezawal* or collector, and deducts his own rent from the collections before handing over the surplus to the *putneedar* purchaser, who, moreover, is by the express terms of Section 7 declared to take all the risk of the attachment.

It is difficult to conceive a more perfect remedy than the law here gives to a zemindar one of whose *putnees* has passed by a Revenue sale from the hands of the original lessee to a stranger. If the latter refuse to give security, the landlord secures himself by taking rent direct from the ryots.

It is contended that the landlord may have great difficulty in appointing a *sezawal* in cases like the present, where the purchaser at auction has disposed of his interest in *durputnee*. But this would not be so. A *durputneedar* appointed under the terms of Regulation VIII is in the same position as the original *putneedar*, has all his rights and at the same time all his liabilities to the zemindar; but in any case, the grant of a *durputnee* to a third party would not annul the law or prevent the appointment by the zemindar of a *sezawal*, should no arrangement be made for giving security for rent. If this were so, the Regulation would be a dead letter.

The appeal is dismissed with costs.

The 28th March 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Putnee Rents—Payment by monthly Kists—Custom.

Case No. 1085 of 1871.

Special Appeal from a decision passed by the Additional Judge of Hooghly, dated the 21st June 1871, reversing a decision of the Moonsiff of that district, dated the 22nd April 1871.

Joy Kishen Mookerjee (Plaintiff) *Appellant,*

versus

Jankee Nath Mookerjee (Defendant) *Respondent.*

Baboo Annund Chunder Ghossal for Appellant.

Baboos Umbica Churn Banerjee and *Bhyrub Chunder Banerjee* for Respondent.

It is contrary to the usage of the country for a putneedar to pay his rents by monthly *kists*, without a special agreement for that purpose.

Glover, J.—There are no grounds for this special appeal. The plaintiff, the zemindar, sued the defendant, putneedar, who purchased the estate under Regulation VIII of 1819, for two months rent of the year 1277, *viz.* Magh and Falgoon. The defendant's allegation was that he was not liable to pay monthly *kists*. The first Court found for the plaintiff on the ground that there was a list prepared by the plaintiff showing the periods at which the various *kists* were to be paid, and that the defendant being aware of that list, was bound to pay accordingly. The Additional Judge, however, held that there was no agreement whatever between the parties to pay by monthly *kists*, and that such payment was contrary to the usage of the country. We think that the Judge was right; the ordinary usage of the country is certainly not to make monthly collections, and it was for the plaintiff to prove that there was some arrangement between him and the defendant by which the rents were to be paid month by month. He has not done so and has not filed the *kabooleut* of the defendant's predecessor although it was in his power to produce it and not within that of the defendant who is a recent purchaser under Regulation VIII of 1819. The decree upon which the first Court places much reliance is a decree for three months' rent which happened at that particular time to be due, but there is nothing in the decree to show that there was any arrangement or contract between the parties to pay rent by monthly *kists*, and as to the list it appears on looking to the Judge's decision that the original case was not decided with reference to the list, but with reference to the three months' rent decree already alluded to.

We see no ground for interference and dismiss the special appeal with costs.

The 28th March 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Execution—Summary Decision of Revenue Authorities (under Regulation VII, 1799)—Jurisdiction of Civil Courts—Limitation (Act XIV of 1859 s. 22).

Case No. 28 of 1872.

Miscellaneous Appeal from an order passed by the Judge of Dacca, dated the 9th October 1871, reversing an order of the Moonsiff of Furreedpore, dated the 29th July 1871.

Luchmeekant Ghose and others (Judgment-debtors) *Appellants,*

versus

Bamun Doss Mookerjee and others (Decree-holders) *Respondents.*

Baboos Girija Sunkur Mojoomdar and *Taranath Chuckerbutty* for Appellants.

Baboo Mohinee Mohun Roy for Respondents.

Where execution was sought of a decree which was passed in 1850, and which could not be executed by the Revenue Authorities in consequence of the transfer of its jurisdiction in such matters to the Civil Courts, HELD that the Civil Courts had jurisdiction to entertain the application.

This being a process of execution to enforce a summary decision of the Revenue Authorities under Regulation VII of 1799, Act XIV of 1859 s. 22 was held applicable; and no proceeding in execution having been taken out to enforce such decision or to keep the same in force within one year next preceding the application for such execution, it was held barred by limitation.

Kemp, J.—THIS is a somewhat peculiar case. The judgment-debtor, who is the special appellant before us, appeals against the decision of the Judge of Dacca on several grounds: 1st, That the Civil Court had no jurisdiction; 2nd, That the Lower Appellate Court has misinterpreted the law of limitation applicable to the case, and lastly, that even if the view of the Lower Appellate Court be correct, there has been no finding by the Judge as to whether the steps taken by the decree-holder to execute his decree was *bonâ fide* or not.

This was a suit under the provisions of Regulation VII of 1799. The decree is dated so far back as the year 1850. The original sum decreed was Rs. 591-4, and the decree-holder, after this long lapse of years, seeks to take out execution for a sum of Rs. 1,850-12-10, or more than three times the original amount decreed.

With reference to the first point, namely the question of jurisdiction, we may observe that this point was not raised in either of the Courts below, but it is a question to which our attention has been directed by the special appellant, and being one of jurisdiction, it is a point which we cannot pass over.

We think that the original decree, execution of which is now sought, cannot now be executed by the Revenue Authorities, inasmuch as the jurisdiction of the Revenue Authorities in matters of this kind has been made over to the Civil Courts. We think, therefore, that the Civil Court had jurisdiction to entertain this application.

We now come to the question whether the application is barred or not. We are of opinion with the Moonsiff that it is clearly barred, and that the Judge is wrong in his interpretation of the law.

This being a process of execution to enforce a summary decision of the Revenue Authorities, Section 22 Act XIV of 1859 applies, and unless some proceeding in execution shall have been taken out to enforce such decision or to keep the same in force within one year next preceding the application for such execution, it is barred.

Now, the present application is made on the 25th of April 1871, and the application next preceding the present application is dated the 20th April 1869, so that more than two years have elapsed between the two applications, and therefore Section 22 applies. Moreover, taking April 1869 as the starting point, we find that on that date the case was simply struck off, and the only application which can be called an application under the law was made on the 25th April 1864.

Again, it is clear that the provisions of Act XIV of 1859 and the operation of Sections 20, 21, 22, and 23 of that Act were postponed by Section 2 Act XI of 1861 to the 1st January 1862, and even from that date, namely the 1st January 1862, the decree-holder's application is not in time.

We, therefore, concur with the Moonsiff, reverse the decision of the Judge, and decree the special appeal with costs.

The 28th March 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Ameen's Enquiry and Report—Evidence—Probabilities—Error of Law.

Cases Nos. 1084 and 1086 of 1871.]

Special Appeals from a decision passed by the First Subordinate Judge of Hooghly, dated the 25th July 1871, reversing a decision of the Moonsiff of Hureepal, dated the 23rd March 1871.

Kalee Doss Acharjee (Plaintiff) *Appellant,*

versus

Khettro Pal Singh Roy and another (Defendants) *Respondents.*

Baboos Hem Chunder Banerjee and *Mohendro Lall Mitter* for Appellant.

Baboos Chunder Madhub Ghose and *Obhoy Churn Bose* for Respondents.

HELD that the Ameen's enquiry ought not to have been ordered in this case where the question to be decided was one of disputed boundary which turned chiefly on possession before the date of suit, and that the Subordinate Judge would have been justified in disregarding the Ameen's report and trying the appeal on the recorded evidence.

HELD also that the Subordinate Judge's having weighed the evidence with some indirect reference to probabilities, was not an error of law.

Glover, J.—OUR decision will admittedly govern both these appeals.

The plaintiffs are purchasers of a garden called the Gur or Roy's Bâgân, and they sue for possession of 8 beegahs 10 cottahs of land situated to the north of this Bâgân and alleged to belong to it, from which they say that the defendants, who are the owners by purchase of an indigo factory situate on the northern boundary of the Roy's garden, have dispossessed them.

The defendants plead, firstly, limitation, and, secondly, that the land belongs to their indigo factory.

The Moonsiff deputed his Court Ameen to hold a local enquiry; and on it, and the evidence generally, found that the disputed land was a portion of the Bâgân, and that the plaintiffs were in possession of it as such before they were ousted by defendants.

The Subordinate Judge reversed this decision after sending for and examining both parties to the suit. He found no proof that the plaintiff's northern boundary was a Gur or trench such as described, but he did find that the defendants and their predecessors had been in possession of the disputed land long before the alleged date of ouster, and that the factory boundary line was an "Ail" to the south of the 8½ beegahs claimed by the plaintiffs.

The plaintiffs appeal specially, and Baboo Hem Chunder Banerjee on their behalf contends that the Subordinate Judge's decision proceeds upon altogether conjectural grounds, and that according to the rule laid down by the Privy Council in the case of Ranee Soorut Soonduree Dossee *vs.* Prosunno Coomar Tagore, XV Weekly Reporter, 20, P. C., the result of a local enquiry conducted by a competent official should not be interfered with except upon clearly defined and sufficient grounds.

The Ameen's enquiry, we may observe, ought never to have been ordered; the question to be decided was one of disputed boundary which turned chiefly on possession before the date of suit, and this was an issue which the Moonsiff could and ought to have decided himself. Instead of doing so, the judgment in the cause is virtually the judgment of the Ameen, and the Subordinate Judge would have been justified in disregarding the Ameen's report, and in trying the appeal on the recorded evidence (Issur Chunder Doss *vs.* Joogul Kishore Chuckerbutty.*

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* The 19th January 1870.

Present:

The Hon'ble J. B. Phear and Dwarkanath Mitter, *Judges.*

Act VIII of 1859 *s.* 180—*Local Investigation—Ameen's Report—Evidence—Title.*

Case No. 2828 of 1869.

Special Appeal from a decision of the Subordinate Judge of Backergunge, dated the 29th June 1869, *modifying a decree of the Moonsiff of that district, dated the 20th June* 1867.

Ishur Chunder Doss (one of the Defendants) *Appellants,*

versus

Joogul Kishore Chuckerbutty (Plaintiff) *Respondent.*

Baboo Bhogrub Chunder Bannerjee for Appellants.

No one for Respondent.

Section 180 Act VIII of 1859, does not warrant a Civil Court in deputing its functions to an Ameen whom it sends to make a local investigation.

Specification of the points to which the Ameen's investigation should be directed.

An Ameen's report based on a copy of a *kubooleut* is little or no evidence of title.

Phear, J.—THIS is a suit to obtain a declaration of the plaintiff's right of possession to certain land as against the defendant. There are, therefore, two elements in the cause of this suit: *first*, the possession of the plaintiff; and, *secondly*, his title as against the defendant to retain that possession. As far as we can judge from the written judgment of the Court below, that Court was of opinion that the plaintiff had failed to show any title to the land as against the defendant. The words of the Judge are:—"It appears that plaintiff "has failed to produce his title-deed, the pottah, whereby to show that the lands in demand are included "within the talook." Apparently some other inferior documentary evidence was put in for the purpose of supporting his title. But the Judge considered that even that evidence did not extend to the land in dispute. Under these circumstances it seems that the first Court sent an Ameen into the Mofussil, as the Subordinate Judge says, "to ascertain the real facts of right and possession, and the boundary of the place;" and the Judge remarks that the Moonsiff did well in doing so. I quite agree with the pleader who has argued this case on behalf of the appellant, that this proceeding is entirely unjustifiable. It really amounted to deputing the decision of this case to the Ameen. This Court has very many times, in reference to proceedings of this kind, expressed its opinion that Section 180 of the Civil Procedure Code does not warrant a Civil Court in deputing its functions to an Ameen, whom it sends to the locality for the purpose of making a local investigation. All that it can charge the Ameen with, is to obtain such information with regard to the physical features of the place in dispute, the identification of land depicted in maps with one another by the aid of objects to be formed on the land, and other matters of this kind which may be of use in, and auxiliary to, the proper trial of the suit by the Court before which it is pending.

It is not very clear to my mind, from the judgment of the Lower Appellate Court, to what extent that Court has relied upon the report which the Ameen, deputed in the way I have just mentioned, made to the Court. But I think I gather from it that the Subordinate Judge has found in that report the only evidence of title

The Moonsiff decided for the plaintiff, because, as the garden was called the Gur Bâgân, it was most probable it had Gûrs or trenches round it; that such trenches were in existence on the southern, eastern, and western sides, and that there were traces of a filled up trench on the north; that the undisputed Bâgân lands were high and so were the disputed 8½ beeghas, whilst other land in the close vicinity was of a lower level from which it was fairly to be inferred that the disputed land was part of the Bâgân and therefore the plaintiff's; and lastly that there was evidence to show that there were formerly fruit trees on the lând the produce of which was taken by the plaintiffs; that since the disappearance of these trees the land has remained unproductive and fallow, which would nôt have been the case had the defendants held possession, for they have utilised all the neighbouring lands for the potato crops, and would doubtless have cultivated the disputed land in the same manner had it been in their possession.

The objection taken by the special appellants to the Subordinate Judge's decision as being based on conjecture solely, would seem more properly to apply to the Moonsiff; but however that may be, we do not think that the order of the Subordinate Judge is one with which we can interfere in special appeal.

The Subordinate Judge has found as a fact on evidence that the predecessors of the defendant, the owners of the indigo factory, Messrs. Smith and Wageam were in possession of the disputed land before the plaintiff's purchase, and this would at once dispose of the latter's cause of action, which is alleged to be the filling up of the northern trench and taking possession in Bhadoon last. The Subordinate Judge no doubt strengthens himself in his opinion by a reference to the fact that whilst the plaintiff's *kobalah* does not mention a trench or Gur as the northern boundary of their purchase, the factory document of title makes the southern boundary of the factory, the Roy's Bâgân. But the Subordinate Judge's inference that there was no Gur or trench running east and west between the two properties is not an unreasonable one.

The same may be said of the close vicinity of the plaintiff's alleged boundary to the factory steps; it certainly is not likely that a person building such a factory would place his door-step within one cubit's length of his neighbour's land. But we do not find from the Subordinate Judge's decision that the appeal was decided on these inferences, but rather on the evidence of the defendant's long anterior possession. The Subordinate Judge was probably induced to place more reliance on the defendant's evidence than on the plaintiff's in consequence of certain probabilities. But the respondent could only have asked him to come to a different conclusion on the strength of certain other probabilities in their favour. His having weighed the evidence with some indirect reference to probabilities is not, we think, an error of law. We do not say that we are altogether satisfied with Mr. Thompson's decision, but we do not think that we are, sitting in special appeal, justified in interfering with it. Both appeals are dismissed with costs.

The 3rd April 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Rival Decree-holders—Attachment of House—Attachment of House and Land—Sale—Priority—Pro ratâ Distribution.

Case No. 803 of 1871.

Special Appeal from a decision passed by the Judge of Dacca, dated the 27th April 1871, *reversing a decision of the Subordinate Judge of that district, dated the 29th June* 1869.

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upon which the plaintiff has been allowed to succeed. In that report the Ameen states that it appears from the copy of a *kubooleut* filed by one of the defendants whom he mentions, not the appellant, that a certain plot of land, a portion of which is in dispute, appertains to the *howlah* of the plaintiff; and upon this statement of the Ameen, the Lower Appellate Court has based its judgment in favor of the plaintiff. The appellant objects to this statement being used in evidence against him, and I think that objection is good. It is obvious that this evidence, if evidence it can be called, is intrinsically of the weakest possible character: and if it had been adduced and tendered in open Court, the appellant would have been entitled to object to it, and to require that it should be excluded. A copy of a *kubooleut* simply filed by one of his co-defendants certainly ought not to have been used in evidence against him without his consent; still less, if I may say so, ought the statements of the Ameen sent to make a local investigation with reference to the effect of this copy of the *kubooleut* to have been treated as anything upon which the Civil Court could act. I think, therefore, that the decree of the Lower Court, so far as it was adverse to the appellant, was made without legal materials to support it, and that this appeal ought to be decreed. The decree of the Lower Court must be reversed and the suit be dismissed as against the appellant. The appellant will have his costs in all the Courts.

Lalla Mitterjeet Singh Chowdhry (Defendant) *Appellant,*

versus

Sonatun Doss and others (Plaintiffs) *Respondents.*

Baboos Hem Chunder Banerjee and *Rash Beharee Ghose* for Appellant.

Baboos Mohinee Mohun Roy and *Doorga Mohun Doss* for Respondents.

Where one decree-holder attached the house, and another decree-holder attached the land upon which the house stood as well as the house, and both house and land were sold together, although the former had priority with reference to the sale proceeds, the latter was declared entitled to share *pro ratâ* on account of the sale proceeds of the land which was not attached by the former.

Kemp, J.—THE special appellant and special respondents are rival decree-holders. The plaintiffs, special respondents, attached first, and therefore under the law have the priority with reference to the sale proceeds. It appears that the plaintiffs, special respondents, attached the buildings alone, whereas the defendant, special appellant, attached the land upon which the buildings stand and the buildings also. The buildings and the land together were sold for 2,000 rupees. The question now in dispute is how this sum is to be divided between the two rival decree-holders. The case came up on appeal, and was remanded for the Judge to decide this point. He was not restricted as to taking further evidence; he was distinctly told to ascertain the value of the building, either by the evidence on the record, or by a local enquiry, if he deemed such enquiry to be necessary. The Judge has made a local enquiry, and has deputed an Ameen. The Judge finds on the evidence, and on the enquiry by the Ameen, that the house is worth 2,600 rupees, and the land 250 rupees.

It is contended by the special appellant that the Judge ought to have given the special appellant the proceeds *pro ratâ* of the land which the special appellant estimates at 400 rupees on the evidence of the purchasers of the property. It is also contended that the Judge was not right in law in taking further evidence.

We think, with reference to the second point, that the remand order disposes of that question, for the Judge was told to make further enquiries, and, if necessary, to take evidence and make a local enquiry.

On the 1st point we think that, as the Judge has chosen to form his estimate on the evidence of the Ameen, we cannot say that he was wrong in law in doing so.

The property, therefore, being worth 3,000 rupees, that is to say, the buildings and land together, and both the properties having fetched only 2,000 rupees, the plaintiffs having taken out process of attachment first are entitled to be satisfied first.

The defendant of course will be entitled to something on account of the sale proceeds of the land which were not attached by the plaintiff. Therefore, assuming the value to be 3,000 rupees, and the sale proceeds 2,000 rupees, the defendant, special appellant, will get *pro ratâ* on the sum realized, namely he will get the proportion which 250 rupees would bear to 2,750 rupees. The costs of this appeal will be paid by the special respondent.

The 3rd April 1872.

Present:

The Hon'ble Louis S. Jackson and W. Markby, *Judges.*

Death of Plaintiff—Cause of Action (Survival of)—Abatement of Suit—Co-Plaintiffs—Irregularity (cured by Consent of Parties)—Judgment (pronounced by Successor of Judge by whom written.)

Case No. 1281 of 1871.

Special Appeal from a decision passed by the Additional Judge of Patna, dated the 2nd August 1871, *reversing a decision of the Subordinate Judge of that district, dated the 25th April* 1871.

Mussamut Parbutty and others (Plaintiffs) *Appellants,*

versus

Mussamut Higgin and others (Defendants) *Respondents.*

Baboo Gopal Lall Mitter for Appellants.

Baboo Mohesh Chunder Chowdhry for Respondents.

During the pendency of a suit brought by a Hindoo widow to recover possession of her husband's estate, the widow died, and two claimants (first a female on the strength of a will executed by the widow, and afterwards the heir of the deceased husband) were made co-plaintiffs. HELD that the cause of action was one which from its very nature survived upon the death of the plaintiff and that therefore the suit would not abate; that although it was not strictly regular or usual to allow the two claimants to come upon the record as co-plaintiffs, the irregularity had been cured by the consent of the parties, it being for their advantage that the trial should proceed, and that the co-plaintiffs should be left in possession of any decision which they might obtain against the defendants, and allowed to settle the question arising between themselves in other proceedings.

A judgment is not impeachable on the ground that, though written by the Judge who heard the case, it was not pronounced by him but by his successor in office.

Jackson, J.—THE facts of this case are a little peculiar. The suit was brought by a certain Hindoo widow, named Hoolas Kooer, who had taken the estate of her husband, against Fuzl Hossein and Mussamut Bhikun, alleging that Fuzl Hossein had, while in occupation as farmer of some of the immoveable property belonging to her estate, executed a deed in favor of Mussamut Bhikun, with the view of ousting the plaintiff; and the suit, therefore, was to recover possession of this property.

During the pendency of the suit, Hoolas Kooer died, and the present special appellant Mussamut Parbutty applied to the Court, on the strength of a will executed by Hoolas Kooer, to be substituted for her as plaintiff. An order to that effect was made by the Court, but afterwards another person named Buldeo Singh appeared, alleging himself to be the heir of Hoolas Kooer's deceased husband, and applying that he also might be put upon the record as plaintiff.

No objection appears to have been taken by the defendants; and the Court, accordingly, declining to go into the question whether Mussamut Parbutty or Buldeo Singh, was the legal representative of Hoolas Kooer, put them both on the record, and made them co-plaintiffs.

In that way the suit went to trial, and judgment was given for the plaintiffs. The defendants appealed to the Zillah Court, and the appeal was heard by Mr. Henderson, the Additional Judge.

Another circumstance to be mentioned is that the trial took place before Baboo Bolak Chand, who was at that time the Officiating Subordinate Judge of Patna, and who was relieved in his tenure of that office before he had time to deliver the judgment. He wrote his judgment, and handed it over to the officer who succeeded him in the office of Subordinate Judge, who accordingly pronounced that judgment for him in open Court a few days after the hearing.

The Judge holds that, in the first place, the Court below was not competent to proceed with the suit with the two parties I have named as co-plaintiffs, and he considers all that was done in their presence to have been a nullity or "useless," and he also holds that Bolak Chand being *functus officio* at the time when the judgment was pronounced, that judgment was good for nothing.

The co-plaintiff, Parbutty, appeals specially to this Court, and it is contended that the Judge was wrong on both these points: but for the special respondent it has been argued that the Judge was right, that inasmuch as the cause of action did not survive to Parbutty, she not being, as I understand it to be contended, the heir at law of the deceased husband of Hoolas Kooer, she was not entitled to carry on the suit, and that the suit therefore abated.

This is not quite the ground, I think, taken by the Additional Judge; but I do not think it will bear argument any more than the ground which the Judge has taken. It seems to me clear that the cause of action was one which, from its very nature, did survive upon the death of the plaintiff, and therefore the suit would not abate. Whether the proper representative of the deceased plaintiff is before the Court is another question. I am not prepared to say that the course taken by the Subordinate Judge in allowing the two claimants to come upon the record as co-plaintiffs, was strictly regular, or one which ought to be taken in ordinary circumstances; but that which is in itself unusual and irregular may often be cured by the consent of the parties: and in this case it appears that every one did agree to the course taken, and it is clear that such agreement having taken place, it was a more convenient course for every one that the trial should proceed and a decision be given, than that the suit should either be dismissed or be allowed to remain in abeyance for an indefinite time, while the question between the claimants as to who was to succeed the deceased plaintiff in the suit was being determined. It was for the advantage of the parties that the case should go on to trial, and that the co-plaintiffs should be left in possession of any decision of the present suit which they might obtain against the defendants, and should be left to settle the questions arising between themselves in other proceedings. I think, therefore, that the Judge was wrong in setting aside the decision of the Subordinate Judge on this ground.

Then, as to the other question, it appears to me that there is really nothing in it. Baboo Bolak Chand, when he heard the suit and apparently when he made up his mind as to the judgment which he would give was actually Subordinate Judge of the district, and the circumstance that he had not time to write out, as required by the Code, the judgment which has to be delivered in

Court, before he was relieved in his office, does not I think affect the validity of that judgment. He heard and to all intents and purposes determined the suit, and gave judgment, but his tenure of that particular judicial office having expired before judgment could be pronounced, that judgment, which was the judgment of the Judge who heard the case, was pronounced as a matter of form by his successor in open Court. That judgment, therefore, appears to me to be unimpeachable on any such ground.

The case will have to go back to the Lower Appellate Court for re-trial on the merits.

Markby, J.—I also think the case must go back. It appears to me to be an error to suppose that the judgment delivered by the Full Bench in the case reported in IX Weekly Reporter has no bearing whatever upon the question last disposed of in Mr. Jackson's judgment. The question there was of a totally different character. The acts which were under consideration were acts done by the Judges while they were Judges of the Court; and the only question there to be considered was what the effect of those acts was. It was a mere accident that those Judges afterwards left the Court before the case was finally disposed of, and that circumstance had no bearing on the matter at all except that it rendered the matter irremediable. What was held in that case was that, where there are several Judges who had to give their opinion in a case, the mere handing in to the Registrar by a Judge of his own opinion without there having been any final consideration by all the Judges as to what their final decision was to be, was not a judgment. The decision in that case proceeded upon this, that, in order to there being a final judgment of the Court, there must have been a final meeting and consideration by all the Judges who heard the case as to what their judgment was to be.

The 3rd April 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges*.

Execution of Decree—Act VIII of 1859 s. 246—Rival Decree-holders—Jurisdiction of High Court (under s. 15 of Charter Act)—Regular Suit.

In the matter of

Kalee Kishore Sen, *Petitioner*,

versus

J. P. Wise, *Opposite Party*.

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Mr. C. Gregory and *Ba*

kun Doss for Opposit

Petitioner, a decree-holder, allowed a holder to obtain a decree upon a regular su him entitled to follow the properties in dispu cution of his decrees, and did nothing even a decree was obtained until another decree-holder a for the attachment and sale of the properties in cution of his decree; and the Lower Court having the parties arrayed before it and having passed an order rejecting the petitioner's application, petitioner, after more than 90 days (the period limited for an appeal) had elapsed, invoked the aid of the High Court under Section 15 of the Charter Act, but the Court declined to exercise that jurisdiction leaving the petitioner to his remedy in a regular suit.

Kemp, J.—On the 10th of January last a rule was issued on the opposite party to show cause why the petitioner's prayer in this case should not be granted. Mr. Gregory and Baboo Doorga Mohun Doss have appeared on behalf of the opposite party and the case has been fully argued to-day. It appears that the petitioner, Kalee Kishore Sen, is a decree-holder holding a personal decree against one Gureeb Hossein Chowdhry. The order of the Subordinate Judge of Dacca, which is the subject of this application, is dated the 30th September 1871. The Court is asked to exercise the ordinary powers vested in it under Section 15 of the Charter Act. The application was made on the 10th January 1872. No explanation has been given as to the delay which has occurred in making this application. Suffice it to say that the application is made after more than 90 days had elapsed from the decision of the Subordinate Judge. Before this Court can exercise the powers vested in it by that Section 15 it must be satisfied that the petitioner is without remedy. Now in this case it is clear that the petitioner could not come up to this Court by way of appeal, and therefore it would be contrary to the principle laid down in the Full Bench decision to do by way of motion what we could not do by way of appeal. Kalee Kishore Sen, as already observed, has obtained personal decrees against Gureeb Hossein Chowdhry. Mr. J. P. Wise, the opposite party, has obtained several decrees, four in number, against Mahomed Zukee Chowdhry, the father of Gureeb Hossein Chowdhry. These decrees are decrees against the estate, and it is clear that Gureeb Hossein Chowdhry, if he is in possession of the estate of his father, has taken that estate with the burden and responsibility of paying his father's debts.

arning to the order which is the sub- this application, namely, the order of ubordinate Judge dated 30th Septem- 871, we find that all parties concerned e arrayed, namely, Kalee Kishore Sen petitioner as petitioner, Mr. J. P. Wise objector, and Gurreeb Hossein Chowdhry s judgment-debtor. The case was numbered as No. 77 of 1871, Miscellaneous case. There was no refusal on the part of the Subordinate Judge to exercise jurisdiction, and it was clearly a case in which he had jurisdiction to pass an order. In his order he refers to a proceeding of the 30th of July 1870. There are other proceedings of the same year, but the proceeding more particularly referred to is that of the 30th July 1870. Now, on referring to these proceedings which were under Section 246, we find that the present petitioner applied for the attachment and sale as against Gureeb Hossein Chowdhry, his judgment-debtor; a party not now before the Court, Hur Kishore Gooho, intervened under Section 246. His intervention was to this effect that Gureeb Hossein Chowdhry's interests had been sold to third parties, and that therefore they could not be taken in execution of the petitioner's decree. The objections of the intervenor were allowed on the 30th July 1870. Mr. Wise upon this brought a regular suit to make the properties liable for the decrees which he had obtained against Mahomed Zukee Chowdhry, but the petitioner took no steps whatever although the intervention had been successful. Mr. Wise in his regular suit obtained in this Court on the 8th of March 1870 on regular appeal from the decision of the Subordinate Judge of Dacca, a decree reversing the judgment of the Subordinate Judge and declaring that Mr. Wise was entitled to follow the properties in execution of his decrees with the exception of one *talook*, namely, Talook Raj Narain Sen. The petitioner having done nothing whatever by regular suit to set aside the decision under Section 246 which was adverse to him, on another decree-holder, namely, Monohur Pal, applying to the Moonsiff of Lekragunge to attach and sell the properties in execution of his decree (which application was rejected by the Moonsiff but subsequently allowed by this Court on the 8th of March 1871) presented a petition to the Subordinate Judge setting forth that now there was no obstacle to his being permitted to execute his decree against Gureeb Hossein Chowdhry, inasmuch as another decree-holder, namely Monohur Pal, had applied to the Moonsiff of Lekragunge, and although his application was unsuccessful in appeal to this Court, this application was allowed; and that therefore the petitioner, Kalee Kishore Sen, was entitled to proceed as against Gureeb Hossein Chowdhry and to execute his decree. Upon filing that petition, proceedings were taken in the Miscellaneous Department. As already observed, Kalee Kishore Sen, Mr. Wise, and Gureeb Hossein Chowdhry were made parties. The case was numbered and heard, and the Subordinate Judge having full jurisdiction to pass an order in the case alluded to the former proceedings under Section 246 which resulted in an order adverse to the petitioner on the 30th of July 1870; he also referred to the fact that Mr. Wise had obtained a decree from this Court, already alluded to, making these properties liable, and therefore he rejected Kalee Kishore Sen's application to execute his decree.

We think that this is a case in which we ought to exercise the discretion which is vested in us under Section 15. To say nothing of the delay in bringing this matter to our notice, a delay which has extended over the period which would under ordinary circumstances be the limit if an appeal was allowed, namely, 90 days, there is the fact that throughout the proceedings taken by Mr. Wise and Monohur Pal, the petitioner has done nothing in the way of moving the Court by regular suit to make these properties liable for his decree. He has left Mr. Wise in the first instance to bring a regular suit in which he was defeated in the first Court but which he eventually won in this Court. He did nothing even after that case was won by Mr. Wise, until Monohur Pal, another decree-holder, obtained from this Court on the 8th of March 1871 an order reversing the decision of the Moonsiff of Lekragunge. Therefore, exercising the discretion vested in us under Section 15, we think that this is a case in which we ought not to exercise the extraordinary powers vested in us under that Section. The petitioner is not without remedy. The Subordinate Judge clearly had jurisdiction, and whether he was right or wrong in his decision, he has not declined to exercise that jurisdiction. All the parties interested in the litigation were arrayed before him, and he has passed an order rejecting the application.

The petitioner must seek his remedy in a regular suit, and he is not entitled owing to his own neglect to invoke the aid of this Court under Section 15. We discharge the Rule with costs.

The 3rd April 1872.

Present :

The Hon'ble Louis S. Jackson and W. Markby, *Judges.*

Review of Judgment — Re-hearing of Matter already considered—Raising of new Points.

Case No. 41 of 1870.

Application for Review of Judgment passed by the Hon'ble Justices Louis S. Jackson and W. Markby, on the 15*th January* 1870, *in Regular Appeal No.* 202 *of* 1869.*

Huree Pershad Mundul (Plaintiff) *Petitioner,*

versus

Baboo Nund Kishore Singh and others (Defendants) *Opposite Party.*

Mr. J. W. B. Money for Petitioner.

No one for Opposite Party.

Parties applying for a review of judgment are not absolutely debarred from asking for a re-hearing of a matter which has been already argued and considered, nor are they debarred from raising a point which has not, but which might have been, raised previously; but in every such case it lies upon the party making the application, to show the Court some good ground upon which that indulgence is asked for, and it is in the discretion of the Court to allow or to refuse such an application.

Jackson, J.—It appears to me extremely important to adhere to the practice of the Court as stated in the decision of the Full Bench reported in XV Weekly Reporter, page 1, Full Bench Rulings. The practice which has been there stated, and which has since, if it had not before, prevailed in this Court, I understand to be simply this, that parties applying for a review of the judgment of the Court, are not absolutely debarred from asking for a re-hearing of a matter which has been already argued and considered, nor are they debarred from raising a point which has not, but which might have been, raised previously. But in every such case it lies upon the party making the application to show the Court some good ground upon which that indulgence is asked for, and it is in the discretion of the Court to allow or to refuse such an application. Now in this case, we have asked Mr. Money to show upon what ground his client was entitled to ask this from our hands; and the grounds stated are those of hardship and surprise.

This was a suit to recover possession, as putneedar, of certain lands. It appears that, in respect of the lands or some portion of them, some act had previously taken place in respect to which the plaintiff had considered himself injured, and had brought a suit against his landlord and the party committing the injury complained of; and we held in this case that the present suit disclosed no cause of action separate and distinct from that which had been in effect adjudicated upon in that suit. We declared that upon that ground the suit ought to have been dismissed, and upon that ground it was dismissed. Then we went on to give our opinion upon another point which we also considered was fatal to the plaintiff's suit. Now it is said that upon the first of these points the plaintiff, then respondent, was taken by surprise.

I have not brought with me my notes of the hearing of that case, but my brother Markby has got his note-book, from which it appears that the respondent's pleader, Baboo Ashootosh Dhur, objected that the point was one which was suggested by the Court, and which had not been taken in the Courts below. That it is quite a different thing from saying that he was taken by surprise. In fact, the issue raised and the nature of the case was such that he must have been prepared, and he must have known that he would be called upon to show what the cause of action was, and when and how it arose: and certainly, if the pleader who represented the petitioner on that occasion had been taken by surprise, we should have expected that that fact would have been plainly and distinctly shown to us on this application, and not vaguely stated in the petition of review. It is not as if the point had been started by the appellant in the argument, but it was a point taken by the Court, and the answer to it was that it had not been taken by the Courts below; but it does not appear that either party was at all taken by surprise.

As to the ground of hardship, that entirely depends upon the assumption, for which I am not aware of any ground, that the plaintiff had valuable property of which he was deprived by the defendant in the mode alleged, and which he would have recovered, but for our adverse decision. It appears to me that the ground that Mr. Money undertook to show us altogether fails, and that we ought not to allow this review. This review is therefore rejected.

Markby, J.—I am of the same opinion. I delivered a judgment to the same effect with Mr. Justice Bayley this morning.

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* 13 W. R., 64.

The 4th April 1872.

Present :

The Hon'ble G. Loch and W. Ainslie,
Judges.

Sale in Execution—Act VIII of 1859 *s.* 246*—Payment by Instalments—Mortgage—Purchaser from Judgment-debtor—Payments of previous Mortgages by Purchaser—Misconduct of one of several Purchasers.*

Case No. 106 of 1871.

Regular Appeal from a decision passed by the Officiating Judge of Patna, dated the 27th March 1871.

Syud Wajed Hossein and others (Defendants)
Appellants,

versus

Hafez Ahmed Rezah and others (Plaintiffs)
Respondents.

Mr. C. Gregory and *Moonshee Mahomed Yusoof* for Appellants.

Baboos Kalee Mohun Doss, Romesh Chunder Mitter, and *Nulit Chunder Sen* for Respondents.

Upon default of debtors who had offered to pay their debt by certain instalments, and had pledged their property, and agreed to let it to be sold if there was any default in payment of *kists* due, and had prayed that the decree might be drawn up accordingly, the effect of the decree, and the sale under the decree, was to make that property liable for sale in liquidation of that decree, and the sale passed the property as it stood at the time when it was originally mortgaged.

Quære—Whether a person holding by purchase from the judgment-debtor, is in a position to succeed under Act VIII of 1859 s. 246.

The purchaser was held entitled to recover the amount paid by him on account of previous mortgages, when, in making those payments, he merely acted for the debtor who had borrowed the money from him, and what he did was to see that that money so borrowed was properly applied in clearing off those debts which rendered his own purchase unsafe, and of the existence of which he was at that time cognizant.

Where the whole property was sold, and the purchasers agreed among themselves what shares they were to take in the property, the Court was unable, because of the apparent misconduct of one of the purchasers who, after having acted as pleader for the other party, had now become one of the purchasers of the property which he knew had been previously sold to his clients, to limit the extent of that sale, or to declare that the said pleader was not entitled with the other purchasers to the whole 16 annas.

Loch, J.—THIS suit is brought to recover possession of 8 annas of Mouzah Peah on proof of title under the following circumstances :—

It appears that Komul Singh, Leeladhar Singh, and Jograj Singh, holders of a certain *mokururee* comprising Peah and other villages, on the 11th October 1859, executed a registered deed of instalment for a loan taken by them from Jeetun Lall and Sunkur Lall, and, as security for the loan, mortgaged the said property. Jeetun Lall and the heirs of Sunkur Lall brought an action against the debtors upon the deed of instalment; and on the 5th August the debtors admitted the claim, the *kistbundee*, and the mortgage; and on the 27th August 1861 a decree on confession of judgment was made, which was in these terms :—"That the suit be decreed on confession of the claim; both parties will act according to the terms of *ekbaldabee.*" Some time after this, one Shah Lutafut Hossein purchased the decree, and applied for execution, and attached the mortgaged property, and put it up for sale on the 20th July 1869, on which date the plaintiffs purchased Mouzah Peah, part of that mortgaged property, and on the 18th September were put in formal possession thereof under the provisions of Section 264 Act VIII of 1859. But when they went to realize rent, they were opposed by the defendants, and accordingly they applied to the Court on the 6th November 1869 to be put in possession; and an order to that effect was passed on the 6th January 1870. But on appeal to the High Court, that order was set aside on the 2nd May 1870. As the plaintiffs are thus put out of possession, they sue to recover possession of the disputed property, with mesne profits to the date of recovery, and costs of the suit limiting the present action to an 8 annas of the Mouzah Peah, as the other 8 annas in possession of other parties who hold it upon a different title to the defendants in this case.

The plaintiffs further say that, while the property was under attachment on the application of Lutafut Hossein to execute his decree, the defendants in this case, on the 15th May 1868, purchased an 8 annas of the entire 16 annas of Mouzah Peah from the original proprietors, and on the 11th June 1869 filed a claim in the Court; and without any enquiry being made under Section 246, a vague order was passed by the Subordinate Judge regarding the property claimed, directing that the sale of the rights and interests of the judgment-debtors should proceed.

The case put forward by the defendants is that, previous to the bond executed to Jeetun Lall and Sunkur Lall, the property had been mortgaged to other parties, *viz.* to Phool Singh, to Kesho Lall, and to Sheo Churn Lall, that these mortgages had been bought up by Sheo Sahoy Singh, one of the plaintiffs in the present case, who caused the property mortgaged to be attached and advertised for sale, and that on the application of the owners, *viz.* Komul Singh and others, they, the defendants, advanced money to pay off the said debts on the understanding that an 8 annas of the property was to be sold to them: and that on the 15th May 1868 a regular bill of sale was made out, and executed in their favor by the said Komul Singh and the other proprietors for 21,000 rupees; that when the property was advertised for sale in execution of the decree of Lutafut Hossein, they filed a petition of objection, claiming the 8 annas' share as purchased by them and in their possession; that an order was made by the Judge for the sale of the remaining rights and interests of the judgment-debtors, which were accordingly sold, and that the plaintiffs purchased nothing but what remain to the debtors, *viz.* an 8 annas' share of Mouzah Pesh, exclusive of that share which they, the defendants, had previously purchased.

The Judge who tried the case has held that the purchase of the plaintiffs was of the whole 16 annas of Mouzah Pesh, and that purchase must prevail over the private purchase made by the defendants, inasmuch as the property was under attachment at the time, and that the sale was not for an 8 annas, but of the whole 16 annas of Mouzah Pesh, and he has given the plaintiffs a decree, and declared the deed of sale of the 15th May 1868, propounded by the defendants, to be of no effect, and has further amended his decree by giving mesne profits, and has also declared that the defendants are liable for all costs bearing interest at 6 per cent.

The contention before us comes under the following various heads:—

First.—The nature of the decree made on the 27th August 1861.

Secondly.—Was the property under attachment when the defendants purchased 8 annas share of Mouzah Pesh in May 1868?

Thirdly.—What was sold under the sale proceedings of the 20th July 1869?

Fourthly.—Is the defendant entitled to be recouped the sums he paid on account of mortgages prior to that of Jeetun Lall and Sunkur Lall, bearing date the 11th October 1859?

Fifthly.—Can the plaintiff, Moulvee Abdool Kader, be allowed to take advantage of the sale?

Sixthly.—Whether the Judge was not in error in declaring that the whole bill of sale was of no effect, the suit being only for the possession of Mouzah Pesh, whereas the bill of sale comprehended other properties which are not in contest in the present suit.

With regard to the first point, it has been urged that the plaint on which the decree of the 27th August 1861 was based, was a plaint which only asked for the payment of the money; that the decree was made on the confession of the defendants; and that the decree was given in conformity with that confession; that the utmost that can be said of that decree is that it was a simple money decree. We think, however, this contention is not correct. The suit in that case was instituted on the 6th April 1861. The plaintiff asked the Court to recover the whole debt as the debtors had failed to pay the instalment agreed to in their *kistbundee.* In the answer filed by the debtors on the 5th August 1861, they admitted the existence of the debt, and they agreed to pay the amount under a fresh *kistbundee,* and they at the same time pledged the whole property originally pledged, and they agreed further that, if they defaulted as to any *kists,* they should be liable for the whole amount of the bond; and that the property then pledged would be liable to be sold on failure of their payment; and they asked that a decree might be drawn up according to the above specification.

The order of the Court is that the suit be decreed according to the admission of the defendants and the parties act up to the terms of *ekbaldabee.*

Now it is clear that what the debtors in that case did was to offer to pay their debt by certain instalments, that they pledged their property which they said should be sold if there was any default in payment of *kists* due, and they prayed that a decree might be drawn up accordingly. Having defaulted, the effect of the decree and the sale under the decree was to make that property liable for sale in liquidation of that decree, and the sale passed the property as it stood at the time when originally mortgaged, *viz.* in October 1859.

We come then to the next point, *viz.* whether the property was under attachment when the defendants purchased it in 1868. We find it unnecessary to go into this point, because, whether the property were under attachment or not, it had been under the decree made liable for the debt due to Jeetun Lall and Sunkur Lall; and therefore, if sold to the defendants, it would be subject to their lien till the debt was liquidated.

Then comes the question as to what was sold in the sale proceedings of 1869. It appears that on the 13th March 1869 Lutafut Hossein applied for execution against the mortgaged property, consisting of Mouzah Pesh, Dowlutpore, &c., that separate attachment proceedings were taken out in regard to Mouzah Pesh, and in regard to Dowlutpore, &c.; and similarly separate sale proclamations were issued with regard to Mouzah Pesh, and with regard to Dowlutpore and others. On the 11th June 1869, the defendants came into Court, claiming an 8 annas' share of the property, alleging that they were entitled to this property under a deed of sale to them by the debtors bearing date the 15th May 1868; and on this an order was made by the Subordinate Judge (a very imperfect and a most unsatisfactory order it must be confessed), which was to this effect:—"That from the "statement of the petitioner it is clear that "some right and interest of the debtors re-"main in the property advertised for sale; "then whatever right and interest of the debtor "remain in the said property advertised for "sale, that will be sold. Then this objection "need not stop the sale, therefore it is ordered "that the rights and interests of the debtors "be sold; and at the time of the sale, notice "of the objection of the petitioner will be "made known to the purchasers, and the pre-"sent objection having been registered will "be struck off."

The petitioners appear to have been satisfied with this order. But we cannot agree with the pleader for the appellants, defendants, that it is a distinct order releasing 8 annas of the property; that it limited the sale to the rights and interests of the debtors in the remaining 8 annas of Mouzah Pesh. It was a most imperfect and an improper order, for, on such an application being made, the Judge, to whom the petition was presented, should have determined under the provisions of Section 246 whether or not the objection was a good one, and whether the property claimed should be released from the operation of the decree; that the order passed amounted in reality to a rejection of the application is apparent from the further sale proceedings, which show that this claim and other claims of a similar character were mentioned as having been made known to the purchasers at the time of the sale. But nowhere is the property exempted from sale; and therefore we think that the whole of the 16 annas of Mouzah Pesh was put up for sale, and sold and purchased by the plaintiffs. This view of the effect of the order passed by the Subordinate Judge on the above petition of the defendant is borne out by the opinion expressed by the High Court, when that order came up before it in an appeal disposed of in 1870, when the Court held that the order was tantamount to a rejection of the petition, and that the form of the order was very objectionable. The appellant now asks us to put him in the same position that he would have been in had the order been made properly under Section 246. But that is quite impossible for us to do, as we hold that the whole property, rightly or wrongly, was sold; and we think it questionable whether a party in the position of the defendant holding this land, by purchase from the judgment-debtor, is in a position to succeed under Section 246. But be that as it may, we find that the 16 annas of Mouzah Pesh was really sold, and that it is consequently impossible to comply with the appellant's prayer in this respect.

Then, with regard to the claim of the defendant to be recouped, the sum paid on account of the mortgages prior to that of Jeetun Lall, we think that he is entitled to have that money repaid to him. It is to be observed that one of the plaintiffs in this case, Sheo Sahoy Singh, had purchased up all the mortgages previous to the one of October 1859 held by Jeetun Lall and Sunkur Lall; that he, as well as Abdool Kadir who was vakeel for the defendants, were perfectly cognizant how the state of matters stood; and Sheo Sahoy had received from the defendants the whole of the money that was due upon those previous mortgages, and by that act this property was relieved from all liabilities previous to the date of the bond of 1859 under which the plaintiffs in this suit now claim. There is nothing whatever to show that the defendants were aware of the existence of the mortgage of October 1859; for had they been so, there can be no doubt that, as they took steps to see the previous debts paid off, they would have also taken care to have freed the estate from the incumbrance of this debt also, for the money that they paid over to the debtors was considerably more than the amount of the debt due upon this bond. The plaintiffs have derived a benefit from the act of the defendants, inasmuch as by that act the property has been relieved from all incumbrances. Had these payments by the defendants not been made, the plaintiffs would have purchased this property subject to all the prior liens, and we think, under these circumstances, that the defendant is equitably entitled to have this money repaid to him before the plaintiff be allowed to take possession.

It has been urged that he is not entitled to it, because it was a voluntary payment. We cannot look upon it in the light of what is ordinarily called a voluntary payment. The defendant, in making these payments, acted for the debtor who had borrowed the money from him, and what he did was to see that that money so borrowed was properly applied in clearing off those debts which rendered his own purchase unsafe, and of the existence of which he was at that time cognizant. And we think that the cases which have been quoted to us, and which are noted in the margin, are on the whole in favor of the view that we have now taken. This point, therefore, we give in defendant's favor, holding that he is entitled to recover the amount paid by him on account of mortgages prior to October 1859.

I Weekly Reporter, page 91.
XIV Weekly Reporter, page 283.
IX Moore, page 306; Suth. P. C. Rep., 483.
II Moore, page 60; V Weekly Reporter, P. C., 124.
Marshall, page 651.
II Weekly Reporter, page 29.
Cases cited on the other side.
XIV Weekly Reporter, page 49.
Gap No. Weekly Reporter, p. 345.
III Weekly Reporter, page 210.

The next point is whether Moulvee Abdool Kadir, one of the plaintiffs, should be allowed to take advantage of the sale. It appears that Abdool Kadir was the pleader for the defendants when they filed that objection to the sale of the property in June 1869. Having obtained the order which was then passed, he remained satisfied with it, though it was ambiguous in its terms, and now he has joined the opposite party and become one of the purchasers of the property which he knew had been previously sold to his clients. The sale proceedings, as well as the sale certificate, show that the purchasers of this property were purchasers according to the following shares:—

Ahmed Rezah 3 annas,
Moulvee Abdool Kadir 3 annas,
Shaikh Abdool Kadir 3 annas,
Omesh Chunder Sircar 3 annas,
and
Sheo Sahoy Singh 4 annas.

Though we consider the conduct of Moulvee Abdool Kadir highly objectionable and blameable, we cannot interfere with the sale so as to limit it as asked by the defendant, appellant, to 13 annas. The whole property was sold, and the present plaintiffs agreed among themselves what shares they were to take in this property, and we cannot, because of the apparent misconduct of Moulvee Abdool Kadir, limit the extent of that sale, or declare that Moulvee Abdool Kadir, with the other plaintiffs, is not entitled to the whole 16 annas.

The last point taken is the order made by the Judge setting aside the bill of sale. The Judge's order is:—"I declare that the deed of "sale dated the 15th May 1868, propounded "by the defendants, to be of no effect." And the defendants, appellants, very properly urge that, as that bill of sale is not confined to Mouzah Peah, but comprises other villages which were purchased on the same day from Komul Singh and others, the Judge could not cancel it as relating to those properties which are not in contention in the present case. Furthermore, it is urged that the object of the plaintiffs is to place those other villages in the position of *dakhilee* villages to Mouzah Peah so as to claim them as having been purchased by them at this sale in execution. And the pleader for the defendants goes on to show how separate attachments were taken out for Mouzah Peah and for Mouzah Dowlutpore; how separate sale proclamations were issued; how previous to the sale the parties were examined, and it was agreed that Peah and Dowlutpore, &c. should be put up separately for purchase, and how the sale proceedings show that Peah only was sold, and that the sale proceeds thereof were quite sufficient to cover the debt, and therefore Dowlutpore, &c., were not put up for sale. We think, however, we need not enter further into the question, but simply declare that the Judge's words can have effect no further than the property in contention before us, and that the deed of sale is set aside only in regard to Mouzah Peah.

We affirm the judgment of the Lower Court dated 27th March 1871, with this modification that, before the plaintiffs can be put in possession, they must recoup the defendant all sums, principal and interest, paid by him on account of the mortgages existing previous to the mortgage of October 1859, and we remit the suit to the Court below that the amount so payable to the defendant may be ascertained and embodied in the decree. The order of the 29th August 1871, awarding mesne profits to the plaintiff, is reversed.

Looking to the circumstances of this case, we think that the parties should pay their own costs in both the Courts.

The 4th April 1872.

Present:

The Hon'ble H. V. Bayley and W. Markby,
Judges.

Review of Order (rejecting Application to admit Special Appeal).

In the matter of

Burramoollah, *Petitioner,*

versus

Nil Chand Dutt and others, *Opposite Party.*

Mr. M. M. Ghose for Petitioner.

No one for Opposite Party.

The Court declined, in the absence of some satisfactory explanation, to entertain an application for a review of an order rejecting an application to admit a special appeal.

Markby, J.—In this case an application for the admission of a special appeal was made to this Court on the 19th December last. The petition contained 10 grounds of appeal; and after hearing a pleader in support of the application, it was rejected by two Judges.

There is now presented to us an application for a review of the order passed rejecting the application to admit the special appeal, treating that rejection as a judgment to which Chapter XI of the Code of Civil Procedure relating to reviews is applicable. The application for review contains four new grounds of special appeal in addition to the 10 old ones; and if it were the first application to admit a special appeal, it would be too late.

Assuming the rejection of the application to admit a special appeal to be a judgment which may be reviewed, we think we ought still to consider whether we ought to entertain the application for review. It is not suggested that there is anything peculiar or exceptional in this case, or that there has been any new discovery since the case was last heard; or that there has been any miscarriage by the Court; or that the case put forward on the last occasion was not correctly understood and disposed of; it is only said that "the real ground of special appeal in this case was not properly and expressly put forward on the last occasion, though it appears from the old grounds that there was some allusion to them." In short, it comes to little more than this that the case having been once argued by a vakeel of long standing and great experience, another advocate now states that he can put the applicant's case more forcibly.

I entirely admit that this Court has a discretion to admit applications for review in any case in which it considers that it is desirable for the ends of justice to do so; but I also think it has a discretion, before it is called upon to hear a case re-argued, which has been already once determined, to require some explanation to be given why this exceptional course should be followed, and I think that such a statement as that which is made in this case does not amount to such an explanation as we are entitled to require. Mr. Ghose contends that we ought to hear his argument in support of the application to admit the special appeal, in order to see whether the ends of justice require that a review should be granted. But that evades the whole question. If we are bound to hear his application, in order to see whether it ought to be granted, it is obvious that every application to admit a special appeal may be made, and must be heard, as many times over as the parties choose to present a petition for review, for it has been held by this Court that there is no limit to the number of applications for review. To-morrow we may have a third advocate, who thinks he can put the case more forcibly than Mr. Ghose, the next day a fourth who thinks he can put it more forcibly still, and so on *ad infinitum.*

The power of review is a most valuable one if properly exercised, but it would be a grievous injustice to the large number of suitors who are waiting to be heard, if we were to allow parties, who have once had a fair opportunity of appearing and placing their case before the Court, to come up over and over again in order to try and put their case better. The petitioner in this case has had three distinct hearings in three different Courts, and I think that, in the absence of any special circumstances, we may assume that his case has been sufficiently investigated.

I may add that, whilst this case has been under consideration, I have sat to hear an application for review with Mr. Justice Louis S. Jackson, and he expressed in that case similar views to that which I have expressed here, in which I concurred.

Bayley, J.—I quite concur.

The 4th April 1872.

Present:

The Hon'ble G. Loch and H. V. Bayley,
Judges.

Hereditary Lease (Characteristics of a).

Case No. 6 of 1872.

Application for Review of Judgment passed by the Hon'ble Justices G. Loch and H. V. Bayley, on the 23rd June 1871, *in Special Appeal No.* 785 *of* 1870.

Baboo Lekhraj Roy and another (Plaintiffs)
Petitioners,

versus

Kanhya Singh and others (Defendants)
Opposite Party.

Messrs. J. T. Woodroffe and *R. E. Twidale* and *Baboo Grish Chunder Ghose* for Petitioners.

Messrs. J. W. B. Money and *G. C. Paul* and *Baboo Rajendro Nath Bose* for Opposite Party.

Though the lease in this case contained no words importing an hereditary character, yet it was held to have the effect of being hereditary on the ground that the period of its continuance was not dependent on the life of any party, whether lessor or lessee, but on the continuance of the superior tenure.

Loch, J.—An application for the admission of a review of our judgment of the 23rd June 1871, has been made on the part of Lekhraj Roy and others, plaintiffs in the case: and after serving notice on the opposite party we have had the question re-argued at length.

The question we have to determine is, whether the lease given in 1215, of Mouzah Towee, by Choonee Lall to Nirput Singh is a hereditary lease at a fixed rent, or whether the lessor could re-enter on the death of the said Nirput Singh.

By the deed of the 25th Chyet 1215, corresponding with 1808 A. D., the lessor Choonee Lall, alleging that he was the holder of a *mokururee* tenure from Government of Mouzah Towee, gave a lease or *ticca* to Nirput of the said mouzah by which the lessee was bound to pay from the beginning of 1215 the *jumma* of 606 rupees under all circumstances and without excuse up to the term of the lessor's *mokururee;* and it provides, should the Government make any new settlement of the *mokururee* so as to raise the revenue payable by the *mokururreedar* to the Government, the lessee would pay that difference between his present and the enhanced rent. And the lease concludes with words to this effect:—that the writing is by way of a pottah for terms of years terminable with the *mokururee.*

The Lower Appellate Court finds incidentally that Choonee Lall held a *mokururee* of the whole 16 annas of the Mouzah Towee from 1207 to 1216, that is up to 1809 A. D. This finding is apparently based on an extract from the Collector's register and report of the *mohafis* filed with the record. This finding was accepted by this Court when the case came before it originally in August 1870, and also in June 1871. The Subordinate Judge says merely that Choonee Lall held a *mokururee,* and though Mr. Money, Counsel for the respondent in this case, urges that the *mokururee* dates from the year 1200 F. S., yet I think we must abide by the finding on this point of the Lower Court as to the period when Choonee Lall's *mokururee* commenced. It appears that, on the death of Choonee Lall, his wife Jeetun Deyee succeeded to the possession of the *mokururee,* and she brought an action to recover possession from Nirput Singh on the allegation that he had fallen into arrears, and under the terms of the lease she was entitled to take possession. In that suit she alleged that Nirput Singh, in collusion with other co-parceners in the zemindaree, had altered the terms of the lease, which she stated had been given by Choonee Lall for a fixed period, but which Nirput Singh had by such alteration made co-extensive with the *mokururee* tenure. He probably alludes to the words "*Ta myad mokururee khood*" written over the last line of the *ticca* lease; but as this expression appears in other parts of the lease, it has not been contested before us that this interlineation is not part of the original lease. The Court in 1827 decided, for reasons stated in the judgment, that Jeetun Deyee could not re-enter into possession, and that all that she could recover was the rent due from Nirput Singh, which he on his part was willing to pay, though he alleged that he had paid it already under an assignment from her to the other co-parceners in the zemindaree.

Jeetun Deyee was succeeded in the estate by her two daughters, Fool Deyee and Tope Deyee, and on the death of Tope Deyee, her sister Fool Deyee took possession of the whole estate, and this gave birth to fresh litigation on the part of the representatives of Tope Deyee, who brought a suit against Nirput

Singh as *ticcadar* of Mouzah Towee, and Roop Lall, *ticcadar* of Chuck Hasil, to recover the share of rent due from them on account of Tope Deyee's 8 annas' share. In this litigation the representatives of Fool Deyee appeared as objectors, and it was held in that case that the representatives of Tope Deyee were entitled to a moiety of the estate; but that, with regard to the *ticca* of Nirput Singh, they could not get possession, but were entitled only to their share of the rent.

Fool Deyee was succeeded by Muddun Gopal, and in execution of the decree against Muddun Gopal, 8 annas' share of the property was sold and was purchased by the present plaintiff Lekhraj Roy. Now it has been urged by the opposite party that all this litigation is evidence to prove the nature of the tenure held by Nirput Singh. But it appears to me that, as stated in our judgment of August 1870, this litigation is no evidence in regard to the point which we have before us, *viz.* whether this lease to Nirput Singh was hereditary or not; and I do not find that in our judgment of June 1871, we referred to this litigation as if it were evidence in the case, but merely as a matter of history for the purpose of showing what was the conduct of the parties before and after the death of Nirput Singh; and therefore, I think, we may put this litigation out of further consideration, for it proves nothing as to the hereditary character of the lease, a question which was not raised and could not have been raised in that litigation. Then, with regard to the litigation that occurred subsequent to the death of Nirput Singh, *viz.* a suit for rent in 1862 brought against his representatives by the representatives of Fool Deyee, that also does not go to prove the hereditary nature of this tenure. A copy of the plaint in that case has been filed, in which it is stated that Mouzah Towee was given in lease to the ancestor of the defendant so long as that *mokururee* should continue. But no final order appears to have been passed, and what became of the case is not explained: nor does that plaint prove that the *mokururee* was hereditary. A paper purporting to be a receipt by the representatives of Fool Deyee for the amount of the rent claimed in the above suit, has been filed by the defendant in this case. But as neither the plaint above referred to bears any order upon it, nor has the receipt, though admitted upon the record, been proved, it appears to me that the former does not further the case, and that the latter cannot be admitted in evidence.

Getting rid, therefore, of all this litigation, we have simply to look at the terms of the lease and at the conduct of the parties from the time of the death of Nirput Singh up to the date of the present suit, and to see whether, as strongly pressed upon us by the opposite side, the decision of the Privy Council in Dhunput Singh's case* is applicable or not?

Now, with regard to the lease, we find that there is no mention therein of the period for which Choonee Lall's *mokururee* was to exist. He speaks of the possibility of the Government making a fresh settlement with him at an enhanced rent. He does not apparently contemplate such a thing as a fresh settlement being made with any other person; and having this belief in his mind, he lets the land to Nirput Singh in *ticca*, which *ticca* is to last so long as his *mokururee* lasts.

I think no valid objection can be raised as to the hereditary nature of this lease merely from its being called a *ticca*, or from its comprising terms which are in use in ordinary *ticcas*, such for instance as a prohibition to cut trees, as a power to the lessor to re-enter on failure of payment of rent as the prohibition for the resumption of rent-free lands, &c., for such terms are common to most leases, and their introduction cannot, I think, be said to indicate that the lease was merely for a term of years. The terms are used for the protection of the property and the rights of the lessor. No term is fixed in the lease. Its term is limited by the period of the superior lease,—so long as the *mokururee* lasts, so long the *ticca* lease is to last. No word such as *mowrosee* is to be found in the lease. It might have terminated in a year. The Government might have made a fresh settlement for 10 years, or for 20 years, or for 100 years, and the *ticca* would have lasted for an equal period, and therefore, it cannot be said that this lease was for Nirput Singh's life: It was to last so long as the *mokururee* of his lessor Choonee Lall lasted. I repeat an observation I made on a former occasion. Had Nirput Singh died during the life-time of Choonee Lall, could the latter have prevented the heirs of Nirput from holding possession? Could Choonee Lall, having reference to the terms on which he leased the property to Nirput Singh, *viz.* so long as his own *mokururee* lasted, have opposed their entrance on the ground that the lease granted to Nirput was only for life? Could they not have said—though there be no words used in the *ticca* lease declaring it to be hereditary, yet its term is not dependent on Nirput Singh's life, nor on any body else's life, it is without limit, and its termination depends on the termination of the *mokururee* lease held by you from Government; if that lease from any cause ceases, then will Nirput's lease necessarily fall; but so long as the former continues in force, so long must our lease continue to have effect?

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* 9 W. R., P. C., 3.

In looking to the intention of the parties when the lease was given by Choonee Lall to Nirput Singh, I think we have allowed ourselves to be influenced by the statement made by the Lower Appellate Court, and accepted by this Court that Choonee Lall's *mokururee* was to last only to the year 1216, and we have argued from that that both Choonee Lall and Nirput Singh were aware that the *mokururee* was to last only for one year from the period when the *ticca* lease was given to the latter, and this has no doubt had its effect upon us in coming to a determination as to the nature of the lease granted to Nirput Singh. In that lease there is no reference made to the period of Choonee Lall's lease from Government and beyond the mere fact of his holding a *mokururee*, the *jumma* of which was liable to enhancement, we cannot gather anything as to the nature or period of that *mokururee*. If then we read the *ticca* lease by itself, we find that the arrangement was that so long as Choonee Lall's *mokururee* remained in existence, so long this *ticca* lease should remain in force, subject only to the contingency of an increase in the revenue payable to the Government. Now we find that the *mokururee* of Choonee Lall is in fact in existence up to the present date, and that the plaintiff in this case comes in on that very title as representing Choonee Lall *mokurureedar*, and that there has been no change whatever in the *jumma* originally fixed by Government upon this *mokururee;* and therefore the defendant very strongly asserts that, under the terms on which his ancestor took the lease, he cannot be evicted, because the superior holding, *viz.* the *mokururee* of Choonee Lall, is in existence up to the present time, and it is only by the destruction of Choonee Lall's lease that the subordinate tenure can fail.

Now, with regard to the conduct of the parties since the death of Nirput Singh, which occurred in 1262 F. S. or 1855 A. D., it is true that rents have been received by the representatives of the *mokurureedar*, but there has not in fact been any number of descents since the time of Nirput's death, either on the side of the lessor, or on that of the lessee. It was urged by Mr. Money for the opposite side that the point to be looked to was the number of successions on the side of the grantors, and that if there had been only one descent on the side of the grantees, that would be sufficient to satisfy the requisitions of the judgment of the Privy Council in Dhunput Singh's case.* But we find, since the death of Nirput Singh, that on the part of the grantors there has been no succession, for the plaintiff in the present case is the purchaser of the rights and interests of Muddun Gopal, and in fact represents Muddun Gopal who succeeded before the death of Nirput Singh, and therefore we may say that, since the death of Nirput Singh, there has been no change in the succession of the grantors; and so long as Nirput Singh was alive, it was a matter of no consequence how frequent the successions were, for so long as he lived the various descendants on the part of the grantors could only take from him the rent which had been agreed upon in the lease.

Then with regard to the grantees. The lease was given to Nirput Singh, for we cannot recognize his father Neem Chand, though it has been urged that the lease was actually given to Neem Chand. Since the time of Nirput Singh, the only descent that there has been is that of his son Kanhya and of his grandsons who represent another son who died before his father. Here then the descents on the part of the grantee are only one descent. In the case of Dhunput Singh, the successions on either side were more numerous, and certain alienations of the property were sanctioned by the lessors. The circumstances of the two cases, therefore, are not on an equal footing. But be that as it may, we think on a further full consideration of the lease that, though it contains no word importing an hereditary character, yet it has the effect of being hereditary, for the period of its continuance is not dependent on the life of any party whether lessor or lessee, but on the continuance of the superior tenure. We think, therefore, that the conclusion we came to as to the nature of the lease in our judgment of 23rd June 1871, was substantially correct, and that a sufficient ground for the admission of a review has not been made out. We dismiss the appeal with costs which we fix at Rs. 500.

Bayley, J.—I concur in rejecting this application for review. It is not for us at this stage to alter the finding of fact by the Lower Court as to the *mokururee* dating from 1207 B. S., *not* 1200. The previous decision certainly shows the *ticcadar* could not be ejected from the *jumma*. That litigation, however, really was referred to more as a part of the narrative than as part of the actual decision of this Court.

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* *Ubi supra.*

As to whether the *jumma* is to be hereditary or not, I quite concur in the remarks and conclusions of Mr. Justice Loch both on the grounds of the nature of the tenure and the conduct of the parties themselves. I agree, therefore, in the order proposed by him.

The 4th April 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Separate Suits for Rent—Solenamah—Pottah.

Cases Nos. 1169 and 1175 of 1871.

Special Appeals from a decision passed by the Judge of West Burdwan, dated the 29th July 1871, *affirming a decision of the Moonsiff of Bishtopore, dated the 27th May* 1871.

Ooma Churn Chowdhry (Defendant) *Appellant,*

versus

Ram Kant Chowdhry and others (Plaintiffs) *Respondents.*

Baboos Ashootosh Dhur, Taruck Nath Dutt, and *Bhowanee Churn Dutt* for Appellant.

Baboo Chunder Madhub Ghose for Respondents.

HELD that in this case the *solenamah* was a distinct transaction from the *pottah*, and that the plaintiff was entitled to bring separate suits for rent in respect of the tenures held under those documents respectively.

Kemp, J.—THESE two suits were brought by one and the same plaintiff against the same defendant for arrears of rent.

In suit No. 1169, the issues were, 1st, whether the defendant leased the lands as stated in the plaint, and owes the arrears claimed, or not? and, 2nd, whether the defendant's plea of payment was true or not? The Moonsiff found in suit No. 1169 that the plaintiff had proved that defendant held a tenure of 27 beegahs 19 cottahs and 11 chittacks of land at a rent of Rs. 81-10-11; that deducting Nidhee Ram Chowdhry's share the rent payable for plaintiff's share was Rs. 25-14-16-9, and that defendant had failed to prove his plea of payment. The suit was therefore decreed.

This decision was upheld in its entirety by the Judge. Before the Judge in this suit a fresh ground of appeal was raised, which was not in issue before the Court of first instance, namely that separate suits ought not to have been brought. On this plea the Judge found that separate suits were necessary as the tenures had been separated.

In the other suit No. 1175, the Moonsiff observes that the plaintiff files a *kabooleut* dated 13th Kartick 1254, and although they adduced no evidence in support of the document, yet the defendant does not declare it to be false or otherwise object to it. The Moonsiff then goes on to state that the defendant's objection that under the terms of the pottah he is bound to pay 8 annas per beegah for the cultivated area and for that alone, and that the cultivated area is no more than 35 or 36 beegahs, while the plaintiff declares that the land under cultivation is 60 or 70 beegahs. The Moonsiff then says that the plaintiffs have not proved the extent of the cultivated area; that they have not paid the Ameen's fees, or even applied for measurement of the land, which is a default on their part; and that therefore the defendant is bound to pay only 8 annas a beegah for the cultivated area which he admits, namely 36 beegahs. Then the Moonsiff proceeds to put his construction (which is the important point in this case) on the pottah. The Moonsiff is of opinion that the meaning of the pottah is that any land that may be found by measurement, save the 33 beegahs in the "*neej-chas*" of the plaintiff and the 24 beegahs held by the defendant bearing a *jumma* of 12 rupees, will be settled at the same rate, namely 8 annas; and that all lands that may be brought into cultivation will be leased to no other person but the defendant, and that the intention of the parties is further distinctly stated in the petition filed by the plaintiffs in another suit, from which it appears that the defendant is bound to pay 8 annas for the cultivated land only. The Moonsiff, therefore, gave the plaintiffs a modified decree.

In appeal the Judge put a different construction upon the pottah. He is of opinion that by the terms of the pottah it was agreed that the defendants should pay 8 annas per beegah for the area ascertained by measurement after 1258, that there is no restriction therein of cultivated area, and therefore that the whole admitted area, namely beegahs

291-12-10 is liable to the rate agreed upon, that is 8 annas per beegah. He therefore decreed the whole of the plaintiff's claim.

The defendant appeals in both cases. The points taken by his pleader are, 1st, that a previous notice was required; 2nd, that the Judge has erred in construing the *solenamah* and the pottah, and in holding that separate suits can be brought; 3rd, that the construction put upon the terms of the pottah by the Judge is erroneous; and 4th, that the plaintiff can only demand the *jumma* assessed by Government.

The first point was not raised below, and we do not think it proper to permit it to be raised in this stage of the case. We now come to the construction of the pottah. The pottah is dated the 13th Kartick 1254. It recites, 1st, that the total area of the mouzah as then ascertained is 175 beegahs of "*hassil*," "*puteet*," and "*jungle*" lands. Of these 33 beegahs were reserved by the grantor of the pottah as his "*neej-chas*." Of the remaining 142 beegahs 24 beegahs were assessed at 8 annas per beegah, or 12 rupees per annum, and for this a pottah was given. This 12 rupees *jumma* for the 24 beegahs was not payable at once, or from 1254, but according to the terms of the pottah the 24 beegahs were to be held free of rent from 1254 to 1256, for 1257 at 4 annas per beegah, and from 1258 the grantee was to pay at the full rate of 12 rupees per annum, or 8 annas per beegah. The pottah then goes on to state that, with the exception of the 33 beegahs reserved by the grantor, and the 24 beegahs leased by the grantee, all lands, that upon future measurement may be found to be in excess were to be settled at the above rate, namely 8 annas a beegah. Then there is a further clause that all "*hassil*" (cultivated) lands which may be in excess of the 24 beegahs, namely the pottah lands, shall be settled with the grantee and with no body else.

Now, looking to the whole pottah and more particularly to the fact that in the year 1254 the 24 beegahs which were then assessed were assessed at 8 annas a beegah, and to the subsequent clause which states that all *hassil* lands that may be found to be in excess of the land for which the grantee was paying 8 annas a beegah, were to be settled with him and with him alone, coupled with the facts in the petition presented on the 18th July 1855 by the plaintiff in a former case, in which the intention of the grantor of the pottah is clearly stated, we must agree with the Moonsiff that the intention of the parties was that the "*hassil*" lands which were found in excess of the 24 beegahs settled with the defendant in 1254 were to be assessed at the rate of 8 annas a beegah. We, therefore, think that the construction of the Judge is a wrong construction, and that his decision, as far as the construction put upon the pottah is concerned, must be reversed.

We now come to the *solenamah*. It appears that in the suit which refers to the 24 beegahs of land, which was then stated to be 27 beegahs owing to excess found on measurement, the *solenamah* was entered into between the parties. According to this *solenamah* of the year 1271 the defendant agreed to pay the plaintiff for the time being according to an estimated rate, and in future according to the Government settlement.

We think the *solenamah* is a distinct transaction from the pottah, and that the Judge was right in holding that plaintiff was entitled to bring separate suits.

The result will, therefore, be that the Appeal No. 1175, which raises the question of the construction of the pottah is decreed with costs payable by the special respondent, and the Moonsiff's decision affirmed, and that No. 1169 which raises the question of the *solenamah* and the point whether separate suits by the plaintiff were maintainable will be dismissed with costs payable by the special appellant.

The 5th April 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble Louis S. Jackson, *Judge.*

Certificate under Act XXVII of 1860 *(Issue of)—Stamp Duty—Meaning of "Furnished" in Court Fees Act s.* 6.

In the matter of

Dhunput Singh Doogur, *Petitioner,*

versus

The Government, *Opposite Party.*

Baboo Rash Beharee Ghose for Petitioner.

Baboo Unnoda Pershad Bannerjee for Opposite Party.

A certificate under Act XXVII of 1860 should be issued directly it is granted, provided the proper stamp prescribed for such certificate be furnished.

Couch, C. J.—THE third Section of Act XXVII of 1860, under which the certificate is granted, directs that the Court shall issue a notice of the application inviting claimants and fixing a day for hearing, and then upon the appointed day, or as soon after as may be convenient, the Court shall determine the right to the certificate and grant the same accordingly. Then it is provided that the Court may take such security as it shall think necessary from the person to whom it shall grant the certificate. That contemplates that the certificate has been granted before any steps are taken to obtain the security from the party. There is no special provision with regard to what shall be done if the party to whom the certificate has been granted fails to give security. The proper course is for the Court to withhold the actual issuing of the certificate until the security has been given. But when we come to apply the Stamp Law to the proceeding, Section 6 (of the Court Fees Act) saying that no document shall be furnished by any public officer unless a fee of the amount indicated has been paid, we must consider that the furnishing there meant is made at the time when the Court determines to grant the certificate, and when it is to be drawn up ready to be issued to the party. If that were not so, a delay on the part of the Court, for which the party would not be in any way responsible, might result in his being subject to a much higher stamp duty than he would have been if he obtained the certificate directly the Court had granted it.

That meaning must be put upon the word "furnished," and it is also supported by the provisions in the 6th Section of the General Clauses Act which says that the repealing of a law shall not affect proceedings commenced before the repeal of the Act shall have come into operation. It may be considered that, for the purpose of indicating what the proper stamp duty in a case of this kind is, the provisions of the Stamp Law of 1867 were still in force, and, therefore, the Court had the power to take the stamp according to that law. The rule must not be made absolute in its terms, because it does not expressly provide for any stamp being paid at all upon this certificate; but the order must be that the Judge is to issue a certificate under Act XXVII of 1860 to the petitioner as guardian of Gopee Chand Settia, an infant, provided a stamp of the amount prescribed by Act XXVI of 1867 for such a certificate be furnished.

Jackson, J.—I concur.

The 5th April 1872.

Present:

The Hon'ble G. Loch and W. Ainslie,
Judges.

Possession—Prescription—Evidence—Receipts for Government Revenue.

Case No. 889 of 1871.

Special Appeal from a decision passed by the Officiating Judge of Gya, dated the 27th March 1871, affirming a decision of the Subordinate Judge of that district, dated the 29th June 1870.

Lallee Singh and others (Plaintiffs) *Appellants,*

versus

Mussamut Amrit Kooer and others (Defendants) *Respondents.*

Moonshee Mahomed Yusoof for Appellants.

Baboo Nil Madhub Sen for Respondents.

The question of possession was held not to have been properly tried by either Court, and to be one of chief importance in this suit, for if plaintiff be able to prove his possession of the village in question for 30 years, he has gained a title by prescription and would be entitled to ask the Court to give him a declaration of that title, notwithstanding any title that the defendant might set up to the contrary, and however good that title might be.

The possession of receipts for Government revenue is no proof, or at best a very weak proof, of possession of property.

Loch, J.—In this case, the plaintiff sues for a declaration of his title to 3 annas and 10 dams' out of 8 annas of 16 annas of *Mousah* Kutchna, *aslee* and *dakhelee*, and for confirmation of possession; and he prays that the proceeding of the Deputy Collector dated the 4th September 1868, and a confirmatory proceeding of the Collector dated the 20th December 1868, under which the defendant Amrit Kooer's name was entered as a proprietor of the above *mousah* in the Collector's register, be set aside, and that her name be expunged from the said register.

The plaintiff claims under a sale for arrears of Government abkaree revenue, held under an order made by the Collector on the 25th April 1840, and he alleges that he and his co-sharers have been in possession of the whole village from that time up to the present moment, that in 1868 Amrit Kooer applied to the Collector alleging that she was entitled to the 4 annas' share of the *mousah* belonging to Sheo Buksh, and prayed that her name be registered in the place of Sheo Buksh; thereupon the Collector did, by his order of the 20th December 1868, direct her name to be registered, and such registration is injurious to his title.

The defendant Amrit Kooer alleges that 4 annas of the village belonged to Sheo

Buksh, who had, after separating from his family, purchased the same with his own funds; that on his death it descended to his son Obhoy Narain, and came to her, the defendant, as the widow of Obhoy Narain.

The issues raised were, first,—whether the suit was barred by limitation; secondly,—whether the 4 annas' share of the village Kuchna, was the right and property of Gridharee Singh, or of his son Sheo Buksh Singh, and whether the said 4 annas' share was sold in auction or not; and, thirdly, who was in possession of the property in dispute.

On the question of limitation the first Court came to no decisive finding, and allowed the case to proceed on the merits, and then found on the evidence that the possession of the defendant was proved, considering that the evidence adduced by the defendant was preferable to that adduced by the plaintiff.

The judgment of the first Court is most inconsistent, for, in disposing of the issues of limitation and of possession, the same question was before the Court, and it had to be determined on the same evidence. On the point of limitation the Subordinate Judge says :—"Moreover none of the parties have produced such conclusive proof as to convince the Court of the fact of their possession. Both parties have adduced the evidence of a few witnesses in support of their respective statements, and none of them can be preferred to the other; hence this issue is disposed of in favor of the plaintiffs." And yet when he comes to dispose of the second issue on the merits, *viz.*, the question of possession, he finds "from the evidence of the witnesses adduced by the defendant, it has been established that Sheo Buksh had separated from his father and had acquired the property in dispute after separation, that is he had purchased the 8 annas of the village in dispute; after his death, his two sons, Pertab Narain and Obhoy Narain, equally divided the property among themselves, and held possession thereafter. The 4 annas' share of Pertab Narain had been sold in auction, and the other 4 annas of Obhoy Narain, the husband of the defendant No. 1, is still in her possession. She has accordingly produced the receipts for payment of the Government revenue. The evidence of the witnesses adduced by the plaintiffs, cannot out-weigh these proofs."

On appeal to the Judge, the plea of limitation seems to have been given up; and the Judge finds that in the sale held under the Collector's order of the 25th April 1840, which was confirmed by the Commissioner on the 24th December 1840, only one-half of the village was sold, and that the half in which Sheo Buksh's name appears was exempted from sale. He also finds that, "Mussamut Amrit Kooer has furthermore got her name recorded in the register," and that "she has proved her possession by the production of Government receipts for revenue paid. Her witnesses also prove the fact of the property being self-acquired." And the Judge concurs with the Lower Court in thinking that the plaintiffs have failed to make out their case, and he rejected the appeal.

Two points are raised before us in special appeal, *first*, that the Lower Appellate Court has misconstrued the proceeding of the 25th April 1840, in holding that only half of the village was sold, and that the right construction of that document will show that the entire 16 annas of the property was sold. *Secondly*, that the Lower Appellate Court has not tried the question of possession, for if the possession of the plaintiff from the date of the auction-sale were proved, he would be entitled to a decree. Further objections were taken to the *dakhilahs* of payment of Government revenue which had been referred to by the Judge as proof of defendant's possession. It was further urged that the Judge of the Lower Appellate Court had not taken into consideration certain judgments which were on the record, and which related to the property in question.

It appears that in 1828 Ram Lochun took a settlement from the Government of the abkaree revenue, and pledged as security for the revenue his rights and interests in *Mouzah* Kuchna, while Boonee Singh, Gridharee Singh, Pertab Singh, and others became sureties for him. Ram Lochun fell into arrears, and in order to realize those arrears, the rights and interests of the sureties in *Mouzah* Kuchna were sold under an order of the Collector of the 25th April 1840. We have read that proceeding and also the order of the Commissioner confirming the sale, bearing date the 24th December 1840; and we have no doubt that what was sold were the rights and interests of the abkaree farmer and of his sureties in the whole village. There is nothing in that proceeding which shows that 8 annas of the village were separated, and not put up for sale, or that the interests of the sureties were limited to a particular 8 annas of the village.

On the question of possession, we think that the Judge has not considered the evidence which has been adduced in this case. The question of possession is of chief importance in this suit, for, if the plaintiff is able to prove his possession of the whole village from 1840 up to the present time, he has gained a title by prescription, and would be entitled to ask the Court to give him a declaration of that title, notwithstanding any title that the defendant might set up to the contrary and however good that title might be. The decision of the first Court on this question is, as previously observed, very inconsistent, for, when disposing of the question of limitation, it holds that neither party has been able to prove possession, and yet, when trying the second issue on the merits, it finds from that same evidence that the defendant has proved possession. This is not the proper way of trying the case. If the plaintiff, when the question of limitation was before the Subordinate Judge, were unable to prove possession, his case was at an end. The Subordinate Judge should not have proceeded further with it. If however he can prove possession, that possession will over-ride any title that the defendant may be able to prove, for the plaintiff has according to his allegation held possession for 80 years. In disposing of this question, the Judge says that Mussamut Amrit Kooer has proved her possession by the production of Government receipts for revenue paid. But the possession of receipts for Government revenue is no proof or at best a very weak proof of possession of property. It is not a proof so strong that one can safely say that the production of such documents is sufficient to prove possession.

We think the question of possession has not been properly tried by either Court, and we therefore remand the case to the first Court for a proper finding on this issue.

With regard to the proceedings on the record to which we have been referred by the special appellant, we find that in none of them was the defendant in this case a party. The case is remanded for re-trial with reference to the above remarks, and the costs of this appeal will follow the result.

The 5th April 1872.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Minor (Suit for or against)—Representation by Relative (without Certificate under Act XL of 1858)—Res-adjudicata.

Case No. 1148 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of East Burdwan, dated the 27th March 1871, *affirming a decision of the Moonsiff of Indas, dated the 28th March* 1870.

Bonomalee Kesh (one of the Defendants)
Appellant,

versus

Hungshessur Roy (Plaintiff) *Respondent.*

Mr. Piffard and *Baboos Ashootosh Dhur, Bhowanee Churn Dutt*, and *Rash Beharee Ghose* for Appellant.

Baboos Jugodanund Mookerjee and *Sreenath Doss* for Respondent.

It is not necessary that a party who represents the interests of a minor should take out a certificate under Act XL of 1858 before he can be heard on behalf of the minor, or be able to institute or defend a suit on his behalf; but the Court is competent under Section 8 of that Act to permit any relative of the minor to institute or defend a suit on his behalf, although a certificate of administration has not been granted to such relative.

From the fact that, in a former suit, plaintiff's mother was arrayed amongst the parties as guardian of plaintiff then a minor, as well as from the line of defence which she adopted and in the absence of any evidence to the contrary, it was presumed that she had the permission of the Court to appear and represent the minor's interest in that suit; and the question raised in the present suit having already been raised and decided in the former suit, the plea of *res-adjudicata* was held to apply.

Kemp, J.—THE defendant is the special appellant in this case. The plaintiff brought this suit to set aside a *kobalah* executed on the 21st Aghran 1258, and also to set aside a former decree, and to recover possession of the properties stated at the foot of the plaint. In the plaint it is alleged that the *kobalah* of 21st Aghran 1258 is invalid, inasmuch as Khetter Mohun, the vendor and father of the plaintiff, was a lunatic at that time ; that the original vendee Pran Kishen, during the lunacy of the plaintiff's father, was the manager of the property ; that he fraudulently prepared this *kobalah* in his name ; that subsequently this property was conveyed by him to the defendant Bonomalee, who is the special appellant before us ; that he, Bonomalee, then brought a fraudulent suit in the Sudder Ameen's Court ; that the step-mother of the plaintiff, Luckhee Pria, although she had not obtained a certificate under Act XL of 1858, put herself forward in that suit as guardian of the plaintiff ; that she did not file a proper written statement detailing all the facts of the case ; that she did not look after the case ; that she colluded with Bonomalee, the plaintiff in that suit ;

and that therefore the plaintiff brings this suit as stated above, and alleges that his cause of action accrued in the month of Assar 1278 when the defendant Bonomalee took possession under color of the decree which he had obtained in that case in the Judge's Court, and which was subsequently confirmed in special appeal.

The Moonsiff of Indas and the Subordinate Judge of East Burdwan have both given the plaintiff a decree. The points raised by the defendant, who is the special appellant in the Court below, were, first, that the suit of the plaintiff was barred under Section 2, Act VIII of 1859, inasmuch as the question at issue in this suit, namely whether there had been a *bonâ fide* sale from Khettur Mohun to Pran Kishen, and from Pran Kishen to Bonomalee, the present defendant, had been already decided in a suit in which the plaintiff was properly represented through his guardian Luckhee Pria; and that this question cannot be re-opened. Secondly, that the defendant's vendor Pran Kishen, and after him the defendant Bonomalee, during the life-time of Khettur Mohun, the father of the plaintiff, had been in adverse possession from the date of the *kobalah* of 1258, for more than 12 years; and that the limitation ran out during the life-time of the plaintiff's father, and therefore this suit is barred. Thirdly, that if the plaintiff can be said to have got over the 12 years' plea in bar, he is still barred because his suit is not brought within three years from the time he attained his majority. There was also an allegation that the father of the plaintiff was not a lunatic at the time of the sale made to Pran Kishen; and that there was no collusion between Bonomalee, the plaintiff in the former suit, and Pran Kishen, or between Bonomalee and Luckhee Pria.

Both the Courts below have overruled the plea in bar under Section 2 Act VIII of 1859, relying mainly upon a decision of this Court to be found in the 7th Weekly Reporter, page 399. The Lower Courts appear to have been of opinion that because Luckhee Pria had not taken out a formal certificate under Act XL of 1858, and because it did not appear upon the proceedings that she had obtained the permission of the Court under the provisions of Section 3 of the said Act, her acts were not binding upon the minor; and that therefore the plea of *res-adjudicata* did not apply.

We think after hearing the learned Counsel for the special appellant and the pleader for the special respondent that the decision of the Court below on the plea of *res-adjudicata* is wrong in law and must be reversed with costs. On referring to the decision of the Sudder Ameen in the former case in which the present defendant Bonomalee was plaintiff, we find that both Pran Kishen and Luckhee Pria did appear in that suit. The defence of Luckhee Pria was that the property belonged to her minor son, the present plaintiff; and that the transaction as between Khettur Mohun and Pran Kishen was a *benamee* transaction; that although the name of Pran Kishen was used and registered as *malik*, the real beneficial owner was Khettur Mohun; and that Pran Kishen was merely his *benamdar*. Pran Kishen, who also appeared and defended the suit, supported the averments of Luckhee Pria. The issue was whether the *kobalah* of Khettur Mohun to Pran Kishen was a *bonâ fide* one, and whether Pran Kishen was the beneficial owner or a mere *benamdar*, and also whether Pran Kishen had conveyed the property to Bonomalee, the present defendant. The Sudder Ameen found that the sale by Khettur Mohun to Pran Kishen was not a genuine sale, and he dismissed the suit of Bonomalee. The Judge of East Burdwan, on the 29th June 1865, reversed that decision of the Sudder Ameen, holding that the sale by Khettur Mohun to Pran Kishen was a *bonâ fide* sale; that Pran Kishen was the beneficial owner; and that he conveyed the property to Bonomalee. In the special appeal, in which Luckhee Pria also appeared as the guardian of the minor, the question raised was whether the *onus* had been thrown on the right party. The Judges who heard that special appeal (Justices Trevor and Glover) held that the *onus* was thrown on the right party; and that inasmuch as the name of Pran Kishen appeared as the ostensible owner, and as his name had been registered, the *onus* was on the opposite party, namely Luckhee Pria and Pran Kishen, to prove that Pran Kishen was not the beneficial owner; and the Judge having found that they failed to do so, the special appeal was dismissed. We think that there has been a clear finding upon the same subject-matter which is now in issue, namely whether the purchase by Pran Kishen from Khettur Mohun was a *bonâ fide* purchase, and whether Pran Kishen was the beneficial owner, and as such beneficial owner whether he could convey the property to Bonomalee. That finding was come to in the presence of Luckhee Pria who represented the interest of the minor. It is not necessary that a party who represents the interests of a minor should take out a certificate before he can be heard on behalf of a minor, or be able to institute or defend a suit on his behalf. Under Section 8 Act XL of 1858, the Court is competent to permit any relative of a minor to institute or defend a suit on his behalf, although a certificate of administration has not been granted to such relative.

Now in this case it is clear that Luckhee Pria throughout in the three Courts appeared as representing the minor. Her defence was one manifestly in the interests of the minor. She opposed Bonomalee, and she entirely supported Pran Kishen. Her defence was, as we have already said, that Pran Kishen was a mere *benamdar;* and that the sale was not real as between Khettur Mohun and Pran Kishen. In the case on which the Lower Courts have relied and which is to be found in the 7th Weekly Reporter, page 399, the question was whether the act of the guardian who represented that she was entitled to act in that capacity was binding upon the minor. In that case we held that she had not obtained the permission of the Court; and that therefore her acts did not bind the minor. In this case, from the fact that Luckhee Pria up to this Court was arrayed in the suit amongst the parties as guardian of the minor, the line of defence which she adopted both before the Sudder Ameen and the Judge, and in the absence of any evidence to the contrary, we must presume that she had the permission of the Court to appear and represent the minor's interest in that suit. We, therefore, hold that the question which has been raised in the present suit, had already been raised and decided in the former suit between the present defendant Bonomalee and the present plaintiff who was represented and properly represented by his guardian Luckhee Pria; and that therefore the plea of *res-adjudicata* fully applies to the case.

The decision of the Subordinate Judge will be reversed, and the plaintiff's suit dismissed with all costs including the costs of this appeal payable by the special respondent.

The 5th April 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Putnee—Suit for Rent—Use and Occupation.

Case No. 657 of 1871.

Special Appeal from a decision passed by the Officiating Judge of Midnapore, dated the 18th April 1871, affirming a decision of the Subordinate Judge of that district, dated the 5th January 1871.

Messrs. R. Watson and Co. (Defendants) *Appellants,*

versus

Tarinee Churn Gangolly (Plaintiff) *Respondent.*

Mr. R. T. Allan and *Baboo Mohinee Mohun Roy* for Appellants.

Baboo Sreenath Doss for Respondent.

A zemindar and putneedars being bound together by the terms of a written contract, the zemindar can only sue for rent on the terms of that contract, but not for rent for the use and occupation of his land.

Glover, J.—The plaintiff in this case is the zemindar. Some time ago he sued the defendants, who were putneedars holding under him, for *khas* possession of their tenure on the ground that their interest had terminated, and that on the death of the original grantees the estate reverted to the proprietor. That case was decided against the plaintiff both in the Zillah Court and this Court; and an appeal we are told is now pending on the part of the zemindar to Her Majesty in Council. In this case the plaintiff sues the defendants for rent, and both the Courts below have decreed in his favor, giving at the same time interest upon the balance claimed.

The substantial point taken in special appeal is that the plaintiff and the defendants being bound together by the terms of a written contract, the plaintiff landlord can only sue for rent on the terms of that contract, and as he has not in this case sued to recover the putnee rent on the basis of his *kabooleut,* but has sued for rent due for the use and occupation of the land, his suit ought to have been dismissed.

Another objection is also taken, namely that the plaintiff being only a part shareholder in the estate was not in a position to bring a suit by himself. But I think that this objection could not under the circumstances have been maintained, if it was necessary to decide the case on that point, inasmuch as it was never taken in the Courts below at any stage of the proceedings. To return however, to the substantial issue, I think that the contention of the special appellant is correct. The plaint is no doubt very cautiously worded; in one or two parts there is a mention of the putnee pottah and of the putnee rent, as if the plaintiff meant to sue to recover that particular rent. But on the whole the tenor of it clearly shows that the object of the plaintiff was to ignore the putnee lease altogether, and to demand the rent from the defendants for the use and occupation of his land. Both the Lower Courts have taken this view of the plaint. The plaintiff was probably under the impression that, by making admissions as to the existence of a putnee lease, he might possibly do some injury to his case now in appeal before the Privy Council. The plaintiff does not, I consider, sue for his putnee rent, but for rent due for the use and occupation of the land, and the question is, can he bring such a suit? It is quite clear that up to the present moment there is a contract in writing between the parties to this suit on the subject of rent for the land held by the defendants, that is to say the defendants hold a pottah, and the plaintiff holds a ***kabooleut;*** and therefore the plaintiff can only bring a suit to recover rent on the basis of that ***kabooleut.*** The Courts below have considered that, inasmuch as the defendants are undoubtedly in the possession of this land, and inasmuch as they nowhere object to the amount of rent alleged to be due, it is immaterial in what way the suit is brought; the defendants have got equitably to pay so much money as rent, and it does not matter how they pay it. I think that the view taken by the Lower Courts on this point is erroneous. The only ground of action which the plaintiff had was failure to pay ***kists*** under a ***kabooleut;*** and before he can get a decree for his rent, he must bring his suit on that ***kabooleut.***

For these reasons, I am of opinion that the judgment of the Court below must be reversed; and the plaintiff's suit for rent in its present shape dismissed with all costs.

Kemp, J.—I wish to say a few words in concurrence with the judgment which has been just delivered. I was not one of the Judges who decided the case which is now on appeal to Her Majesty's Privy Council. Now taking the case without reference to the fact that that appeal is now pending, it appears to me that the plaintiff's suit ought to be dismissed. In his plaint he says that his cause of action arose on the 30th Bhadro 1274, when the defendants committed default in paying the ***kist.*** The suit is for the rent due from the ***kist*** of 30th Bhadro 1274 to 30th Srabun 1275. The plaintiff states that he is a one anna one gundah two cowrees and two krants shareholder; and that the ***jumma*** payable for that period is Rs. 1,463, 5 annas 6 gundahs and 1 cowree in proportion to his share, and the interest on that amount being Rs. 423-5, he valued his suit at Rs. 1,886, 10 annas 16 gundahs and 1 cowree. With his plaint he filed a ***hussab*** which sets forth the ***kists*** of 1274 and 1275. Now it is very clear that he must have been suing on the footing of the contract between him and the defendants. That contract is the putnee contract, and plaintiff's cause of action is a breach of that contract, inasmuch as the defendants did not pay the ***kists*** from Bhadro 1274 to Srabun 1275. He was, therefore, bound to bring his action upon the terms of the contract. But he has not done so; and in his plaint after setting forth his title he proceeds to say that the defendants are in possession in the room of John Robert Watson and Co; that the plaintiff is the ***malikesumeen,*** and therefore he is entitled to the rent from the defendants as occupiers of the land. If he sued the defendants in that footing, he ought to have produced the contract; and if on the other hand he sued them on the footing of putneedars, then he ought to have treated them as putneedars. Had he done so, the defendants would have no doubt paid the rent, and there would have been no necessity for this suit. It appears to me, therefore, looking at the frame of the plaint, that this is a mere attempt on the part of the plaintiff to re-open a question which has already been decided by the Court between the parties, namely that this putnee tenure is not a life-grant. I concur in reversing the judgment of the Court below and decreeing this appeal with costs.

The 5th April 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Act VIII of 1869 *B.C. s.* 102—*Special Appeal—Suit for Rent below Rs.* 100—*Question of Right to enhance—Notice of Enhancement—Omission of "same Class of Ryots"—And of "otherwise than by the Agency and at the Expense of the Ryot."*

Case No. 710 of 1871.

Special Appeal from a decision passed by the Officiating Judge of Midnapore, dated the 15th April 1871, *affirming a decision of the Moonsiff of Gurbetta, dated the 19th July* 1870.

Messrs. R. Watson and Co. (Plaintiffs)
Appellants,

versus

Ram Dhun Ghose and another (Defendants)
Respondents.

Messrs. G. C. Paul and *R. T. Allan* and *Baboo Bhowanee Churn Dutt* for Appellants.

Baboo Taruoknath Dutt for Respondents.

A special appeal was held to lie under Section 102 Act VIII of 1869 B. C., in a suit for rent below Rs. 100 in which the question of right to enhance had been determined.

Where a ryot well knew and pleaded to the grounds of enhancement, the mere omission of the words "same class of ryots" in the notice was held not fatal to the plaintiff's suit.

Nor was the omission of the words "otherwise than by the agency and at the expense of the ryot" considered material where the plaintiff distinctly stated in his plaint that the productive powers of the soil had increased owing to the land having been irrigated from the plaintiff's *khas* tank.

Kemp, J.—This is a suit to enhance the rent of the defendant after service of notice. The first Court determined that the plaintiff's right to enhance must be dismissed, because the words "same class of tenants" were not inserted in the notice. This finding has been confirmed by the Judge in appeal. The Judge remarks that "the "omission of the words 'of the same class' "is fatal to the suit." Then he goes on to say that "the Lower Court does not appear "to have observed that there was another "ground of enhancement in the notice, *viz.* "that the fertility of the land was increased "by the water from the plaintiff's tank; "this ground, however, appears to us open "to a similar objection. It is not stated "when the tank was dug, nor how the irri"gation is carried on, and it is omitted to "state that 'it was otherwise than by the "agency and at the expense of the ryot.'"

A preliminary objection has been taken by the respondents that no appeal will lie in this case; that the suit being a suit for rent and valued at 15 rupees, and there being an appeal to the Judge, no special appeal lies to this Court under Section 102 Act VIII of 1869 B. C. Now this Section enacts that there shall be an appeal in a suit in which the question of right to enhance has been determined. It seems to us abundantly clear that the plaintiff's right to enhance has been determined in this suit by the decision of the Moonsiff, and that an appeal will lie.

We now come to the question whether certain words having been omitted in the notice, the notice is so informal that the suit of the plaintiff must be dismissed. Now taking the first ground on which both the Courts below have objected to the formality of the notice, namely because the words "tenants of the same class" have been omitted, we observe from the nature of the defence of the ryot that he was perfectly aware of the grounds upon which the plaintiff sought to enhance his tenure; and turning to his written statement in original, we find that the words are "ঐ জমির চতুষ্পার্শ্বে আমার শ্রেণীর প্রজা নাই," that is to say "there are no ryots of my class on the four sides of that land." Now it is idle to say that the tenant when he made that statement did not well know what he had to plead to. We, therefore, think that we ought to follow the decision reported in the 12th Weekly Reporter, page 537, and hold that the ryot having well known and pleaded to the grounds of enhancement, the mere omission of the words "same class of tenants" in the notice is not fatal to the plaintiff's suit; and that it is not a substantial objection to the hearing of the case. Then with reference to the ground which has been started by the Judge and was not noticed by the Moonsiff, we think the same remarks will apply perhaps with greater force. The plaintiff distinctly stated in his plaint that the land having been irrigated by the water taken from the plaintiff's *khas* tank, was fertilized, and that the productive powers of the soil had increased owing to that fact, namely that it was irrigated from the plaintiff's *khas* tank. Here again the defendant knew exactly what he had to meet; for his objection was that the land was not irrigated with water from the plaintiff's *khas* tank.

We, therefore, think that the decision of the Judge must be reversed and the case remanded to the Court of first instance to be tried on the merits. The special appellant is entitled to get his costs.

The 6th April 1872.

Present:

The Hon'ble G. Loch and W. Ainslie,
Judges.

Joint Decree—Realizing Debt from some Debtors separately—Joint Liability of the others.

Case No. 288 of 1871.

Miscellaneous Appeal from an order passed by the Subordinate Judge of Gya, dated the 30th May 1871.

Nunkoo Lall (Decree-holder) *Appellant,*

versus

Musst. Dhunesh Kooer (Judgment-debtor) *Respondent.*

Baboo Chunder Madhub Ghose for Appellant.

Mr. C. Gregory and *Moonshee Mahomed Yusoof* for Respondent.

A joint decree remains a joint decree, notwithstanding the acts of the decree-holder in realizing his money from one or more of the judgment-debtors separately, for he is entitled to realize his debt from any one of the debtors, and by proceeding against one he does not relieve the other debtors from their joint liability to him.

Loch, J.—THE question before us in this case is whether the decree-holder is entitled to execute his decree against the respondent Mussamut Dhunesh Kooer to the full extent of his decree, or only in proportion to the share of the property which was held by her; and it is urged that though admittedly the decree was, when passed, a joint decree against all the debtors and they were jointly and severally liable for the amount decreed, yet the decree-holder has, by his conduct in taking portions of the sum decreed from one or other of the debtors and releasing them from further claim, altered the nature of the decree and has so made that decree, which was originally joint, a separate decree as against the rest of the judgment-debtors, and therefore the respondent alleges that she is liable to pay a certain sum in proportion to the share of the property in her possessions which was decreed to the decree-holder.

The Lower Court has held that, as the decree-holder has out of the joint debt received from certain debtors sums of money in proportion to the respective shares they held in the property and discharged them from further liability under the decree, he has of his own accord extinguished his right to realize the amount of the decree still due as a joint debt from the other debtors, and the Court has therefore limited the decree-holder's claim as against the respondent before us to a sum in proportion of her share of the property. We think that this finding is incorrect. If the decree was originally joint and several, the decree-holder was at liberty to proceed against any one of the judgment-debtors to recover the whole, or as much as he could, of the amount decreed, from him, and the fact that he has recovered from several of the judgment-debtors money on account of this decree, and has given them receipts and released them from further demand, does not in reality destroy the nature of that decree. It was contended before us that it was not a joint decree. But looking at the decree itself, we cannot doubt that it was a joint decree, and in fact this is admitted by the defendants themselves, who urged that, though originally it was a joint decree, it has become a several decree by the acts of the decree-holder.

We further find from a judgment of this Court, dated the 16th July 1870, that the question of limitation was raised, and in that case it was held that the decree being a joint decree, proceedings taken out against one of the judgment-debtors were quite sufficient to keep the decree alive as against the other, and therefore limitation did not bar the execution. There is no ground, therefore, for saying that it is other than a joint decree. Such being the case, it is evident that in execution the Court executing the decree has no power to alter the character of the decree which has been made. If the decree were joint, it will remain a joint decree, notwithstanding the acts of the decree-holder in realizing his money from one or more of the judgment-debtors separately, for he is entitled to realize his debt from any one of the debtors, and by proceeding against one he does not relieve the other debtors from their joint liability to him. We think, therefore, that the order of the lower Court must be reversed, and the decree-holder be allowed to execute his decree against the respondent in this case, who, as debtor under a joint decree, is liable to pay the whole amount.

The appeal is decreed with costs, sixteen rupees being allowed for pleader's fees.

The 6th April 1872.

Present:

The Hon'ble G. Loch and W. Ainslie, *Judges.*

Agent of Government (Contracts by)—Public Works Department—Excess of Authority—Payments made.

Case No. 167 of 1871.

Regular Appeal from a decision passed by the Officiating Judge of Patna, dated the 8th May 1871.

Beer Kishore Sahoy (Plaintiff) *Appellant,*

versus

The Government of Bengal and others (Defendants) ***Respondents.***

Messrs. R. E. Twidale and *C. Gregory* for Appellant.

The Legal Remembrancer and *Baboos Unnoda Persad Banerjee* and *Jugodanund Mookerjee* for Respondents.

An agent on the part of Government (an officer of the Public Works Department as in this case) cannot bind the Government with a contract made by him in excess of his authority. Nor can any payment made by the officer who has so exceeded his authority in making the contract, make that contract binding.

Lock, J.—On the 28th December 1868, the plaintiff, Beer Kishore Sahoy, entered into a contract with Major Marshall, Executive Engineer of Dinapore Division, to supply 2½ lacs cubic feet of *kunkur* at certain specified rates. The *kunkur* was to be supplied in accordance with requisitions made between the 1st January and 15th August 1869, and there were other conditions such as are usual in the Department of Public Works and in a printed form in English. A dispute arose with regard to the quality of the *kunkur* to be supplied and resulted, as the Judge says:—"In no more than 53,260 cubic feet, according to the plaintiff's statement, being required and delivered." The plaintiff now sues for damages calculated at Rs. 9,984-2-10.

The defendant denied liability, and among other issues raised was that the Executive Engineer, Major Marshall, had exceeded his authority in entering into this contract with the plaintiff. The Judge overruled this plea, and after going into the merits of the case, gave a modified decree for the plaintiff.

The plaintiff, dissatisfied with so much of the Judges' order as deducted from his claim, has come up in appeal to this Court.

The case came on before us on the 19th and 20th February last. During the hearing of the case, a book was produced in Court, entitled "Code of Regulations for the Public Works Department," and it was produced apparently with a view to show what was the power that the Executive Engineers are invested with in regard to making contracts. On a reference to para. 30, Chapter 14, the Chapter of Contracts, we found that an Executive Engineer was competent to accept tenders for the execution of any sanctioned work within the amount sanctioned by competent authority, provided that the same in each case does not exceed Rs. 2,000; the Superintending Engineer had likewise power up to Rs. 10,000; and the Chief Engineer could finally accept any tender within the sum sanctioned by competent authority for the execution of a work.

On this passage being brought to our notice, the pleaders for the appellant alleged they were taken by surprise, and they prayed for time to show that the contract made by Major Marshall had been duly sanctioned, and the Court allowed a fortnight's time to show that this contract was binding upon the Government by showing either that it had been ratified by proper authority, or that Rule 30 had been changed. The case came up before us this day, and we have an edition of the same work, but of a later date, of 1870, and we find that the above Section is still in force, and the pleader for the appellant is unable to show either that the contract made by Major Marshall had been sanctioned by superior and competent authority, or that the contract is binding upon the Government by any other Section of this Code. It appears the rules under which the officers of Public Works Department are to be guided, have been published in the *Government Gazette*, and therefore every person, wishing to deal with the officers of the Public Works Department, has the opportunity of knowing what are the terms under which they can deal with them, and what are the powers of the different grades of officers with whom they deal. The contract in the present case is admittedly above 10,000 rupees, and therefore the plaintiff must have known perfectly well that Major Marshall had no authority to make the contract, and though it is urged by him that even if Major Marshall had no authority, yet the Superintending Engineer, to whom the matter was referred after the dispute arose, did ratify it, but it appears to us that the Superintending Engineer did not ratify the contract, for there is nothing in his letter to show that he did ratify it; instead of doing so, he objected to the contract, and he proposed some fresh arrangement, which was never agreed to by the plaintiff. It cannot be said, therefore, that he ratified the contract. Further, as the contract was for a sum above 10,000 rupees, the Superintending Engineer had no power to sanction it.

Then it is said that, under certain rules of the Public Works Department, accounts are furnished by the Executive Engineer, which go up to the Chief Engineer and the Controller of Accounts, and therefore the nature of the contract must have been known; and as these accounts were examined and passed, the Government was bound, as it must be presumed, to have sanctioned the contract. We think that the rules referred to are rules for the guidance of Government officers in their separate departments, and the mere fact of those accounts being submitted to one officer or to the other does not raise any presumption that the contract was sanctioned by proper authority, and was consequently binding upon the Government. The accounts go before the Controller of Accounts, and the circumstance of his checking those accounts affords no presumption that the contract made by the Executive Engineer has been ratified by him.

We come then to consider the positions of the parties. Major Marshall was simply an agent on the part of the Government, with limited powers; those powers have been published in the Gazette, and made known to the public. The plaintiff in this case comes to Major Marshall, and it must be presumed that he knew what Major Marshall's powers were. He was satisfied with Major Marshall's proceedings, and supplied *kunkur* under the contract which was made with him by Major Marshall. When another executive officer comes in, and finds that the material supplied is of inferior quality, the plaintiff tries to bind the Government by saying that Major Marshall ratified the contract by paying for so much of the material as had been delivered. As Major Marshall had no authority to bind the Government, and exceeded his authority in making the contract, any payment by him cannot bind the Government. The mode in which this business has been carried on exhibits great negligence on the part of Major Marshall. He had the Code before him; he must have known what his powers were, and notwithstanding the rules laid down for his guidance, he made no attempt whatever to get the sanction of the proper authority to the contract that he made. It appears that he was examined in this case by commission, and a question was put to him, "Was the contract that you speak of sanctioned by higher authority?" He answered, "I doubt if it was, or if any of my contracts were. But they were put in force with the full knowledge of superior authority." He does not explain what he means by these words: we do not know what he means by "the full knowledge of superior authority." It is true that he paid for the first portion of the material supplied, but this payment being made by the officer who exceeded his authority in making the contract does not make that contract binding. And no sooner was Major Marshall succeeded by another officer, than his contract, instead of being sanctioned, was objected to, and when reported to the Superintending Engineer, that officer proposed, in lieu of the contract made by Major Marshall, some other contract to which the plaintiff did not accede. It seems to us, therefore, that the plaintiff cannot expect that the acts of Major Marshall should bind the Government in this case, because, as observed above, Major Marshall had only limited authority; and, therefore, anything he has done will not make the Government liable for the sum now claimed by the plaintiff. We think, therefore, that the decree of the Lower Court must be reversed, and the plaintiff's suit dismissed, except as to Rs. 1,142, which the plaintiff will get with interest from this date. Government will have costs on the portion dismissed.

The 8th April 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Joint Hindoo Family—Transfer by one Brother to the others (after Decree)—Bonâ fides—Burden of Proof—Proof of Payment of Consideration—Passing of Money.

Case No. 1236 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Rajshahye, dated the 4th September 1871; *reversing a decision of the Moonsiff of Sherajgunge, dated the 24th February* 1871.

Brojo Lall Sandyal (Defendant) *Appellant,*

versus

Bhobo Sonnduree Debia Chowdhrain (Plaintiff) *Respondent.*

Baboos Kalee Mohun Doss and *Kashee Kant Sen* for Appellant.

Baboo Unnoda Pershad Banerjee for Respondent.

Where one brother of a joint undivided family transferred his interest in the joint property to the other brothers after a decree had been passed against him although before attachment, HELD that, when a question arose in such a case, the *onus* was on the brothers to whom the transfer was made, to prove the *bonâ fide* character of the transaction.

The mere fact of the passing of some money from one hand to another does not necessarily constitute such a transfer of interest as would indicate a *bonâ fide* transaction.

Bayley, J.—I AM clearly of opinion that this special appeal must be dismissed with costs.

The suit was for a declaration that a certain talook attached by the plaintiff as the property of her judgment-debtor, but which had been released by the Collector on an application of the defendant and his brothers alleging that it was their property by virtue of a deed of sale executed on the 7th Joyst 1275, did in fact belong to the judgment-debtor, and that the alleged deed of sale set up by defendant was invalid and inoperative.

The case of the defendant, Brojo Lall, was that his brother Bhoobun Mohun *alias* Prohlad Sandyal, the judgment-debtor, transferred a 10 annas share of the talook to him and his two brothers, who, however, have not appeared in this case.

The first Court found that the *kobalah* was actually executed by Bhoobun Mohun in favor of the defendant and his brothers, that the consideration-money passed, and that there was no proof of the plaintiff's allegation of fraud. The first Court seems to have based its judgment on the fact that the plaintiff's decree was dated the 15th Bhadro 1273, and the sale was not made till Joyst 1275. The first Court in this view dismissed the plaintiff's suit.

On appeal, the Subordinate Judge fixed these as the real issues to be determined in the case, *viz.* whether the deed of sale relied upon by the defendant was a *bonâ fide* deed, and whether the transaction was really one which passed the property.

The Subordinate Judge commences by throwing the burden of proof on the defendant. He says :—"I think the plaintiff's claim is true, and the *kobalah* was fraudulently prepared with a view to defraud the plaintiff of the amount decreed to her." He then gives in detail the reasons which he considers to support the plaintiff's allegation, and prove collusion on the part of the defendant. He finds that the *kobalah* set up by the defendant is not subscribed by any one of the neighbours or by any co-sharer of the talook as an attesting witness. He finds that the *kobalah* was not registered until a month and 27 days elapsed after its execution, that is not until the defendant's alleged vendor died. The Subordinate Judge also finds that neither the defendant nor his brothers were in possession from the date of their alleged purchase. Now these reasons may be more or less weighty in themselves, and may be more or less open to question in regular appeal; but to say that these are not circumstances quite sufficient to start a case in favor of the plaintiff is, I think, erroneous in law. I think these are facts sufficient to raise a *primâ facie* case in favor of the plaintiff; but, irrespective of that, the Subordinate Judge proceeds upon the evidence of *both* sides, and finds even from the defendant's witnesses facts in favor of the plaintiff. He finds that the rents of the property in dispute were collected by a gomastah appointed at the time of Bhoobun Mohun, the judgment-debtor. He finds that Bhoobun Mohun managed the property during his life-time, and that after his death the rents were collected by joint servants who are also found to have been retained in the joint service after the property had passed into the hands of the special appellant and his brothers. The Subordinate Judge then reviews the circumstances that attended the registration, and finds as a fact that the execution of the deed of sale was a collusive transaction as between the judgment-debtor and the purchasers. He then refers to the deposition of Dowaoollah, a joint servant of the family, who states that the general fund of the four brothers was with Bhoobun Mohun, and that he had money also when the talook was sold. On all these grounds the Lower Appellate Court reverses the judgment of the first Court, and gives a decree to the plaintiff.

The main ground urged in special appeal by Baboo Kalee Mohun Doss is this, *viz.* that the Lower Appellate Court has committed an error in law in placing the *onus* of proof on the defendant when it ought to have been placed at first on the plaintiff.

Now I have already observed that the conclusion of fact arrived at by the Lower Appellate Court as to the *malâ fide* character of the transaction is based on the depositions of both the plaintiffs and the defendant's witnesses. I have also observed that the facts found are quite sufficient to start a case in favor of the plaintiff; and if I have to go still further, I think there are several other circumstances in the suit which make a strong case in the plaintiff's favor which the defendant has to rebut; for instance, one brother sells property to three other brothers, of whom only one has appeared before us. None of these brothers tenders his evidence. Of the witnesses called one is a gomashtah in charge of the family affairs, and the others in charge of the land affairs; and although the man in charge of the family affairs cannot show distinctly the collections from the land, he shows the complete separation of the defendants, and although he was a joint servant, that he separately accounted to each of the brothers. No deed of partition has been produced or even mentioned. The servants of the family who can most naturally be expected to show distinctly by accounts that the property had passed into the hands of the defendant and his brothers for a valuable consideration, do nothing of the kind. No accounts are produced before the Court, and it is well known such are ordinarily legal. It is true that there is some direct evidence as to the consideration having changed hands, but the mere fact of the transfer of some money from one hand to another does not necessarily constitute such a transfer of interest as would indicate a *bonâ fide* transaction. The money going from A's hands to B may be as much part of the sham transaction as the writing and other formalities of the deed. The circumstances of each case must carefully be looked at in order to determine its *bonâ fide* character.

Here a brother transfers his interest in the property to the other brothers after a decree has been actually passed against him, although it is before the attachment of that property. I am not quite prepared to say that relationship of itself would be an index of fraud; but I must say that, in a case where such close relationship exists between the parties, and there is a decree against one of them likely to bring the property into jeopardy, and fear of attachment which last brings the property into immediate jeopardy, any transaction that takes place between them should be looked at with extreme caution; and when a question arises in such a case, it is for the relations to prove most satisfactorily the *bonâ fide* character of that transaction.

On the whole, I have no hesitation in this case in saying that this special appeal must be dismissed with costs.

Mitter, J.—I am of the same opinion. I do not think that the question of *onus* fairly arises in this case. It is admitted that the plaintiff has given evidence to prove that the brothers lived together as members of a joint undivided family before the defendant removed to Benares, and this portion of the plaintiff's evidence, I may say, is strongly borne out by some facts admitted by the defendant himself. The Subordinate Judge appears to have gone through the evidence on *both* sides; and it seems to me perfectly immaterial as to whether he commenced with the defendant's evidence first, and then referred to the evidence given by the plaintiff. The question of *onus* becomes of importance only in those cases where the party on whom the burthen of proof lies has given no evidence whatever to prove his case. In the present case, it seems that the plaintiff has given some evidence to start his case; and all the surrounding circumstances, so far as they are admitted by the defendant himself, go, as I have already observed, to corroborate that evidence to a very great extent. It is true that there is some misunderstanding of some portion of the evidence on the part of the Subordinate Judge, but there is nothing whatever to satisfy me that that misunderstanding has caused any error in the decision of the case on the merits. It is admitted by the defendant himself that the disputed property, together with other ancestral properties belonging to all the four brothers, was managed by common servants, and that the *tubbils* or funds, though separate, were kept by the same treasurer. Under these circumstances, the Zemindaree accounts showing the appropriation by each brother of his alleged divided share in the estate, together with the family accounts showing that the brothers were really divided and separate, as alleged by the defendant, would have been of the utmost importance in throwing light on the real nature of the transaction in question. That transaction, I may observe, was one peculiarly within the knowledge of the defendant and of the family servants who are admitted to be the same persons who were employed in the family during the life-time of the judgment-debtor; and as the defendant has not thought proper to produce the account books, or to offer any explanation for their non-production, it seems to me clear that the conclusion arrived at by the Subordinate Judge is quite correct.

Looking, therefore, to all the facts and circumstances of this case, I think that this special appeal must be dismissed with costs.

The 9th April 1872.

Present :

The Hon'ble Louis S. Jackson and W. Markby, *Judges.*

Recovery of Possession—Dispossession.

Case No. 1226 of 1871.

Special Appeal from a decision passed by the Additional Judge of Patna, dated the 11th July 1871, reversing a decision of the Moonsiff of that district, dated the 18th April 1871.

Chuttoo Singh (Plaintiff) *Appellant,*

versus

Brojo Lall Singh, and others (Defendants) *Respondents.*

Baboo Nil Madhub Bose for Appellant.

Baboos Doorga Mohun Doss and *Boodh Sen Singh* for Respondents.

In a suit to recover possession of a *jote* to which plaintiff alleged he was entitled and from which he complained he had been ousted by defendant, *Held* that the fact of ouster on a particular date was not at all material in the case, and that the real issue was whether plaintiff was entitled to the *jote* and was kept out if it by defendant or not.

Jackson, J.—THE plaintiff in this case sued to recover possession of a certain *jote* to which he alleged that he was entitled, and from which he complained that he had been ousted by the defendant.

The defendant denied that the plaintiff was entitled to the *jote*, or that he had ever held any lands in the village. He averred on the other hand, that the plaintiff's uncle Gujraj Singh had formerly cultivated some lands, but that being old and unable to cultivate, he had given up the lands in Jeyt 1276, and therefore he contended that the plaintiff had no cause of action or ground of suit.

The Moonsiff went into the matter and found that the plaintiff was actually entitled to the *jote*, that the defendant's account of the relinquishment of the *jote* by Gujraj was untrue, and that the plaintiff had been unjustly deprived of the *jote*; and he gave the plaintiff a decree.

On appeal, the case was heard by the Additional Judge. The Additional Judge says that all that it is necessary to consider is whether or not the plaintiff was ousted by the defendant on the particular date alleged. He examined the evidence of the witnesses, and finding that evidence to be of the nature of hearsay evidence, he reversed the judgment of the first Court.

The plaintiff, on special appeal, comes before us and naturally contends that the fact of the ouster on a particular date was not at all material in the case, because the simple question is whether the plaintiff is entitled to the *jote*, and is kept out of it by the defendant or not.

There is no contention that the plaintiff is too late in bringing his suit, or that there is any bar to it. Whether the plaintiff had failed to prove the precise date of his dispossession is quite immaterial, and the Judge has lost sight of the real issue in the case.

The vakeel of the respondent very properly admits that the judgment of the Lower Appellate Court cannot be supported as it stands, and that the case must go back for retrial of the issue whether the plaintiff is, or is not, entitled to the *jote* in question.

Costs will follow the result.

Markby, J.—As the respondent's vakeel admits that the case must go back for trial, there is no doubt that it ought to be remanded.

The 9th April 1872.

Present:

The Hon'ble Louis S. Jackson and W. Markby, *Judges.*

Evidence—Payment of Decree—Objections to Documents (by Appellate Court after Examination of Witnesses who proved them)—Possession of Collectorate Challan (Payment of Fine in Butwarra Case.)

Case No. 1225 of 1871.

Special Appeal from a decision passed by the Judge of Sarun, dated the 30th June 1871, *modifying a decision of the Subordinate Judge of that district, dated the 30th July* 1870.

Lalla Mohadeo Pershad (Defendant) *Appellant,*

versus

Suttannund Misser (Plaintiff) *Respondent.*

Mr. R. E. Twidale for Appellant.

Baboos Chunder Madhub Ghose and *Kalee Kishen Sen* for Respondent.

It is no valid reason to disbelieve the evidence of a witness who swore that he had received the amount of a decree from plaintiff, when the money was paid by plaintiff's agent.

It is unfair and most unsafe for an Appellate Court to start objections to a document after the witnesses who proved it have been examined and allowed to go without being asked any question affecting the genuineness of the document.

Possession of a Collectorate *Challan* by a Mooktear is *primâ facie* proof of payment by him of a fine levied by the Collector in a *butwarra* case.

Jackson, J.—I THINK that in this case I must say that the Lower Appellate Court has miscarried in the matter of the three items to which its judgment, as also this special appeal, relate.

I shall deal with them in the order in which they have been referred to in the course of the argument.

The case was this:—The plaintiff alleged that he had remitted to the defendant who is a practising Mooktear a sum of 3,600 rupees to be applied to certain purposes, but he afterwards learnt that, out of this amount, the defendant had expended only Rs. 2,300 on his account; he alleges that he himself had consequently paid the remaining 1,300 Rs., and he therefore sued to recover that amount from the defendant.

The defendant made out to the satisfaction of the first Court that he had paid the whole amount as directed by the plaintiff.

On appeal, the Zillah Judge modified the decree of the first Court, finding that the defendant had failed to prove payment of three items in respect of which the plaintiff charged him. These three items, in the order in which they have been mentioned in the argument are these. The first is an item of rupees 192 to be paid to one Soondur Lall in satisfaction of a decree which he had obtained against Mussamut Goura. It appears that Goura had sold certain property of hers to the plaintiff, but that property being attached in satisfaction of Soondur Lall's decree, it was arranged that the amount of that decree, namely Rs. 192, was to be paid to him as part of the purchase-money. In respect of that payment, the defendant produced, and relied upon, a petition filed by Soondur Lall in his own execution case, whereby he certifies to the Court that he had received this sum of money from Mussamut Goura "*marfut*" (that is through) Juttanund (plaintiff.) Besides that the defendant called Joy Kishen, Mussamut Goura's Mooktear, who swore that he had received the sum in question from the plaintiff. Other witnesses have also been called to swear to the same fact.

The Judge refuses to believe this evidence, and disposes of the testimony of Joy Kishen by saying that he does not credit it on the ground that the witness is contradicted by the terms of Soondur Lall's petition The Judge implies that Soondur Lall's petition, if he had received the money from the hands of Mohadeo Sahoy, would necessarily contain mention of Mohadeo Sahoy's name. That seems to me to be clearly an erroneous assumption. That petition was not produced in any case or matter in which Mohadeo Sahoy was interested, or a party, but in the execution case of Soondur Lall and Goura. As far as that case was concerned, it was quite sufficient if Soondur simply stated that he had received the amount from Goura, and thereupon the Court would be bound to enter up satisfaction for the amount. But inasmuch as, in execution of that decree, Soondur Lall had seized property belonging to Mussamat Goura which the plaintiff Suttanund Misser had purchased, no doubt it would be desirable for Suttanund Misser to do so, and he would procure the mention of his own name as showing that *he* had paid the money to procure the release of this attached property, but for that purpose it would be unnecessary to state whether he had paid it himself or through an agent. The language of the petition is quite consistent with the statement that the money had actually come from the hands of Mohadeo Sahoy. The only reason for disbelieving the evidence of the witness Joy Kishen being an invalid reason, the credit attributed to him by the first Court would remain, unless the Judge finds some other reasons for doubting his evidence.

We next come to the item of Rs. 450, which was to be paid to Mussamut Goura as the consideration-money of a certain *mowzah* sold by her to the plaintiff. Now as to this the witness previously referred to, Joy Kishen, also states that this money was paid by the defendant. But the Judge observes that "no petition was put into Court as usual to show payment as was done in regard to the other items."

It does not appear that there is any fixed practice that such petitions are presented; and if there was, it would be a feeble argument to displace the evidence of such a witness as the Mussamut's Mooktear. But, in fact, the defendant produces a document which had been prepared in the nature of a petition to notify to the Court the payment of the money. But the statement is that the petition being prepared and taken to the pleader for approval, he said that it was not necessary, and therefore the petition remained in the hands of the defendant as his voucher of having paid the amount, which is also proved by the evidence of other witnesses. As to the petition, the Judge objects that it contains an interpolation of the Mooktear's name. This objection is first started in the Judge's Court—as far as we know it is taken for the first time in the judgment of the Judge. It appears to me unfair and most unsafe for the Appellate Court to start such an objection after the witnesses have been examined and are gone. It was open to the plaintiff to put any question to the witnesses as to that interpolation, that is supposing it to be such an interpolation as could be made the subject of comment. No such question having been asked, and the witnesses having proved the document, it is not open to the Judge to cast any doubt or suspicion upon it. In this item, therefore, the Judge has disregarded and set aside direct evidence, which received the confidence and credit of the first Court, on grounds which in law are invalid.

The third items of Rs. 116 is the amount of a fine levied by the Collector in a *butwara* case. On this point, the defendant produced a Collectorate *challan*. His possession of this *challan*, if unexplained, would fairly raise the inference that he had paid the money and got the *challan* in proof of payment. No explanation is offered, but a suggestion is made that it might have been got from the plaintiff's Mooktear. But this is a gratuitous insinuation. The Judge has, therefore, failed to attach that weight to it which it deserves. It is stated that the *challan* is mutilated, and the name torn out of it. But it appears from it that there was the name of some person, not the plaintiff or the defendant who actually paid this money into the Collectorate.

I think, therefore, on the whole case, supposing that the plaintiff had started a fair case, that the defendant has offered evidence to rebut it entitling him to the judgment of the Court. He had got the judgment of the first Court, and he was entitled to retain it unless other grounds than those relied on by the Judge could be shown for setting it aside.

But what is the case which the plaintiff makes? Why this, that he entrusted some money to the defendant for the purpose of making certain payments, and that he afterwards made some of these payments himself. He gives no dates on which he paid those sums; he does not say why he paid them; he does not show that any demand was made on him, nor that he made any enquiries before making the payments, and he does not produce any receipts to show that he has paid. The whole of the circumstances go to show that the plaintiff believed that the defendant was not provided with documents to prove his personal payment of these moneys.

If we were trying this case as a regular appeal, it is easy to say what our judgment would have been, but I do not think that I go beyond the functions of this Court in special appeal when I point out the considerations which should have had effect upon the Judge's mind in dealing with this case. It may be that there are circumstances to make him disbelieve the evidence of the witnesses. If there are, I think that we ought not to deprive the plaintiff of the opportunity of proving his case; and therefore, instead of restoring the judgment of the Court of first instance, we remand the case to the Lower Appellate Court for a new trial.

Markby, J.—I am of the same opinion, and I fully concur in the observations made by Mr. Justice Jackson in this case which makes it unnecessary for me to go into it.

The 9th April 1872.

Present:

The Hon'ble Louis S. Jackson and W. Markby, *Judges.*

Rent of Jote—Issues to be tried.

Case No. 1237 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 18th July 1871, reversing a decision of the Moonsiff of that district, dated the 24th March 1870.

Mr. J. Missleback (Plaintiff) *Appellant,*

versus

Luchmee Narain (Defendant) *Respondent.*

Mr. R. E. Twidale for Appellant.

No one for Respondent.

In answer to a suit for the rent of a *jote*, defendant denied that he held under plaintiff, and alleged that the *jote* belonged to two persons R and M, and that a decree having gone against M, his rights were sold and purchased by him, defendant; that he subsequently got a pottah or sub-lease from the remaining tenant R; and that he was therefore liable to pay rent to the plaintiff. HELD that the Lower Appellate Court, instead of deciding that defendant was not liable because his name was not recorded in the *sheristah*, should have found whether defendant held the *jote* (as alleged by plaintiff) in succession to the previous tenant, or whether the *jote* really belonged to two persons; and if so, whether any decree had been obtained against one of them, and whether consequently defendant had acquired the entire *jote*, or a portion of it only; and if he held the entire *jote* under the plaintiff, he would then be liable to pay him the whole rent.

Jackson, J.—NEITHER of the Courts below appears to me to have tried the correct issues in this case.

The suit was brought by Mr. Missleback, the plaintiff, to recover from the defendant, Luchmee Narain, the rent of a certain *jote*. According to the plaintiff's allegation, this *jote* belonged to one Pershaud, the ancestor of the defendant, and the defendant held the same *jote*, and was therefore liable to pay the rent.

The defendant denied that he held under the plaintiff at all. He alleged that the *jote* belonged to two persons, Ram Lall and Moshaheb; and a decree having gone against Moshaheb, his rights were sold and purchased by him, defendant; that he subsequently got a *pottah*, or sub-lease from the remaining tenant Ram Lall, and therefore that he was liable to pay the rent to Ram Lall, and not to the plaintiff.

The Moonsiff found that the *jote*, including trees and other matters, belonged to one Mungul Singh; that Ram Lall had no interest in it; that the defendant's pottah was invalid; and that he was bound to pay rent to the plaintiff.

On appeal, the Subordinate Judge found that the defendant's name was not recorded in the *sherishtah*. He therefore held that defendant was not liable to pay the rent; and he reversed the Moonsiff's decision.

Now what it was necessary to find in this case was whether, as alleged, the defendant held the *jote* in dispute in succession to the previous tenant Pershaud (or whoever the previous tenant may have been), or whether the *jote* really belonged to two persons; and whether, if so, any decree had been obtained against one of these persons under which the rights of that tenant alone could have been and were sold; and whether, consequently the defendant had acquired the entire *jote*, or a portion of it only; and if he held the entire *jote* under the plaintiff, he would then be liable to pay him the whole rent.

The ground of the Lower Appellate Court's decision, namely that the defendant's name was not registered in the *sherishtah* is untenable. If he held the plaintiff's land, he must pay rent to the plaintiff.

The case must go back for re-trial.

Markby, J.—I also think the case must go back for re-trial, as directed by Mr. Justice Jackson.

The 9th April 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Possession—Ouster—Joint Family—Limitation—Admission.

Case No. 1139 of 1871.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 13th June 1871, *affirming a decision of the Subordinate Judge of that district, dated the* 16*th February* 1871.

Bhromur Coomaree Debee (Plaintiff) *Appellant,*

versus

Banee Madhub Banerjee and others (Defendants) *Respondents.*

Baboo Hem Chunder Banerjee for Appellant.

Baboos Kalee Mohun Doss, Nil Madhub Sen, and *Rash Beharee Ghose* for Respondents.

A suit for possession of a share in a Mouzah on the allegation that plaintiff had been ousted therefrom by defendants, and that her late husband was joint in estate with his brother under whom defendants claimed as purchasers at a sale in execution of decree, was held bound by limitation, the suit having been brought at the close of 12 years from the date of plaintiff's ouster, and it appearing that defendants had been in undisturbed possession for 11 years 11 months and 1 day, that plaintiff's husband had, in two petitions filed respectively 27 and 29 years before the sale to the defendants, made unequivocal admissions of his having separated from his brother and prayed the Collector to make a settlement with him separately from his brother, while there was no trustworthy evidence on the part of the plaintiff to show that the family was joint at any time within 12 years before the sale.

Kemp, J.—THE plaintiff, who is the special appellant before us, sued for possession of an eight annas share in Mouzah Shoolya, and for declaration of her title on the allegation that she was ousted by the defendants from the aforesaid share in Assar 1266. One Radha Madhub Singh had two sons, Kristo Gobind and Huro Gobind. Kristo Gobind had three sons, Luckhee Narain, Sham Kishore, and Mudden Mohun. Huro Gobind died leaving a widow, the plaintiff in this suit. The plaintiff alleges that the property in dispute, namely, Mouzah Shoolya, is not an ancestral property of Radha Madhub, but was the property which her mother-in-law Muggun Coomaree obtained as *sindoordan*, gift, at the time of her marriage, and therefore the property being *streedhun* of Muggun Coomaree, the mother-in-law of the plaintiff, on her death Kristo Gobind and his brother Huro Gobind, the husband of the plaintiff. succeeded to it excluding the step brothers, for it is admitted that Radha Madhub had sons by another wife. The plaintiff brings her suit on the 5th November 1870, or 11 years, 11 months, and some days after the date of the auction purchase of the defendants which was on the 6th December 1858.

The defence of the defendant was substantially this, that the suit of the plaintiff was barred by special and general law of limitation; that the property in dispute was not the *streedhun* of the plaintiff's mother-in-law; that it was a part of the estate of Radha Madhub, the father of Kristo Gobind and Huro Gobind; that in execution of a decree against Radha Madhub and Kristo Gobind, this property was sold and purchased by them, the defendants, so far back as December 1858; that the plaintiff has not been able to show that Kristo Gobind and Huro Gobind enjoyed this property jointly; that the two brothers Kristo Gobind and Huro Gobind separated long before the auction purchase of the defendants; and that the plaintiff's suit must be dismissed, because it is barred by the statute of limitation.

The Subordinate Judge of Bancoorah, who originally tried the case, passed a very carefully decision. He says that the question of limitation will be disposed of with the merits of the case. He finds that the property in dispute is not the *streedhun* of the plaintiff's mother-in-law; that the plaintiff has not filed any deed of gift or any other document proving that this property was given at the time of her marriage to the mother-in-law of the plaintiff, and that the evidence of the witnesses of the plaintiff on this point, *viz.*, the question of gift to her mother-in-law is not trustworthy. Finding, therefore, that the plaintiff has failed to prove that this was the *streedhun* of her mother-in-law, the Subordinate Judge has come to the conclusion that the Mouzah in dispute belonged to the estate of Radha Madhub. Then the Subordinate Judge relies upon certain petitions filed by Huro Gobind, the husband of the plaintiff, which are numbered 36 and 37 on the record and which are to the effect, as stated by the Subordinate Judge, that after Huro Gobind came of age, he separated from his brother Kristo Gobind. Then the Subordinate Judge goes on to say that this separation being for much more than 12 years prior to the purchase by the defendants, it was necessary for the plaintiff to show that she had, either by the receipt of rent or by the exercise of some act of ownership, been in joint possession with the heirs of Kristo Gobind, the nephews of the plaintiff's husband, within the short time which remained to complete the 12 years. The Subordinate Judge relying on those petitions has also found that the evidence of the witnesses examined by the plaintiff in support of the allegation that her husband and after his death she herself was joint in estate with Kristo Gobind and his heirs, is not trustworthy. He has further found from the local investigation conducted by the Moonsiff in a suit brought by Rash Beharee who is the wife of Luckhee Narain, the son of Kristo Gobind that the possession of Kristo Gobind alone and not jointly with his brother Huro Gobind had been established. Therefore, on the whole case, finding that neither the plaintiff nor her husband Huro Gobind had been in possession of the property within 12 years, the Subordinate Judge dismissed the plaintiff's suit.

On appeal, the Judge of West Burdwan, Mr. Tucker, in his judgment after setting forth the decision of the Subordinate Judge and the reasons for that decision, and the grounds of appeal, goes on to find that the plaintiff has not been able to prove, either by documentary or oral evidence, possession within 12 years; that the defendants since their purchase which took place more than 11 years ago, and their judgment-debtors previous to that purchase, have all along been in hostile possession of the property in dispute for more than 12 years; that it is very doubtful indeed whether the plaintiff had ever been in possession at all; and that there is no proof whatever of the plaintiff's alleged title through her mother-in-law, namely, the fact of her mother-in-law's having obtained this property as a gift at the time of her marriage. The Judge then proceeds to say that the suit was not brought till within two months of expiry of 12 years from the sale in execution, and as there is absolutely no proof of the plaintiff's possession by receipt of rent or otherwise previous to the sale, the claim was rightly dismissed.

The grounds taken in special appeal are extremely lengthy; but it appears that they may be condensed from the arguments which we must confess have been most ably placed before us by the pleader for the special appellant. It appears that the main points on which the appellant's pleader relies in this special appeal are, that the Judge has not placed the *onus*, as he ought to have done, on the defendants; that he has not called upon the defendants to prove that the plaintiff's husband, Huro Gobind, separated from his brother Kristo Gobind more than 12 years ago; that the petitions on which the Subordinate Judge relies are not sufficient evidence of separation inasmuch as there is no unequivocal statement of separation or of any intention to separate in those petitions; that the statements made in those petitions are vague and random statements; that they are no evidence as against the plaintiff, and even if they are admitted to be evidence they do not prove the separation; that the defendants having purchased the right, title, and interest of Radha Madhub and Kristo Gobind, are bound by the statement made by Kristo Gobind in the suit which was decided in 1880; and that in that suit Kristo Gobind clearly stated that this property was the *joutook* property or *streedhun* of his mother. In the course of the argument several decisions were also referred to by the pleader for the special appellant to be found in the Weekly Reporter, Volume XII, page 124, Volume XIV, page 31, and Volume XI, page 468. As much stress has been laid in this case on the question of *onus*, we think it is necessary to observe that in the first Court the *onus* does not appear to have been more particularly laid upon the plaintiff. The Subordinate Judge seems to have decided the question of limitation with the merits of the case. He found, as we have already observed, on the whole evidence of the plaintiff and of the defendants, and more particularly on the petitions containing those admissions of Huro Gobind, that the husband of the plaintiff, Huro Gobind, separated in estate from his brother Kisto Gobind many years before the sale. We think that the Subordinate Judge was perfectly right, looking to the fact that the suit is brought admittedly at the close of the 12 years from the admitted date of the plaintiff's ouster, and the fact that the defendants have been in undisturbed possession for 11 years 11 months and 1 day, taken with the fact that Huro Gobind in those petitions, one so far back as 27 years before the sale to the defendants, and the other 24 years before that sale, stated in one of them in most unequivocal terms that he had separated from his brother Kristo Gobind, and in the other in which he also made the similar admission he further prayed the Collector to make a settlement with him separately from his brother Kristo Gobind. It appears to us, therefore, taking those petitions, the admissions made therein, and the evidence adduced on both sides, that the Subordinate Judge was quite justified in coming to the conclusion that the plaintiff's suit was barred by the statute of limitation. It is said that the Judge has not taken into consideration the question of *onus*. It is true that the Judge's decision is a brief one; but we find that he confirms the decision of the first Court; and that on the evidence he is of opinion that the plaintiff has not proved her possession within 12 years.

We now come to the question whether those petitions ought to have been admitted as evidence. We find that no objection was taken to those petitions either in the first Court or in the second Court in the petition of appeal. These petitions are dated Magh 1242 and February 1841 respectively; one of them was filed 27 years before the sale to the defendants in execution, and the other 24 years before that sale; they have come from the public records; they were not in any way disputed below in either of the Courts; the admissions made in them are unequivocal admissions; and there is no trustworthy oral evidence on the part of the plaintiff to show that the family was joint at any time within 12 years before the sale of this property to the defendants. On the other hand, as far as the evidence of the plaintiff's witnesses has been read to us, there is sufficient to show that those witnesses did admit that there was a separation between Huro Gobind and Kristo Gobind; but they said that there was a subsequent re-union of which there is no sufficient proof. We think, therefore, that these petitions must be accepted as evidence; and accepting them as evidence, we find that the statements made therein by Huro Gobind are not vague and random statements, as stated by the pleader for the special appellant; they are unequivocal statements of a separation as between him and his brother Kristo Gobind.

With reference to the decisions of 1830 and 1838 in the case of Kristo Gobind, it appears to us that they can have no bearing on the question of possession and limitation in this case, for they are both of dates long prior to the sale to and purchase by the defendants. We therefore think on the whole case that the plaintiff has failed to establish that she or her husband Huro Gobind was at any time in possession of the disputed property within 12 years prior to suit; and that her case has been properly thrown out as barred by the statute of limitation.

We dismiss the special appeal, with costs payable by the special appellant.

The 9th April 1872.

Present:

The Hon'ble H. V. Bayley and F. A. Glover, *Judges.*

Act VIII of 1859 *s.* 162—*Summoning Plaintiff to give Evidence—Procedure.*

Case No. 986 of 1871.

Special Appeal from a decision passed by the Judicial Commissioner of Chotá Nagpore, dated the 11th March 1871, *reversing a decision of the Deputy Commissioner of Maunbhoom, dated 14th September* 1870.

Baboo Makoond Adit and others (Defendants) *Appellants,*

versus

Rajah Suttoorghun Adit (Plaintiff) *Respondent.*

Baboo Anund Chunder Ghossal for Appellants.

Baboo Doorga Mohun Doss for Respondent.

A Court is bound under s. 162 Act VIII of 1859, before summoning a plaintiff to give evidence, to record the reasons of its being satisfied that the evidence of the plaintiff is essential to the defendant's case. Where, however, the Court does not give reasons of its satisfaction that the presence of the plaintiff is necessary, it does not follow that the defendants had failed to satisfy the Court that there were sufficient grounds for the application.

Glover, J.—This was a suit for arrears of rent due on an *ijarah* lease for the years 1273, 1274, and 1275. The defendants admitted holding the *ijarah;* they also admitted the rates of rent specified in the plaint. Their defence was, that they had paid the arrears claimed, and that nothing was due to the plaintiff. After the case was instituted in the Court of first instance, the defendants put in a petition praying that, under the provisions of Section 162 of the Civil Procedure Code, the plaintiff Rajah Suttoorghun might be summoned to give evidence, the reason of the prayer being that the plaintiff's *amlas* being under his influence could not be expected to give evidence in support of the defendant's allegation. The Assistant Commissioner caused the summons to be served upon the Rajah who filed a petition in reply stating that he was sick, and unable to come; he also requested that his examination might be taken through a Mookhtear, or that it might be put off until the recovery of his health. No order appears to have been passed upon this petition. But on the same day, or very shortly afterwards, the Assistant Commissioner took up the case, and under Section 170 gave judgment against the plaintiff, dismissing his suit for rent on the ground of his failing to appear and give evidence. The Judicial Commissioner, before whom the case came on in appeal, reversed this order holding that the Assistant Commissioner had not carried out the provisions of Section 162 which required that the party desiring the attendance of a plaintiff to give evidence is to satisfy the Court that he has sufficient grounds for his application, and as no such grounds were stated by the defendants, the plaintiff ought not to have been summoned. The Judicial Commissioner then went on to say that as the defendants on whom the entire *onus* rested had given no evidence in support of their plea of payment, the plaintiff was entitled to a decree. Against this decision the defendants have appealed specially.

It is not easy to say what is the proper order to be passed in this case, inasmuch as in our opinion both the Lower Courts have made mistakes in procedure. In the first place, the Assistant Commissioner is wrong as to the grounds which he gives for deciding the case against the plaintiff on default of his personal attendance to give evidence. He says that the plaintiff refused to give evidence, whereas the fact is that he did not refuse, but merely stated that he was sick and he asked the Court to postpone the case until such time that he should be able to attend. Moreover, it was incumbent on the first Court, under the provisions of Section 162, to record the reasons of its being satisfied that the evidence of the plaintiff was essential to the defendants case; and although from the fact of the Assistant Commissioners having summoned the plaintiff, we may probably suppose that he was satisfied that the plaintiff's evidence was necessary, still the reasons of his satisfaction should have been put on the record in order that the Appellate Court might ascertain whether he had or had not used proper discretion in summoning the Rajah. The Judicial Commissioner also appears to have been in error in holding that the defendants having failed to satisfy the Court that there were sufficient grounds for their application the plaintiff ought not to have been summoned. It is quite clear that the Assistant Commissioner was satisfied (although he did not give reasons of his satisfaction) that the presence of the plaintiff was necessary.

Under the circumstances of this case, we think the only plan to be pursued is to remand the suit to the Assistant Commissioner with directions to try it *de novo* according to the provisions of the Procedure Code. Of course he will take up the case as it stood when the defendants made the application to summon the plaintiff inasmuch as they named no other witnesses but were content to rest their defence solely upon the evidence of the Rajah. The defendants will first of all be called upon to satisfy the Court as to the necessity of summoning the Rajah; if they succeed in doing so, the Assistant Commissioner, after stating the grounds on which he complies with the petition, will order summons to be served, and the Rajah if he has any objection to make to a personal appearance, will duly file his objections, and the Court will then proceed to decide the case under the provisions of the Civil Procedure Code. As far as regards a considerable portion of the claim, it is not easy to see in what respect the Rajah's evidence could be beneficial to the defendants. But this is a matter for the Lower Court to decide. Costs will follow the result.

The 10th April 1872.

Present:

The Hon'ble L. S. Jackson and W. Markby, *Judges.*

Registration — Dowl-durkasts — Admissions — Plea of Payment—Onus probandi.

Case No. 1238 of 1871.

Special Appeal from a decision passed by the Officiating Judge of Purneah, dated the 26th June 1871, *reversing a decision of the Moonsiff of that district, dated the 5th April* 1871.

Bibee Meheroonnissa (Plaintiff) *Appellant,*

versus

Abdool Gunee (Defendant) *Respondent.*

Mr. R. E. Twidale for Appellant.

Baboo Boodh Sen Singh for Respondent.

A *dowl-durkast,* being only a preliminary to a lease, does not require registration.

Where a defendant admits the cause of action and pleads payment, he must prove that the claim which is admitted has been discharged by payment.

Jackson, J.—This was a suit to recover arrears of rent for certain lands occupied by the defendant under the plaintiff, not it seems as a ryot or cultivating tenant, but as a farmer.

The plaintiff alleged that the terms on which the land was held were set out in two documents called *dowl-durkasts* which he produced, and which were used as evidence in the first Court.

The defendant admitted that he held land under the plaintiff but denied having made the *dowl-durkasts,* and he alleged that he held the land at a rental much less than that stated by the plaintiff; which he said he had paid.

The Moonsiff gave the plaintiff a decree.

On appeal to the Zillah Court, the Judge declined altogether looking at the *dowl-durkasts.* He considered that they were counterpart leases as defined in the 2nd Clause of the Registration Act, and consequently he held that they must be registered under Section 17 of the Act, and that not being registered they were inadmissible.

He was then pressed to give the plaintiff a decree for rent as admitted by the defendant. But this contention the Judge disposed of by saying that the admissions of the defendant must be taken as a whole, and as the admissions contained a statement of payment, the plaintiff could not profit by it, and the Judge dismissed the suit *in toto.*

In special appeal it is contended that the Judge was in error on both points; and this contention is in my opinion made out.

As to the *dowl-durkasts* the Judge appears to have had brought to his notice a decision in XII Weekly Reporter, page 395, in which *dowl-durkasts* are held to be not actual contracts, but preliminary proposals to a lease, and as such not requiring registration. The Judge observes as to this that his opinion is not changed by this ruling. He admits that it is a preliminary proposal to a lease, but, he says, the plaintiff does not so use it in the present suit, but adduces it as primary evidence of the lease itself, and of its terms.

Now it seems to me clear enough, reading the plaint, and looking at the written statement, that the plaintiff's cause of action arose out of the defendant's occupying the plaintiff's land and refusing to pay rent. That the defendant did occupy is admitted by defendant himself. The *dowl-durkasts* are useful to the plaintiff, and are produced to show on what terms the defendant had consented to take the land, and, unless the contrary be shown, *had* taken the lands. That being so, the question arose whether the *dowl-durkasts,* not being registered, were inadmissible.

Now not only in the case in the XII Weekly Reporter, but in another which is to be found in VII Weekly Reporter, p. 280, (both under the old Act) it was held that these documents do not require registration.

These decisions were, it is supposed, known to the members of the Legislature who passed the last Registration Acts, and are maintained in law by those Acts; and after the passing of the Act of 1866, there is a later ruling in which it was held that documents of this nature do not require registration. The case is to be found at page 178, Volume XIV, Weekly Reporter. The Judge, therefore, was wrong in declining to receive the *dowl-durkasts* in question, on the ground that they were inadmissible. They were admissible and showed what had been the negotiation between the parties, and, if the defendant could not show any departure from the terms stated therein, the Court should presume that the holding of the land was on those terms. Therefore the Judge must determine, if the *dowl-durkasts* are admissible, whether they were made by the defendant, and if so, whether any variation of the proposals contained in them can be shown; for, if not, the rate of rent must be taken to be that mentioned in those documents. If the Lower Appellate Court should find against the plaintiff on this point, then we come to the defendant's admissions as to holding the land. As to this the Judge remarks that "the admissions must be taken with its concomitants, and the defendant's plea of payment must be accepted too;" and he refers to certain observations made by Mr. Justice Markby in a judgment reported in XII Weekly Reporter, page 317.

Now I do not understand that the meaning of those observations of my brother Markby in the case referred to was what the Judge takes it to be. On turning to the judgment itself I find this passage: "Had the defendant admitted the *jummabundee* and pleaded payments, it would of course have been incumbent upon him to prove those payments."

If the learned Judge meant to say that the admissions in question were to be taken absolutely as a whole, he would not have made these observations. Besides this we have the advantage of having my brother Markby sitting here to-day, and he will no doubt put this matter right effectually.

The case will be remanded to the Judge for re-trial. Costs to follow the result.

Markby, J.—I also think that the case must go back. The law of this country on the subject of registration, while it requires in some cases that if contracts are reduced to writing the instrument should be registered, still leaves it to the option of the parties whether the contract shall be reduced to writing, or whether they will content themselves with an oral agreement.

I do not suppose that any one will contend that a *proposal* is a *contract*, and it seems to me that in this case the Judge has decided that the *dowl-durkast*, notwithstanding its name, binds the party signing it to perform what is there stated, and if so, it must be registered. But I think that question is concluded by the decisions which have been referred to. It has been held by this Court on three successive occasions, before and after the passing of the Act, that a *dowl* is only a preliminary to a lease, and as such not requiring registration.

Upon the other point, I think, this case differs very materially from the case to which the Judge refers, and his error on the second point is, as it appears to me, connected with his error on the first.

He treats the *dowl-durkast* as the cause of action, and then he says, as the cause of action is wholly denied by the defendant, and he only admits a totally different cause of action, it is clear that under that cause of action he is discharged by the statement of payment contained in his admission according to the case reported in the 12th Weekly Reporter, which rules that such admissions must be taken as a whole.

From what I have said it is shown that the *dowl-durkast* was not, and could not be, a cause of action. The cause of action in the present case is the occupation of the land, and the *dowl-durkast* may be whole, or may be part, of the evidence on which the plaintiff seeks to establish the terms on which the land was occupied; and therefore this case falls, not within the case there decided, but within the other case which was put by me, namely, that where the defendant admits the cause of action and pleads discharge by payment, there the defendant must prove that the claim which is admitted has been discharged by payment.

The case must, therefore, go back for trial in accordance with the directions of Mr. Justice Jackson.

The 10th April 1872.

Present:

The Hon'ble Louis S. Jackson and
W. Markby, *Judges.*

Execution of Decree—Certificate under Act XXVII of 1860.

Case No. 848 of 1871.

Miscellaneous Appeal from an order passed by the Judge of Backergunge, dated the 22nd August 1871.

Manick Moyee Chowdhrain and others
(Petitioners) *Appellants,*

versus

Poorno Chunder Roy and others (Judgment-debtors) *Respondents.*

Baboos Sreenath Doss and *Mohinee Mohun Roy* for Appellants.

No one for Respondents.

Parties who are decree-holders on the record are *primâ facie* entitled to take proceedings in execution and draw the money standing to their credit under their decree, without the necessity of taking out a certificate under Act XXVII of 1860, when there are no debts to be collected as due to the estate of a deceased decree-holder

Jackson, J.—It seems to me that the order of the Judge in this case is founded on a mistake.

The parties now before us are the representatives of certain decree-holders in suit

No. 299 of 1871, and they applied to the Zillah Judge for an order that certain monies then in Court should be paid out to them in execution of decree. They appear to have made some previous application on which the Judge seems to have been of opinion that they ought first to take out a certificate under Act XXVII of 1860, whereupon they presented a petition on the 23rd of Srabun 1278, in which they pointed out that they had been allowed to act as representatives of the deceased decree-holder; in fact one of the petitioners, Manick Moyee Chowdrain, is herself one of the decree-holders. They were parties on the record as decree-holders and they asked to be allowed to draw the money without a certificate, as there were no debts to be collected.

The Judge recorded an order in the vernacular to the effect that the money could not be paid out without a certificate.

The petitioners come up to appeal against this order. The order cannot be supported. The parties are now the decree-holders on the record, and *primâ facie* they are entitled to take proceedings in execution and draw the money standing to their credit under their decree.

No doubt it is quite competent to the Judge, if anything occurred to lead him to believe that these parties are not entitled to draw the money, to call on them to satisfy him they are entitled to do so, but they ought to be required to prove their right in this particular form. A certificate is only required to enable parties to collect debts. An application for a certificate involves stamp duties proportionate to the amount which is expected to be collected; but where there are no debts due to the estate of the deceased person, it would be a hardship upon parties to require them to take out a certificate. If the Judge is satisfied that the petitioners are entitled to draw the money, the money must be paid to them. The order of the Judge is therefore set aside.

Markby, J.—I concur.

The 10th April 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Sale in Execution of Decree—Evidence—Title—Description of Boundaries in Sale—Proclamation or Certificate.

Cases Nos. 1257 and 1258 of 1871.

Special Appeals from a decision passed by the Officiating Deputy Commissioner of Julpigoree, dated the 25th July 1871, *reversing a decision of the Sudder Moonsiff of that district, dated the 27th March* 1871.

Baluk Doss and another (Plaintiffs) *Appellants,*

versus

Nimaye Chunder Sircar and others (Defendants) *Respondents.*

Mr. C. Gregory and *Moulvee Syud Murhumut Hossein* for Appellants.

Baboo Bhugobutty Churn Ghose for Respondents.

A mere general description of boundaries in a sale proclamation, or a sale certificate, does not of itself confer on the purchaser such a conclusive title as can be rebutted by no proof to the contrary.

Bayley, J.—We think both these appeals must be dismissed with costs.

The plaintiff brought two suits; one for recovery of possession and establishment of right valued at Rs. 124, and the other for price of half the corn grown valued at Rs. 34.

The facts of the case are these:—The defendant No. 2 and defendants Nos. 3, 4, and 5 purchased on the same day, at a sale in execution, two lots; one called Jote *Mundulghat*, and the other Jote *Goralbaree.* The plaintiff derives title from defendant No. 2, and the question is what are the correct boundaries of the *jotes* purchased. The Moonsiff went to the spot, and after a local enquiry, decreed the plaintiff's claim.

On appeal, the Judge going upon the evidence of what he calls "unbiassed witnesses," on the Ameen's report, and on the depositions of the former owners of the *jote*, came to a finding of fact that the weight of evidence was on the side of the defendants, and that before the sale the boundaries of the two *jotes* were as the defendants 3, 4, and 5 stated, and not as were entered in the sale certificate. The Judge also finds that, "taking the boundaries as the "defendants 3, 4, and 5 stated, the disputed "land was part of *Goralbaree* Jote; that "plaintiff never had possession of it, and it "was acknowledged that the defendants are "in possession." The Judge accordingly decreed the appeal, and dismissed the plaintiff's suit.

The gist of Mr. Gregory's contention in special appeal is that, as the purchasers at the auction-sale purchased the rights and interests of the debtor which had been attached and sold with certain descriptions in the sale proclamation and in the petition for attachment, and as a similar description was also given in the *bynamahs*, the title of his client ought to be declared in the lands as specified in those papers.

Now, there is a certain difficulty in this argument to start with, *viz.* the plaintiff or rather the person through whom he derives title purchased the rights and interests, whatever they might be, of the judgment-debtor sold under a certain description which might be right or wrong ; but a mere general description of boundaries in the sale proclamation, or in the sale certificate, does not of itself confer on the purchaser such a conclusive title as can be rebutted by no proof to the contrary. No doubt, such descriptions may raise a *primâ facie* case, but that is open to be rebutted by evidence, and in this case the Lower Appellate Court going through the whole evidence finds that the preponderance is in favor of the defendant's contention. Under these circumstances, there is no such error in law as would justify our interference in special appeal.

We may add that it was certainly within the competency of the Lower Appellate Court to go beyond the actual statement in the sale certificate, with a view to determine whether that description was correct or not, the real thing sold being the rights and interests of the judgment-debtor in *Mundulghat* whatever those rights and interests might really and not by way of description be.

Both the special appeals are dismissed with costs.

The 12th April 1872.

Present :

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble W. Ainslie, *Judge.*

Small Cause Court (Jurisdiction of)—Act XI of 1865, *s.* 6—*Mahomedan Law—Marriage—Dower—Kabinnamah.*

Reference to the High Court by the Officiating Judge of the Small Cause Court at Dacca, dated the 1*st February* 1872.

Hala Khoory Bibee, *Plaintiff,*

versus

Shaikh Basoo Koshye and another, *Defendants.*

A suit for the *maujjil* or exigible portion of dower due to plaintiff under a *Kabinnamah* is cognizable by a Small Cause Court under Section 6 Act XI of 1865, notwithstanding that questions of considerable difficulty may be raised in it collaterally with regard to the validity of the marriage. The decision of the Small Cause Court on such collateral matters has not the same effect as the decision of the Court which had jurisdiction to determine them in a suit regularly brought for the purpose.

Case.—THIS is an action for Rs. 100 being the *maujjil* or exigible portion of dower due to plaintiff, under a *Kabinnamah* of 27th Srabun 1270, B. S., alleged to have been executed by her father-in-law, the defendant No. 1, for and on behalf of his son, the defendant No. 2 Shaikh Ladoo.

Defendant No. 1 denies execution of the *kabin* and pleads non-liability. Defendant No. 2, the husband of plaintiff, urges in defence that, as the marriage between him and the plaintiff was solemnized when both of them were minors and without their father's consent, the marriage itself is null and void, and that he knows nothing whatever about the execution of any *kabin* or deed of dower in favor of plaintiff.

The first question to be disposed of is :—Whether or not the case is at all cognizable by a Small Cause Court. I am humbly of opinion that it is not. It has been laid down by Sir William Hay Macnaghten in his Principles of Mahomedan Law (Rule 20 of the Chapter on Marriage) that "a necessary concomitant of marriage is dower," and in fact Mahomedan marriages without dower are not sound in the eye of their law. It is hence that suits for dower settled by *kabins* do, as in the present instance, very often raise the most intricate questions with regard to the validity or otherwise of the marriage contract, and the judgments of the Small Cause Courts in such cases, though only for money due under *kabin-bonds*, go a great way towards establishing the wife's future rights as such to her husband's real estate. Mahomedan ladies in this country do every now and then come to Small Cause Courts for the recovery of their dower-money ; but it becomes clear afterwards that they cared more for the establishment of their rights as wives, than for the money they apparently claimed. But as such questions do not appear to me to be proper subjects of investigation by a Small Cause Court, and as in fact they cannot be disposed of without entering deeply into the intricacies of the Mahomedan Law on the subject of marriage, I dismiss the case with costs, contingent, under Section 28 of Act XI of 1865, upon the opinion of their Lordships the Judges of the High Court.

The judgment of the High Court was delivered as follows by :—

Couch, C. J.—In this case an action was brought in the Small Cause Court for 100 rupees, being the *maujjil*, or exigible portion of dower, due to the plaintiff, as she alleged, under a *kabinnamah* of 27th Srabun 1270, which she said had been executed by her father-in-law, the first defendant, on behalf of his son, the second defendant.

The Judge of the Small Cause Court raised the question whether it was a case which was cognizable by a Small Cause Court, and he has referred that question to this Court.

Now this is a suit upon a contract which comes within the language of Section 6 Act XI of 1865, which provides that the suits which are cognizable by Courts of Small Causes shall be, amongst others, claims for money due on a bond or other contract, and there are certain exceptions in the proviso which says that no action shall lie in any such Court on a balance of partnership account, unless the balance shall have been struck by the parties or their agents ; or for a share or part of a share under an intestacy, or for a legacy or part of a legacy under a will ; or for the recovery of damages on account of an alleged personal injury, unless actual pecuniary damage shall have resulted from the injury.

This case does not come within any of these exceptions, and it is within the language of Section 6. The Judge of the Small Cause Court appears to have been influenced in his decision by, as he says, the fact that in a suit of this kind questions of considerable difficulty may be raised with regard to the validity of the marriage, and that such questions are not the proper subjects of investigation in the Small Cause Court. That may be, but it cannot be a ground for introducing into Section 6 an exception which is not to be found in it. It may be that a Small Cause Court, in trying the suits which it has jurisdiction to try, has at times to enquire collaterally into matters of difficulty and importance. The Court must investigate them in the best way it can ; and its decision on such collateral matters has not the same effect as the decision of the Court which had jurisdiction to determine them in a suit regularly brought for the purpose.

We think in this case the Judge must be told that we are of opinion that he has jurisdiction to try this suit, and that he ought to try it.

The 12th April 1872.

Present :

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge.*

Execution of Decree (against Representative of Deceased Person)—Act VIII of 1859 *s.* 203 *—Act X of* 1865 *ss.* 279 *to* 281 *&* 282.

Reference to the High Court by the Officiating Judge of the Court of Small Causes of the Suburbs of Calcutta, including Howrah, dated the 5th January 1872.

Nil Komul Shaw, *Plaintiff,*

versus

Mrs. J. Reed, *Defendant.*

Section 282 of the Indian Succession Act does not interfere with the right of a decree-holder, under Section 203 Act VIII of 1859, to have his decree satisfied out of the property of a deceased person (or out of the property of the defendant, the representative, if it should appear that he has not duly applied the property of the deceased) to the exclusion of other creditors, after deducting the expenses chargeable under Sections 279 to 281 of the former Act.

Case.—THIS was a suit brought against Mrs. Reed, as the representative of her deceased husband for goods supplied to him. The claim was decreed against her in her representative capacity, the amount to be realized out of the estate of the deceased. Mrs. Reed had previously obtained from the Administrator-General a certificate under Section 34 Act XXIV of 1867, entitling her to receive the assets of the deceased valued at Rs. 479, a part of which consisted of salary due to the deceased in the hands of the agent of the East India Railway Company, which had been attached by this Court before execution of the decree. Mrs. Reed, having objected to the whole of plaintiff's claim being satisfied out of the sum attached, I took evidence for both sides on the objection, and passed an order that plaintiff was entitled to have Rs. 97-12-6 of the money so attached handed over to him. The principle upon which I went was this :—I first ascertained the total amount of assets left by the deceased, and declared the plaintiff entitled to what remained after deducting the expenses chargeable under Sections 279—281 of the Indian Succession Act to the exclusion of all other creditors of the estate who had not got decrees. It was possible that these parties might forego their claims altogether;

at all events, as they were not before me in any way, I did not see that I was bound to provide for them to the detriment of plaintiff who had taken the trouble of bringing a suit, and had used superior diligence in enforcing his claim. Defendant has applied for a review of this order on two grounds: one being a question of fact, *viz.* as to whether a certain sum of Rs. 70 should be included in the assets of the estate, and with regard to which it is not necessary to trouble the High Court with a reference; the other ground being that I was wrong in declaring the present plaintiff entitled to have the whole of his decree satisfied out of the assets of the estate, as far as they went, to the exclusion of other parties who have claims against it admitted to be correct, but who have not obtained decrees of Court. It is in fact contended that I had no power to enforce the decree at all, but should have left Mrs. Reed to satisfy it at her own discretion rateably with the other unproved claims against the estate; it being left to plaintiff, in case she showed any undue preference, to sue her again for damages.

Section 282 of Act X of 1865 is relied upon by Mrs. Reed in support of this contention; and if the words "or on any other account" in that Section include a decree of Court, her contention would appear to be valid. It is on this question that I have the honor to solicit the opinion of the High Court, *viz.* was plaintiff, under the circumstances stated above, entitled to satisfaction of his decree to the exclusion of the other creditors, or should it have been left to the discretion of the defendant to satisfy the decree *pari passu* with the other unproved claims (not being of the natures specified in Sections 279—281 of Act X of 1865).

My own opinion which I am bound by law to express is that the words "on any other "account" in Section 282 do not cover a decree of Court; in the first place a decree is not *ejusdem generis* with an instrument under seal, but of a higher degree, and the general words "any other account" cannot be extended to words of a higher degree; and, secondly, I think the construction contended for can hardly be reconciled with the provisions of Sections 208 and 211 of the Civil Procedure. I have retained the money in dispute until the decision of the High Court on this reference

The judgment of the High Court was delivered as follows by—

Couch, C.J.—We think the plaintiff is entitled, as the Judge of the Small Cause Court is of opinion, to have the Rs. 97-12-6, the balance of the assets after making the necessary deduction for expenses, paid to him towards satisfaction of the decree which he had obtained.

The provision in Section 208 Act VIII of 1859, entitles the decree-holder to have his decree satisfied out of the property of the deceased, or out of the property of the defendant, the executor, if it should appear that he has not duly applied the property of the deceased; and Section 282 of the Indian Succession Act does not interfere with that right. All that it does is to point out the mode in which the executor or administrator is to administer the assets of the deceased, but it does not enable the executor or administrator, when a decree has been obtained against him, to say that no portion of the assets of the deceased person is to be paid in satisfaction of that decree, but he is to deal with them just as if no decree had been passed, which appears to be the objection raised in this case.

We think that the conclusion which the Judge of the Small Cause Court came to is a right one.

The 12th April 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble W. Ainslie, *Judge.*

Registration—Act XX of 1866 *s.* 53—*Instalments—Waiver—Alteration of Suit.*

Reference to the High Court by the Judge of the Small Cause Courts at Hooghly and Serampore, dated the 4th March 1872.

Dhununjoy Ghose, *Plaintiff,*

versus

Bemal Dhara Bagdee and another, *Defendants.*

Baboo Jadub Chunder Seal for Plaintiff.

No one for Defendant.

In a suit under Section 53 of the Registration Act XX of 1866 to recover two instalments, one of which had fallen due more than a year before the institution of the suit, the Small Cause Court came to the conclusion that the bond was not executed by the defendant and was not properly registered, and for that reason dismissed the suit. The High Court on a reference refused to allow the plaintiff to waive the first instalment and to alter the nature of his suit with a view to his obtaining a decree for an instalment to which he was not entitled upon the finding of the Small Cause Court after hearing the evidence.

Case.—A QUESTION of law having arisen in this suit I have the honor to draw up a statement of the case, on the application of the plaintiff and to refer it under Section 22 Act XI of 1865, with my own opinion, for the decision of the High Court.

The plaintiff founded his claim on an instalment bond duly registered with an agreement under Section 53 Act XX of 1866, and sued the defendants for the recovery of Rs. 95, being the balance of the first two instalments with interest thereon after the expiration of one year from the date when the first instalment became due and within one year from the date on which the second instalment became payable and caused summonses to be issued on the defendants.

The defendants denied the demand and pleaded that they have not executed the ***kisteebundee***; and that they never appeared before the Sub-Registrar to have the deed in question registered with an agreement under Section 53 Act XX of 1866.

The plaintiff produced and examined two witnesses to prove the execution of the bond by the defendants, and the special registry thereof. One of the witnesses deposed that the bond in question was written and executed by the defendants at Serampore, and that he identified the executants before the Sub-Registrar; whereas the other witness said that the deed was written and executed at the plaintiff's house at Shamsoonderpore and that he is not an attesting witness to the bond though he knows how to read and write. These witnesses are men of low origin; from the manner in which they deposed I am doubtful of the veracity of their testimony; and the plaintiff's claim is not in my opinion proved.

At this stage of the proceedings the plaintiff's pleader argued (1) that the instalment bond upon which the plaintiff has founded his claim being one which has been registered with the agreement under Section 53 Act XX of 1866, the amount secured thereby may be recovered in a summary way; and on production of the obligation the Court can give the plaintiff a decree under the provisions of the said Section 53 Act XX of 1866, without taking any evidence whatever, notwithstanding that the summons has been issued against the defendants, and that the petition bears a stamp of full value prescribed for a plaint in such a suit for the reason of one year having elapsed from the date on which the first instalment became payable; (2) that the second instalment which became payable in Choitro 1277 B. S. having been included in this suit instituted within one year from the date on which it became payable, the Court is bound to give the plaintiff a decree for the said instalment under the provisions of the said Section 53 Act XX of 1866. The following two questions of law, therefore, arise in the case.

1st.—Whether a summary decree can be given in the case without entering into its merits as to the fact of the defendants having after a settlement of their debt executed the instalment bond and registered it with an agreement under Section 53 Act XX of 1866, when the defendants denied *in toto* the execution of the bond in question and the special registry thereof, and when they were served with a summons to appear, as well as when the institution of the suit was made after the lapse of one year from the date on which the first instalment became due.

2ndly.—Whether the plaintiff is entitled to a decree under Section 53 Act XX of 1866, without giving any evidence whatever for the amount of the second instalment which became payable within one year back from the date of institution of the suit, when the same is included with the amount of first instalment which was due beyond one year back from the commencement of the suit, and when the execution and special registry of the instalment bond have not been proved.

I am of opinion that the case not having been brought within one year from the date on which the first instalment became payable, it is necessary that proceedings required for trial in ordinary cases are to be held, and that the plaintiff is not entitled to a decree merely on production of the obligation as laid down under Section 53 Act XX of 1866. Moreover, in the absence of any satisfactory proof of execution of the bond and the special registry thereof, the Court cannot award a decree to the plaintiff under Section 53 Act XX of 1866, merely for the reason of the claim of the second instalment having been preferred within one year from the date on which it became payable. I am, therefore, of opinion that as the execution of the instalment bond in question by the defendants and the special registry thereof have not been satisfactorily proved, the plaintiff is not entitled to a decree, and would accordingly dismiss the claim subject to the decision of the High Court, and order that a reference on the subject be made to the High Court and that no execution shall be issued in the case until the receipt of the order of the High Court.

The judgment of the High Court was delivered as follows by—

Couch, C.J.—In this case, the plaintiff did not, as he might have done, proceed under Section 53 of the Registration Act for the last instalment. Seeking to recover two instalments, one of which had fallen due more than a year before he brought his suit, he sued in the Small Cause Court in the ordinary way, and asked to have the defendant summoned; and it appears that the Judge of the Small Cause Court, after hearing the case, has come to the conclusion that the bond was not executed by the defendant, and was not properly registered, and for that reason has dismissed the suit.

It is contended for the plaintiff that he may waive the first instalment, and that he is entitled to have the proceeding treated as one under Section 53, and to have a decree for the second instalment. But he is not entitled to that. He cannot, at this stage of the proceedings, alter the nature of the suit which he brought and claim the benefit of Section 53. When we see that the Judge of the Small Cause Court has come to the conclusion that the bond was not executed by the defendant, it is not a case in which we should allow him, by changing the nature of his proceeding, to obtain a decree for an instalment to which it would seem he is not entitled. It would be allowing this provision in the Registration Act to be made the means of a fraud in obtaining payment of a sum of money which the plaintiff is not entitled to, upon the finding come to by the Small Cause Court after hearing the evidence. We substantially agree with the Judge of the Small Cause Court in the opinion which he has come to upon the two questions which he has submitted to us.

The 12th April 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble W. Ainslie, *Judge.*

Arbitration—Revocation—Examination of Arbitrator as Witness.

Reference to the High Court by the Judge of the Small Cause Court at Burrisaul, dated the 28th December 1871.

Nil Monee Bose, *Plaintiff,*

versus

Mohima Chunder Dutt, *Defendant.*

No one for Plaintiff.

Mr. J. S. Rochfort for Defendant.

A reference to arbitration made under an order of Court cannot be revoked at the instance of a party.

If an arbitration award is set aside and the matter is tried as a suit before the Court, the arbitrator cannot be examined as a witness as to the grounds of his decision but only to prove any admission which may have been made before him in the course of the arbitration and which might be material evidence.

Case.—I have the honor in the case respectfully to solicit the opinion of the Hon'ble Court on the points stated below. The case was, on the consent of both parties, referred to arbitration. The arbitrator gave in his award in favor of the defendant. Plaintiff dissatisfied with the award states in a petition that the arbitrator has omitted to record the evidence of a material witness who was present and has not examined another witness on the points at issue. The case was accordingly remanded under Section 328 Act VIII of 1859 to the arbitrator, requesting him to give a fresh award after taking the evidence of the witness whom he had not examined.

The plaintiff afterwards files another petition objecting to the trial of the case by the arbitrator whom he now cities as his witness, and prays that the case be tried by the Court where he wishes the arbitrator to be examined on points connected with the case and which he has since got knowledge of.

This is a case of money claim on promissory note. Its value is of the utmost limit cognizable by the Small Cause Court. Hence, after remanding the case to the arbitrator as stated above, I had sent the copy of plaintiff's petition to him requesting him to send the records of the case for the inspection of the Court which he has done along with a letter stating that the Court may itself try the case, if it likes, and he (the arbitrator) would have objected to act as arbitrator in this case if he before knew that plaintiff would thus try to disgrace him by citing him as a witness before the Court, which conduct shows the craftiness and evil design on the part of plaintiff, &c., &c."

The above last impression of the arbitrator towards the plaintiff whose case has been remanded by the Court for re-investigation by the arbitrator may have filled the mind of the plaintiff with some sort of uncertainty as regards the consequences of the re-investigation and which is perhaps the reason why he now more insists to get his case from the hands of the arbitrator for trial by the Court, but the defendant in whose favor the arbitrator had first given his award is opposed to this.

Under these circumstances, I most respectfully solicit the Hon'ble Court kindly to instruct me.

Firstly.—Whether, after once giving free consent to have his case decided by the arbitrator, the plaintiff can now withdraw his consent and apply to have his case tried by the Court.

Secondly.—When the plaintiff insists to have the arbitrator examined by the Court and thereupon pass its own judgment, has the Court power to try the case by taking it from the hands of the arbitrator to whom the case has been remanded under Section 328.

Thirdly.—Has the Court power to examine the arbitrator as a witness before it regarding any matter connected with the same case referred to him as arbitrator.

My humble opinion is that the plaintiff is bound by his consent and cannot now withdraw it. The award of the arbitrator cannot be set aside except on the grounds stated in Section 324 of Act VIII of 1859. Also when in the absence of the grounds mentioned in Sections 328 and 324 the arbitration award would be final and the arbitrator has acted judicially in investigating the case, he cannot be examined as a witness to elicit from him anything that may tend to show that his award is not correct.

I have also the honor to state that pending the decision of the Hon'ble Court on this reference, I have directed that the re-investigation of the case by the arbitrator or its trial by the Court be postponed.

The judgment of the High Court was delivered as follows by—

Couch, C.J.—With reference to the question which the Judge of the Small Cause Court puts as to the power of the plaintiff to revoke the reference to arbitration, we think that, as this arbitration is under an order of the Court, the plaintiff cannot annul or revoke that order; he is bound by it, and the arbitration must proceed subject to the provisions of the law. The Court has power in certain cases, under Section 328 of the Code of Civil Procedure to remit the matters to the arbitrator, but this was not one of the cases provided for by that Section. If there was any power to set aside the award, it was a power under Section 324; and in that case the matters would not be remitted to the arbitrator, but the award would be set aside and the arbitration would come to an end. It appears from the 7th paragraph of the letter of reference to this Court that the Judge of the Small Cause Court did not consider that the omission to record the evidence of the witness who was present, or the not examining the other witnesses on the points at issue, was such misconduct as required that the award should be set aside. It also appears from that paragraph, that the provisions of Section 324 were present to his mind, and when we find that he remits the matters back to the arbitrator under Section 328, and does not proceed under Section 324, we think we must infer that he did not consider that the case came within the latter Section. The result is that he ought not to have set aside the award at all. From his judgment it would seem that there was not a ground for setting it altogether aside, and he had not the power to remit it. If he considered that the omission to examine the witnesses or to record the evidence was of such a nature as to vitiate the proceedings and to amount to misconduct on the part of the arbitrator, he ought to have set aside the whole of the proceedings and not to have again sent it back to the arbitrator. He did not do that, and it appears to us that the award must stand, there being no sufficient reason shown for setting it aside.

However, a question is put to us which we may answer hypothetically as it may perhaps save a further reference to us, and that is, whether, if the award is set aside and the plaintiff is at liberty to go on with the suit and it is to be tried as a suit before the Court, the arbitrator may be examined as a witness. The arbitrator cannot be examined as a witness as to the grounds of his decision, but we see no objection to his being examined as a witness to prove any admission which may have been made before him in the course of the arbitration, and which might be material evidence. He may be called to prove that although he cannot be questioned as to the grounds of the decision which he came to. It is a well known rule of law with regard to arbitrators that they are not allowed to be examined with regard to those matters, although there is no objection to their being examined with regard to matters which passed before them which would be an admission by the parties, and which would assist the Court in coming to a right conclusion when the case comes to be tried by the Court. Of course, it is only in case the Judge of the Small Cause Court thinks that he is at liberty to take up the case again, and to decide that there was misconduct on the part of the arbitrator and set aside the award under Section 324, that the question will arise whether the arbitrator can be examined as a witness.

We send the case back to him with these observations, and leave him to deal with it.

The 12th April 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble W. Ainslie, *Judge.*

Limitation—Act XIV of 1859 *s.* 14—*Want of Jurisdiction—Suits prosecuted bonâ fide and with due Diligence—Small Cause Courts—Reference to High Court—Application for new Trial (Points arising upon).*

Reference to the High Court by the Officiating Judge of the Small Cause Court at Dacca, dated the 9th March 1872.

Nobo Coomar Chuckerbutty (Plaintiff) *Petitioner,*

versus

Koylash Chunder Barooree and another (Defendants) *Opposite Party.*

The time for which suits may have been pending in Courts which had not jurisdiction, should be deducted in computing the period of limitation if the Judge should find that the suits were prosecuted *bonâ fide* and with due diligence.

A point arising upon the application for a new trial may be referred to the High Court.

Case.—SUIT for Rs. 222-8-10 being the amount of balance under a *kat-chitta heeshab.*

Mr. Linton, the late Officiating Judge of this Court, dismissed this case on the 28th of August last as barred by the statute of limitation.

The plaintiff then filed, before Mr. Linton, an application for a new trial, stating therein that he had at first brought a suit against these defendants in the Calcutta Small Cause Court on this very cause of action, and obtained an *exparte* decree against them, and caused attachment of their property; that, on the motion of the defendants, the decree and execution were set aside on the ground of no service of summons; and that therefore the time for which the case was pending in the Calcutta Small Cause Court, *i. e.* one year and two months and five days, and also the time for which it was before the Moonsiff of Naraingunge, should have been deducted in computing the period of limitation, Plaintiff also cited the High Court Ruling of 20th January 1871, in the case of Banee Madhub Lahoree (W. R., Volume XV, page 69) and urged that the matter might be referred to the Hon'ble Court.

The questions to be decided are :—

1st.—Whether the grounds set forth in plaintiff's petition, as stated above, are sufficient to grant a new trial.

2nd.—Whether the matter, under the circumstances of the case, can be referred to the High Court.

The case being based on a *kat-chitta heeshab,* the first thing to be seen is, whether the period of limitation shall be computed from the date of the last payment made by the defendants, or from the date of every item in the account. As from the circumstances of the case it appears that the parties are not related to each other as "merchants and traders who have had mutual dealings," I am of opinion that plaintiff's case does not come under Section VIII of Act XIV of 1859, and that therefore limitation runs from each date of transaction. The particulars of the account with the dates on which goods are alleged to have been sold or cash lent to defendants, are given in the margin, and the different periods for which this suit was pending in different Courts, shown.

Particulars of Plaintiff's Account.

	Rs.	As.	Gundas.
12th Choitro 1274.			
To rice sold	10	4	0
" cash lent	221	10	7½
	231	14	7½
13th idem.			
To wood sold	9	10	0
14th idem.			
To wood sold	10	10	0
16th idem.			
To wood sold	5	6	10
	257	8	17½
Deduct payments.			
12th Choitro	9	0	0
13th Choitro	10	0	0
16th Choitro	10	0	0
17th Choitro	5	0	0
18th Choitro	1	0	0
	35	0	0

Mr. Linton in his judgment says that he finds "from the plaint which was originally filed in the Moonsiff's Court on the 22nd March last, which corresponds to 9th Choitro 1277, that owing to want of jurisdiction an order was passed on the 30th May last to return the plaint to the pleader; but owing to pleader's neglect, the plaint was not taken back till 5th June, when it was filed in this Court. Consequently,

Plaintiff's suit was first brought in the Calcutta Small Cause Court on 5th February 1869, corresponding with 24th Magh 1275 B. S. It was therefore brought within 10 months and 13 days from the first day of transaction; within 10 months and 12 days from the 2nd day; within 10 months and 11 days from the 3rd day; and within 10 months and 9 days from the 4th date.

The original suit in the Calcutta Small Cause Court was disposed of on the 12th February 1869. The time for which it remained pending was 8 days.

The Review granted there on the 7th March 1870 was disposed on the 9th April of that year.

The time for which it remained pending was one month and 8 days.

Plaint presented in the Sealdah Small Cause Court on the 9th May 1870 and rejected on the 11th July.

The time for which it remained pending there was 2 months and 4 days.

Plaint presented to the Moonsiff of Naraingunge on the 22nd March 1871, and order to return it passed on the 30th May of that year.

The time for which it remained pending there is 2 months and 9 days.

Case instituted in the Naraingunge Small Cause Court on the 5th June of 1871.

deducting the period that the plaint was remaining in the Moonsiff's Court, still plaintiff is out of time."

The defendants, on the other hand, contend, that the time for which the suit was pending in the Courts of Small Causes at Calcutta and Sealdah, cannot be deducted in plaintiff's favor, inasmuch as it was owing to his fault that it could not have been decided in those places. They say that plaintiff can get deduction only of the time for which his suit was before the Moonsiff of Naraingunge; but that, they argue, does not bring plaintiff within time; and that, therefore, his claim is barred. The defendants also refer the Court to the Hon'ble High Court's Ruling of 7th April 1868, in the case of Oodoy Monee Debia, appellant (W. R. Volume IX, page 455).

It is clear that Mr. Linton did make no calculation of the time for which plaintiff's case was pending in wrong Courts, and did come to no conclusion whatever as to whether the time, for which the case was in the Small Cause Court of Calcutta, ought or ought not to have been deducted in plaintiff's favour. I agree with him in holding that the 5 days, for which the case remained in the Naraingunge Moonsiff's Court after the Moonsiff's order to return the plaint, ought not to be deducted. For the delay was in consequence of plaintiff's own neglect, and he should suffer for it. I am also of opinion that the period for which the execution case of plaintiff was pending in the Calcutta Small Cause Court should not be excluded in computing the time of limitation. For an execution case cannot be considered as a suit in the sense in which the word is used in Section 14 of Act XIV. It is only regular suits and appeals that can properly be called suits, execution cases being only the carrying out of orders passed in suits. The time for which plaintiff's case remained before the Judge of the Sealdah Small Cause Court also goes for nothing. For the plaint was rejected there on the ground of not being duly subscribed and verified, and therefore it was clearly a fault of plaintiff that the case could not be decided there. But I find that, all this notwithstanding, the plea of limitation still does not hold good. The original suit in the Calcutta Small Cause Court remained pending for 8 days, and the review for 1 month and 3 days. This, together with the time for which the suit remained before the Moonsiff of Naraingunge, exclusive of the 5 days alluded to above, gives plaintiffs 3 months and 20 days' time; and if this period be deducted in his favor, he is within 3 years from the 1st day of his transaction with defendants. It was not plaintiff's fault that the summonses of the Calcutta Small Cause Court could not be served on the person of the defendant, and the time for which it was before the Moonsiff of Naraingunge was also owing to no negligence of his. Defendants in this country do frequently fly from place to place to avoid service of summonses, and it would fall very hard upon plaintiffs, if they are considered out of time simply because they cannot, with all their endeavours, trace out where defendants go. If the plaintiff in this case be allowed a deduction in his favor of 3 months and 20 days' time as shown above, his suit has been instituted in the Naraingunge Small Cause Court within 2 years 10 months and 22 days from the date of 1st sale; consequently, the claim, in my opinion, is not barred by limitation. As the suit could not be decided in the Calcutta Small Cause Court and the Moonsiffee of Naraingunge for want of jurisdiction and other cause, plaintiff cannot be deprived of the benefit provided for by Section 14 of Act XIV. The ruling cited by the defendants, does not, I think, apply to this case; for the two cases are not at all analogous.

With regard to the second question, I find that a case based on an application for a new trial, can, under the ruling of the High Court, dated 22nd May 1869 (W. R., Volume XI, page 525), be made a subject of reference. Therefore, and the importance of the subject considered, the case is most respectfully referred to their Lordships the Judges of the High Court.

The judgment of the High Court was delivered as follows by—

Couch, C.J.—In this case the Judge of the Small Cause Court has referred two questions, first whether the grounds set forth in the plaintiff's petition are sufficient to grant a new trial; and, secondly, whether the matter, under the circumstances of the case, can be referred to the High Court.

With regard to the first of these questions, upon referring to the statements in the plaintiff's application or petition, it appears that the time for which a suit which had been brought by the plaintiff in the Calcutta Small Cause Court was pending, and also the time for which a suit before the Moonsiff of Naraingunge was pending, should have been deducted in computing the period of limitation, those suits having failed for want of jurisdiction in the two Courts.

Taking the question put with reference to these statements in the petition, we think the answer must be that if the Judge finds, as he appears to have done, that the suits were prosecuted *bonâ fide* and with due diligence, the time ought to be deducted.

As to the question of due diligence, he appears to have been careful to deduct all the time which might properly be considered as not included in due diligence or not fairly to be counted; but there seems no reason to say that he did not consider that the proceedings were *bonâ fide*. Therefore it must be answered that there are sufficient grounds set forth in the petition to grant a new trial.

The second question is, whether the matter under the circumstances of the case can be referred to the High Court. We do not understand what the Judge means by "under the circumstances of the case." It has been held by the High Court that, upon a point arising upon the application for a new trial, it may be referred to the Court. If that is what is meant, we answer that question in the affirmative also.

The 12th April 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble W. Ainslie, *Judge.*

Small Cause Court—Jurisdiction—Share in Intestacy—Reversal of Decision.

Reference to the High Court by the Officiating Judge of the Court of Small Causes of the Suburbs of Calcutta including Howrah, dated the 12*th February* 1872.

Nobin Chunder Gossamee, *Plaintiff,*

versus

Dribo Moyee Debee and another, *Defendants.*

In a former suit A, as his late mother D's heir, sued B for certain moveable property deposited with B by D, claiming it as her *streedhun*, and obtained a decree. In the present suit D's grandson O sues A for the property averring it to be ancestral and not *streedhun* and alleging collusion between A and O.

HELD that the present suit being in effect for a share or part of a share in an intestacy was not cognizable in a Small Cause Court; but that the High Court should not interfere with the decision in the former suit as made without jurisdiction considering the time that had elapsed and that the parties to the suit had made no application.

Case.—PLAINTIFF sues under the following circumstances:—A former suit had been brought in this Court, No. 1707 of 1871, in which defendant No. 1 was plaintiff, and defendant No. 2 defendant, and in which case defendant 1 had got a decree against defendant 2 for certain moveable property deposited with the latter by one Dassmonee deceased, who was the mother of defendant 1. Defendant 1 sued in that case as being entitled to the property as heir to Dassmonee, and on the ground that the property claimed was the *streedhun* of Dassmonee, and the question which was put in issue in that case was whether the property in question was *streedhun* or ancestral; it being admitted on both sides that in the former case defendant 1 would be the proper heir and in the latter the present plaintiff, who is the grandson of Dassmonee by adoption. In that suit I held on the evidence that the property was *streedhun*, and I accordingly gave defendant 1 (who was plaintiff in that case) a decree.

In the present case, plaintiff averring the property to be ancestral, and not *streedhun*, sues as the grandson of Dassmonee for the recovery of the property or its value from defendant 1, who was plaintiff in the other suit, and defendant 2 who was defendant in that suit, alleging that they had colluded with each other in order to defraud him of his rights.

I am now of opinion that both the present suit, and No. 1707 in which the present defendant No. 1 got a decree ought to be dismissed on the ground that neither of them is cognizable in this Court as they came within the exception in Section 6, Clause 2, Act XI of 1865.

The object of this reference is to elicit the opinion of the High Court as to whether both these cases are cognizable in a Small Cause Court as being in effect "for a share or part of a share under an intestacy;" and if the High Court be of the opinion that they are not triable in this Court, this case will be dismissed, and I would request that my decree in case No. 1707 be set aside as having been made without jurisdiction.

It appears that case No. 1707 was originally instituted in the Moonsiff's Court from which plaintiff was sent here on the ground that it was a Small Cause Court case, and when it came on for hearing before me, no question was raised as to the competency of this Court to entertain it. I think, however, that according to the ruling which has been reported in XVII Weekly Reporter, page 46, Grish Chunder Ghose, petitioner, which case I had myself tried, and the circumstances of which were very similar to the cases which form the subject of this reference, neither of these suits will lie in a Small Cause Court.

I have, therefore, dismissed this suit contingent on the expression of the High Court's opinion.

The judgment of the High Court was delivered as follows by—

Couch, C.J.—In this case we are of opinion that the Judge was right in considering that he had no jurisdiction to hear the suit, but with respect to the previous case of 1871 in which he asks us to reverse or annul the decision which he came to because he had no jurisdiction, we think, looking at the time that has elapsed, and that the parties to the suit make no application to the Court, that we ought not to interfere.

The 12th April 1872.

Present:

The Hon'ble W. Markby, *Judge.*

Appeal to England—Deposit for Mesne Profits and Costs—Security (after Execution of Decree)—Evidence.

In the matter of

Juggo Lall Oopadhya (Appellant to England) *Petitioner,*

versus

Jankee Beebee (Respondent to England) *Opposite Party.*

Mr R. E. Twidale for Petitioner.

Baboo Kalee Kishen Sen for Opposite Party.

The decree-holder (respondent to England) was required immediately to elect between furnishing security and drawing the sum deposited by the appellant on account of *wasilat* and costs, and (upon her failure to do so) allowing the appellant to obtain a refund of the deposit upon giving the like security.

A party, however, who seeks to obtain security after the decree has been executed, must show special circumstances (*e. g.* waste or improper dealing with the property) before the Court can grant such an order.

Markby, J.—The first part of this application, *viz.*, that the decree-holder be required to furnish security and draw the sum of Rs. 1,528 deposited by the petitioner in the Court of the Subordinate Judge of Patna, on account of *wasilat* and costs, or upon her failing to do so, the petitioner be allowed to obtain a refund of the deposit upon giving the like security, ought I think to be granted. I think the decree-holder must immediately elect which of the two courses he will adopt. I do not think he can keep the money in Court to the injury of the petitioner.

With regard to the second part of the application, it seems to me that, even assuming that the Court has under the circumstances the power to order security although possession of the property in dispute has been obtained by the decree-holder without security for which there is apparent authority in the case cited in Moore's Indian Reports, Volume X., page 197,* yet I think there are not sufficient materials in this petition to make such an order. I think when a party seeks to obtain security after the decree has been executed, he has to show special circumstances, such, for example, as waste or improper dealing with the property before the Court can grant such an order.

The *first* part of this application is granted, the *second* is refused, but I reserve leave to the petitioner to apply again if he can show any special ground for granting the order.

The 13th April 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Evidence—Ameen's Report (as explanatory of his admitted Map)—Solenamah (Privies to)—Estoppel.

Case No. 1322 of 1871.

Special Appeal from a decision passed by the Judge of Sylhet, dated the 21st July 1871, *reversing a decision of the Moonsiff of Sonamgunge, dated the 27th March* 1871.

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* 10 W. R., P. C., 10.

Mahomed Anwar Chowdhry and another (Plaintiffs) *Appellants,*

versus

Raj Chunder Ghose (one of the Defendants) *Respondent.*

Baboo Grish Chunder Ghose for Appellants.

Baboo Debendro Narain Bose for Respondent.

Where an Ameen's map is received in evidence by consent, and admitted by both parties to be topographically correct, the Court is entitled to look at the Ameen's report as explanatory of the map.

A *solenamah* was considered admissible as evidence against plaintiff, because, although he was not a party to it, his maternal uncles who were the managers on behalf of his mother through whom he claims were parties, and certain boundaries therein laid down contradict the statement as to the boundaries now made by him.

Bayley, J.—We think this special appeal must be dismissed with costs. The Lower Appellate Court has fully gone into the facts; and on a consideration of all the evidence, the Ameen Gooroo Churn's report, and the *solenamah*, has come to the conclusion that the plaintiff has not proved the case which he set forth.

The first objection taken by the pleader for the special appellant is that the Ameen's report is no evidence in this case.

Now, granting that the Ameen's report is no evidence against the special appellant who was no party to the proceeding in which that report was made, we think it was a paper which the Lower Appellate Court was entitled to look to as explanatory of the map of Gooroo Churn, which map is admitted by both the parties to be topographically correct, and which was received in evidence with their consent.

It is then urged that the *solenamah* relied upon by the Lower Appellate Court is not admissible as evidence against the special appellant, as he was no party to it. Now, the plaintiff himself may not have been a party to the *solenamah*, but it is clear that the plaintiff's maternal uncles who were the managers on behalf of the plaintiff's mother through whom he claims were parties, and certain boundaries therein laid down contradict the statement as to the boundaries now made by the special appellant. The case is one of boundary dispute, and there is a clear finding of fact by the Lower Appellate Court on the evidence, with which we are not justified to interfere in special appeal.

The appeal is, therefore, dismissed with costs.

The 18th April 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Hindoo Law—Restitution of Conjugal Rights—Taking away Wife's Jewels—Marrying a Second Wife.

Case No. 1228 of 1871.

Special Appeal from a decision passed by the Assistant Commissioner and Subordinate Judge of Burpettah, dated the 7th August 1871, *reversing a decision of the Moonsiff of that district, dated the 29th June* 1871.

Jeebo Dhon Bahyah (Plaintiff) *Appellant,*

versus

Mussamut Sundhoo and others (Defendants) *Respondents.*

Baboo Obhoy Churn Bose for Appellant.

Baboo Bhugobutty Churn Ghose for Respondents.

The mere taking of a first wife's jewels, or the marrying of a second wife by the plaintiff, cannot be set up as a bar to his claim against the former for restitution of conjugal rights.

Mitter, J.—This was a suit instituted by a Hindoo husband against his wife for restitution of conjugal rights.

The answer set up was that the plaintiff had divorced the defendant; that he had taken her jewels from her, and married a second wife.

The Moonsiff who heard the case in the first instance, gave a decree to the plaintiff. But, on appeal, the Judge has reversed that decision on the ground that, although the plea of divorce was not made out, yet the plaintiff was not entitled to a decree for restitution of conjugal rights when it was proved that he had taken the defendant's jewels from her, and married a second wife.

We think that the reasoning of the Judge is manifestly insufficient to justify the reversal of the decree passed by the first Court. Without entering into any discussion upon the validity or otherwise of the divorce set up by the defendant, it is sufficient for us to accept the finding of the Judge on the *factum* of that divorce. This finding being against the defendant, we do not think that the mere taking of her jewels, or the marrying of a second wife by the plaintiff, can be set up as a bar to his claim.

It has been said that there was another plea, *viz.*, that of ill-treatment which has not been enquired into by either of the Courts below. But on referring to the record, we find that this plea was never relied upon by the respondent, nor did she ask either of the Lower Courts to adjudicate upon it.

Under these circumstances, we think that the decision of the Judge ought to be set aside, and that of the Moonsiff restored.

We think that, under the circumstances, the parties ought to bear their own costs in this and in the Lower Appellate Court, and in that of first instance.

The 25th March 1872.

Present:

Sir James W. Colvile, Sir Montague E. Smith, and Sir Robert P. Collier.

Registration—Conveyances by Purdah Women—Evidence—Mutation of Names.

*On Appeal from the High Court at Calcutta.**

Syud Fuzzul Hossein and others,
versus
Amjud Ali Khan and others.

In cases of transactions by purdah women, mere registration does go far to corroborate the proof of their validity, unless a mutation of names takes place, which, if done under a Mooktearnamah, has not the same effect as against a purdah woman as it has against a person capable of transacting his own business and acting for himself.

When a transaction of this kind is impeached, there ought to be clear evidence, not of the mere signature by the party, but that the secluded woman had the means of knowing what she was about.

THEIR Lordships have come to the conclusion that in this case it is their duty to advise Her Majesty not to disturb the judgment under appeal.

With respect to two of the transactions in question, the case falls within their Lordships' rule against disturbing, except on very special grounds, the concurrent judgments of two Courts on issues of fact. With respect to the two earlier transactions there are conflicting judgments, and it was therefore open to the appellants to go fully into their case and to satisfy their Lordships, if it could be done, that the decision of the Principal Sudder Ameen was that which ought to be upheld.

It must be conceded to Sir Roundell Palmer that the plaintiffs, by alleging in their pleadings that all the documents impeached, including the grant of the mokurruree, which both Courts have pronounced to be valid, were actually forgeries, have raised an issue which they have failed to establish. And if it were necessary or usual in these Indian cases to hold the parties very strictly to their original pleadings, the case would, no doubt, be fairly open to many of the observations which have been made upon it. It seems, however, to their Lordships that, in determining this appeal, they ought to look to the issues settled and tried in the cause. Now, the fourth of those issues appears to them to raise the question, whether it be true or not, according to the statement of the defendants, that the Ranee had executed all or any of the conveyances therein mentioned for the consideration alleged, in such a way as to make the execution of those conveyances her act and deed, and binding upon her; and to throw the burthen of establishing the affirmative of that question upon the defendants. Upon the issue so settled the parties have gone to trial, and the Judges of both Courts, in dealing with the evidence given, appear to have addressed themselves to the consideration whether it was sufficient to establish that these transactions were *bonâ fide* transactions in the nature of conveyances executed for the consideration alleged, and so as to be binding upon the Ranee, a purdah woman.

Again, their Lordships, finding that both the Courts have, upon full consideration of the evidence, held that the two last conveyances were not binding on the Ranee, and that the defendants had failed as to them, have to enter upon the consideration of the rest of this case with the fact found that Moulvie Mahomed Hossein not only stood in a fiduciary relation to the Ranee, but had, in two instances at least, abused his trust, and obtained from her conveyances of a fraudulent character. That circumstance necessarily throws more or less suspicion upon the other transactions in question.

And when their Lordships consider the particular evidence relating to the execution of the other conveyances, which has been so fully and clearly opened to them by Sir Roundell Palmer, they are constrained to say that they see no grounds for coming to a different conclusion from that to which the High Court has come upon it. There are, no doubt, witnesses who speak to the execution and preparation of the instruments, so far as these can have been seen by persons outside the purdah. Some speak to admissions of the payment of the consideration on the part of the Ranee, made by her through the purdah, and swear that they knew and recognised her voice. Some, again, speak of having seen bags of money carried into the inner apartments by the hands of Chooah, a kitmutgar, and another menial servant, who was probably admitted behind the purdah, named Bakshoo. It is possible that these persons may be dead, though the fact has not been proved. It is certain that neither has been produced, and that of neither has the absence been accounted for. The whole evidence seems to their Lordships to fall far short of that which is ordinarily given to prove a conveyance by a purdah woman. There is, generally, the evidence of some relation, or, failing a relation, of some female servant; certainly of some person who is admitted behind the purdah, who can speak to having seen the execution of the instrument by the person in question, and who professes to have identified the executing party to the witnesses on the other side of the screen or purdah. Again, it has been often laid down that, when a transaction of this kind is impeached, there ought to be clear evidence, not of the mere signature by the party, but that the secluded woman had the means of knowing what she was about. Now, all these transactions are in favor of the person who naturally would have advised the Ranee. There is no proof that she had the benefit of any independent adviser. The only shred of evidence of that kind is that one of the subscribing witnesses to some of the documents is described as being at that time her dewan. The Ranee, it is true, seems to have had no near relation with whom she was upon intimate terms, or who lived in the house. Still, one would have thought that there must have been some female, some person actually admitted to live with her behind the screen, who could have given more satisfactory evidence than has been given, both as to the fact of the execution and as to the receipt of the consideration money by her.

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* From the judgment of Steer and Levinge, JJ., dated the 16th September 1868.

Again, the evidence as to one of the transactions of the writer, which has been commented upon by the High Court, is certainly of a suspicious character. It is to the effect that he was directed to prepare the formal document by the Moulvie, who brought to him the draft already prepared, with a blank paper signed by the Ranee. This passage in his evidence may admit of two constructions; but it certainly does admit of that which the High Court seems to have put upon it, *viz.*, that the stamped paper on which the formal deed was to be written had already got the signature of the Ranee upon it. The transaction seems to have struck the witness himself as one of an unusual and suspicious character; for he says that he intimated to the Moulvie his doubts as to the property of the proceeding, and did not write the kowala until his scruples were removed by a dye or female servant of the Ranee who came and confirmed the Moulvie's statement.

The principal ground on which the Principal Sudder Ameen has relied upon in distinguishing the two earlier of the transactions in question from the two on which his decision is adverse to the defendants, are the proceedings which followed the supposed execution of the earlier documents—the registration and the subsequent mutation of names. It is, however, to be observed that in these cases of transactions by purdah women mere registration does go far to corroborate the proof of their validity, unless some such proceeding as that which will be presently mentioned takes place upon it. For the registration must necessarily take place under a mooktearnamah executed by the party executing the principal conveyance; and there can be on the face of the one no higher proof of its execution than there is of the execution of the other. The same witnesses generally depose before the Registrar to the execution of both. But in some of the cases which have come before this Committee there has been proof (and it is unfortunate that the Registrars did not follow that course in the present case) that, when such documents executed by a purdah woman have been produced for registration, the Registrar has sent some officer as commissioner to the house of the lady, who, by examining her through the purdah, after satisfying himself of her identity has obtained an acknowledgment of her signature.

Again, the mutation of names, though a more solemn proceeding, seems invariably to have taken place under a mooktearnamah from the Ranee, and we have the distinct evidence of the pleader that this Mahomed Hossein was acting in all the Ranee's litigious proceedings, that he was in the habit of authorising persons to act for her, and therefore those proceedings have not the effect as against a purdah woman which they would have against a person capable of transacting his own business and acting for himself.

Their Lordships, therefore, looking to the position of the parties, and to the great necessity of protecting these secluded women from the undue effects of that influence which persons connected with them, as the Moulvie was with the Ranee, may acquire over them, find it impossible to say that upon the proof given to establish these transactions, the High Court was wrong in refusing to recognise the validity of any of them, except the grant of the mokurrurree tenure; or that such a conclusion is inconsistent with a fair view of the whole of the evidence in the cause.

For these reasons their Lordships must humbly advise Her Majesty to affirm the decision of the High Court and to dismiss this appeal with costs.

The 26th March 1872.

Present :

Sir James W. Colvile, Sir Montague E. Smith, and Sir Robert P. Collier.

Mahomedan Widow—Unpaid Dower—Alienation by Son for Life of Mother—Evidence—Bye-mokasa.—Priority (among Creditors).

On Appeal from the High Court at Calcutta *

Mussamut Humeeda and others,

versus

Mussamut Budlun and the Government.

The Privy Council reversed so much of the decision of the High Court as ruled that the effect of the arrangement between the plaintiff and her son, by which the son relinquished his share in his late father's property, was not that the mother took an absolute interest in the property in satisfaction of her claim for unpaid dower, but that she should have only a life-interest, the son retaining the legal reversion in himself; the Privy Council being of opinion that the creation of such a life-estate did not seem to be consistent with Mahomedan usage, and that there ought to be very clear proof (which had not been shown in this case) of a transaction so unusual and so improbable amongst Mahomedans.

A widow's claim for unpaid dower, when it does not, by virtue of a *Bye-Mokasa* executed by her husband, become a preferential charge on the estate, constitutes a debt payable *pari passu* with the demands of other creditors.

THE origin of this suit was as follows :—

In the year 1857, one Ali Kureem, who was accused of participating in the rebellion, absconded, whereupon, on the 10th of July 1857, an order was issued by the Magistrate of Patna under the directions of the Commissioners of Circuit directing the Collector of the district of Patna to report what real property Ali Kureem possessed in the district, with a view to its confiscation.

The Collector reported that the mouzahs, and shares of mouzahs, which form the subject-matter of his suit, together with some others, belonged to Ali Kureem, notwithstanding the intervention of his mother, Mussumat Beebee Budlun, claiming them as hers, which intervention the Collector designated as but an attempt to secure the property for an absconded party.

In pursuance of this report an order was made by the Judge of Patna adjudging the forfeiture to the Government, under Section 2 of Act XXV of 1857, of all the property so claimed by Mussumat Beebee Budlun, whereupon the Government took possessions of it, and sold it to several purchasers.

On the 22nd of March 1859, Mussumat Beebee Budlun instituted a suit against the Government and the purchasers of the property, claming to be in possession of it under a valid title.

Her title to all the mouzahs, except two, was in substance this :—that, upon her marriage with Moulvie Mahomet Ali, the father of Ali Kureem, a dower of 100,000 rupees and one gold mohur had been assigned to her, which, upon her husband's death, in 1844, was unpaid; that, thereupon, Ali Kureem, being unable to pay it, relinquished his right as heir of his father to a fourteen anna share of the paternal property to her, in satisfaction or part satisfaction of her dower. The remaining two anna share she claimed as widow and heiress of her husband.

Her title to certain shares in the two excepted mouzahs (Purhownah and Punjkunnah) was of a different character. She alleged that she had bought them of her son in 1855 for 50,000 rupees, the payment of which she thus described.

She stated that, notwithstanding the relinquishment by Ali Kureem of his right of heirship, he appropriated to the purposes of his business (at some time which is not stated) 40,000 rupees of the paternal property. That that sum of 40,000 rupees was, in the first instance, secured on the two mouzahs in question, the rents of which were received by her in lieu of interest; but that, on a subsequent treaty for the absolute sale of the property to her for 50,000 rupees, the said sum was treated as part of the purchase-money, and that the remaining 10,000 rupees were paid to him on the execution of the deed of sale on the 15th of March 1855, whereupon these mouzahs which had been bought by Ali Kureem, and stood in his name, were transferred to hers.

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* From the judgment of Bayley and Roberts, JJ., dated 25th November 1868. Sevestre's Rep. for 1868, p. 665.

These allegations were, for the most part, put in issue by the defendants, whose case was that the plaintiff's dower was no more than 40,000 rupees, and it had been paid in the life-time of her husband, that the asserted renunciation of heirship by Ali Kureem and sale of the two mouzahs were fictitious and colorable; that Ali Kureem was the real owner of the property, and had so acted on many occasions after the supposed relinquishment and sale.

All the issues were found in favor of the plaintiff by the Judge of Patna, who adjudged that the plaintiff was entitled to all the property absolutely.

The Government acquiesced in this judgment, but the other defendants appealed from it to the High Court of Calcutta. The High Court found that the plaintiff had a life-interest only in all the property. From this judgment both parties have appealed, the plaintiff on the ground that her interest was absolute and not for life only; the defendants, on the ground that she had no interest whatever.

It now becomes necessary to refer, with more particularity, to some portions of the judgment of the High Court, and of the evidence on which they are based.

With respect to the property claimed by the plaintiff as relinquished to her by her son in lieu of dower, the High Court thus expressed its opinion :—"We consider that the plaintiff has not established her plea of dower, nor does she hold her husband's estate in virtue of dower. She, as widow and one of the two heirs of her husband, inherited an eighth of his estate. The remainder devolved upon her son, Ali Kureem, who, for reasons best known to himself, permitted his mother, Budlun, to appear to occupy his share during his lifetime, but on the clear and recorded stipulation that, on her death, he would succeed to the whole estate."

Their Lordships concur in the finding of the High Court, that the plaintiff has not proved the amount of dower which she alleges, nor that she was in possession of her husband's property in right of dower, independently of an agreement with her son. There appears to have been no "*Bye-mokasa*" whereby, in the lifetime of her husband, her dower was hypothecated so as to become a first charge upon his estate; consequently her claim in respect of dower would not have priority over the claims of other creditors.

Having regard, however, to the proof which was given, that, shortly after the death of Mahomed Ali in 1844, his widow was put into possession of his property by the recorded consent of her son, who admitted her right to dower, and his inability to pay it; that, as acknowledged heiress to her husband's whole estate, she received payment of debts due to it and incurred liability, enforced in one instance by an action, to pay debts owing from it; that at the time of these transactions no motive, such as that of defrauding creditors, was shown to account for Ali Kureem investing his mother with a fictitious ownership; and, further, that the whole value of the property was probably much less than that of the dower, taking it at 40,000 rupees, their Lordships see no sufficient reason to disbelieve the arrangement between the mother and the son, as it appears on the face of the documents put in by the plaintiff.

The question remains, whether the effect of that arrangement was to give the plaintiff the absolute interest, or an interest for life only.

The Judges of the High Court appear to have thought that a claim for unpaid dower, of whatever amount, was not the real consideration for the agreement between the mother and the son; but have found that, for some other consideration, not disclosed, it was agreed that the whole estate of Moulvie Mahomed Ali should be vested in his widow for her life, and, on her death, should devolve on her son. They reject the transaction pleaded, and substitute one which is hardly consistent either with the pleadings or the proofs in the cause.

No document in the nature of an assignment, or an agreement defining the nature and expressing the terms of the arrangement between the mother and the son, has been produced or proved. The documentary proof of that arrangement consists chiefly of the proceedings, under which various portions of landed property of Mahomed Ali were, immediately after his death, and, with the recorded consent of his son, transferred into the sole name of his widow, and of the proceedings relating to a sum payable to his estate, and to a debt recoverable from it.

The position of the mother and son on the death of Mahomed Ali was this :—the former, as sharer, was entitled to two annas; the latter as "residuary" was entitled to the remaining fourteen annas of the estate, both rights being subject to the debts of the deceased including deferred or unpaid dower (if any).

There does not appear to their Lordships to be on the record the slightest proof of any agreement on the part of the mother, to convert her absolute interest in her two-anna share into a life interest; so as to give to her son a reversionary interest therein capable of being seized or sold under the forfeiture or otherwise.

Again, if the widow had a claim or unpaid dower (and their Lordships think that, on the admission of Ali Kureem in 1844, it must be taken that she had such a claim), and that claim had not, by virtue of a *bye-mokasa* executed by her husband, become a preferential charge on the estate, such a claim would constitute a debt payable *pari passu* with the demands of other creditors. In these circumstances it was competent to the son either to assign his share of his father's residuary estate to his mother by way of security for her dower (in which case she would take only a redeemable interest), or to relinquish it to her absolutely in satisfaction of her claim. In neither case would it have been essential in such a suit as this, which is for the recovery of the possession to which she was entitled and from which she has been ousted, to prove the amount of her dower; although the omission to do so may be urged as an argument to show that the transaction pleaded was not real but fictitious.

The case made is that the son relinquished his share in his father's possession in satisfaction of the claim for dower. Such relinquishment would be *primâ facie* absolute; and, if it were absolute, the widow would take the whole property, subject to the claims of other creditors. The subsequent acts of the parties are consistent with this state of things. It does not follow that, because she paid a small debt in full, she had not a valid claim for dower. The estate may have been sufficient for both; and even, if it were insufficient, she may have thought it better to satisfy than to litigate so small a demand.

Upon what grounds then ought it to be held that what the son gave up, he gave up for only the life of his mother, retaining the legal reversion in himself? The creation of such a life-estate does not seem to be consistent with Mahomedan usage, and there ought to be very clear proof of so unusual a transaction. The only grounds on which it can be inferred that the plaintiff was to take only a life-interest, seem to be the expressions in the *foutenamah* and in the plaintiff's petition recited in the proceeding for the mutation of names in the case of Mouzah Muzdumpore Doomree. The judgment in that case finds generally that she is in possession of the entire property left by Mahomed Ali, "in lieu of Den Mohr receivable by her," without any qualification as to the extent of her interest. Their Lordships conceive that the expressions in question may be explained on the supposition that they may have been used to import that the property was to remain with the widow for the full term of her life; and that Ali Kureem, as her heir, would succeed to them after her death. They are, at all events, of opinion that these expressions, taken in connection with the rest of the evidence, are too weak to prove a transaction, so improbable amongst Mahomedans, as an alienation by the son for the life only of his mother (a transaction consistent with the case of neither party), and that the Zillah Judge came to the right conclusion when he found that the plaintiff took an absolute interest in the properties left by her husband.

It should be further observed, with reference to this part of the case, that the interest of Mahomed Alim in Mouzah Shackpore Doomree was in the nature of a mortgage interest under a *sur-i-peshgee* lease; and that Ali Kureem, by a deed of July 29, 1844, the validity of which does not appear to be impugned, purchased the rights of the mortgagor in this property. It appears therefore to their Lordships that, at the date of the forfeiture, Ali Kureem was entitled to this property subject to the mortgage; and that his rights would pass to the purchaser under the forfeiture and consequent sale; and that there should be a declaration to that effect in the decree.

It remains to consider so much of the judgment as relates to the shares in Mouzahs Burhownah and Punjkunwah, alleged by the plaintiff to have been purchased by her of her son in 1855.

The High Court disbelieve this sale, relying on the improbability of the account of it and of the payment of the purchase-money, and also upon a petition presented by the plaintiff in 1852 in a proceeding of attachment against the property of Ali Kureem, wherein she claimed these Mouzahs on the ground that they had belonged to her late husband who had purchased them "*benamee*" in the name of his son, and that they were transferred to her, together with the rest of her husband's property, under the before-mentioned arrangement with her son, a statement manifestly inconsistent with her contention in this suit.

So far their Lordships concur with the High Court, but are unable to concur with their finding which follows that the plaintiff possessed a life-interest in these Mouzahs—a finding which appears to their Lordships to be neither in accordance with the allegations nor with the proofs in this suit.

The High Court were undoubtedly justified in treating the fact of the plaintiff having, in her petition of 1852, told a story inconsistent with her present case, as throwing discredit on that case and effecting her credibility, but, in their Lordships' opinion, were not justified in treating her allegation in that petition of a "*benamee*" purchase by her husband as proof in her favor of that fact in this suit wherein she does not even allege it.

If the plaintiff is entitled to recover possession of the two Mouzahs in this suit, it must be on the sole ground which she has pleaded, *viz.* a purchase from her son, and on her failing to prove this, judgment must be pronounced as to so much of her claims for the defendant.

Their Lordships will therefore humbly report to Her Majesty as their opinion that both the appeal and the cross-appeal ought to be allowed, and that the decrees of the High Court of Judicature at Fort William in Bengal of the 25th November, 1863, and likewise the decree of the Zillah Court of Patna of the 8th March 1861, ought to be reversed, and that, in lieu of the said decrees, it should be ordered and declared by Her Majesty in the following terms:—

1. That it should be ordered and declared that the plaintiff was and is absolutely entitled to whatever interest belonged to her late husband in the several properties sued for, other than the $5\frac{1}{4}$ annas of the entire sixteen annas of Talooka Kusba Burhownah; and likewise, other than the one-third share of the entire sixteen annas of Mouzah Budara Punjkunwah, and that she is entitled to recover the possession of such properties with mesne profits from the date of dispossession, but subject, as to Mouzah Shackpore Doomree, to the right of redemption vested in Moulvie Ali Kureem, by virtue of the conveyance from Ameroonissa Begum of the 29th of July 1844, which is hereby declared to have passed to and become vested in the defendant the purchaser of that property under the forfeiture and sale.

2. That it should be declared that the plaintiff having failed to establish her title to the shares of the two Mouzahs above excepted, her suit as to those properties ought to be dismissed.

3. That it be ordered that the costs of the litigation in India in both Courts ought to be apportioned between the plaintiff and defendants, according to the course of the Courts of India in cases where the plaintiff is only partially successful, and that each party pay their own costs of this appeal.

4. That the cause be remitted to the High Court to give effect to these orders and declarations, and carry the same into execution.

The 8th April 1872.

Present :

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Cause of Action (Joinder of)—Different Titles—Joint Family—Rule as to Increment.

Case No. 1230 of 1871.

Special Appeal from a decision passed by the Judge of Mymensing, dated the 14th July 1871, *reversing a decision of the Subordinate Judge of that District, dated the 27th August* 1869.

Kalee Sunkur Bhadooree (Plaintiff) *Appellant,*

versus

Eshan Chunder Bhadooree (Defendant) *Respondent.*

Baboos Romesh Chunder Mitter and *Hem Chunder Banerjee* for Appellant.

Baboos Mohinee Mohun Roy and *Gopal Lall Mitter* for Respondent.

The mere claiming of three shares of money due under a bond executed in favor of plaintiff and others jointly, under different titles derived by plaintiff from different persons in different ways, cannot affect the unity of the cause of action on which the suit is brought.

Where one of the members of a joint undivided family purchases for the benefit of, and with funds belonging to, the family, he is entitled to such a share of the property covered by that purchase as is equal to his original share in the *corpus* of the estate, on the principle that the increment must follow the same rule as the *corpus.*

Bayley, J.—We are of opinion that the decision of the Lower Appellate Court in this case ought to be reversed, and a decree entered in favor of the plaintiff for a 12 annas $6\frac{2}{13}$ gundahs share of the money due under the bond which forms the subject-matter of this suit. The plea of misjoinder, upon which the first part of the Judge's decision is based, appears to us to be clearly erroneous, and the pleader for the respondent very properly admitted that he was not in a position to support the Judge's opinion on that plea. The mere fact, that the plaintiff claimed 13 annas of the money due under the bond in question under different titles derived by him from different persons in different ways, cannot possibly affect the unity of the cause of action on which the suit is brought. The money is due on a bond executed in favor of several persons jointly, the plaintiff being one of them, and the plaintiff now claims to recover not only his original share in that money but also two other shares admittedly belonging to two of the several obligors, and which, he says, have devolved upon him, the one by right of inheritance, the other by that of purchase.

Under these circumstances, the only remaining sharer, namely, the defendant No. 4, having refused to join him in this suit, the plaintiff has made him a defendant, and the suit is for the entire amount due to him under the various titles above referred to. It is quite clear that there was no misjoinder of causes of action in this case and that the suit was properly framed and properly entertained by the Court of the first instance.

The next question which arises is, as to the extent of the share to which the plaintiff is entitled. That he is entitled by virtue of his own ancestral right to a 5 annas share of the debt in question is not disputed. The plaintiff further claims another 5 annas which belonged to one of the co-parceners, Kalee Pershad, by right of inheritance, as well as a 3 annas share which belonged to one Chunder Kant, and which the plaintiff alleges was sold to him by the said Chunder Kant under a bill of sale executed in 1272.

With reference to the 5 annas share which admittedly belonged to Kalee Pershad, it is quite clear that the plaintiff is entitled to a decree. The relationship between him and Kalee Pershad is not disputed. The plaintiff is the nephew of Kalee Pershad, and it is admitted by the defendant that he, the defendant, is the nephew or the brother's son of the plaintiff. So that in the absence of any nearer *sapindah* of Kalee Pershad, the plaintiff is undoubtedly entitled to take rank before the defendant No. 4 in the category of Kalee Pershad's heirs. Nor did the defendant No. 4 rest his case upon the ground that there were any such nearer relatives, and his answer to the plaintiff's claim with reference to this 5 annas was that that share ought to be divided between him and the plaintiff according to certain proportions specified in a deed of *angshonamah* alleged to have been executed by all the members of the family in 1272. It is true that the learned Judge in the Court below has not expressed any opinion as to the correctness or otherwise of this document; but having had it read to us, we find that it in no way supports the ground upon which the defendant No. 4 relies. There is no provision to show that any share of the family property which would devolve upon any member of the joint family by right of inheritance should be divided between all the members in proportion to the original share of each member in the *corpus* of the family estate.

There remains then the 3 annas share which the plaintiff alleges was purchased by him in 1272 from one Chunder Kant. The Lower Appellate Court has dismissed this part of the plaintiff's case on the ground that the plaintiff has failed to prove that he made that purchase from his own exclusive funds, and not from the funds of the joint family. It is admitted that, at the time when this purchase was made, the plaintiff and the defendant No. 4 were living together as members of a joint undivided Hindoo family; and it is also admitted that the plaintiff was the manager of the joint estate. Under such circumstances, the Judge was quite right in calling on the plaintiff to show that the purchase in question was made him from his own exclusive funds, and not from the funds of the joint undivided family, of which he was the managing member. It is said that the Judge has not specifically noticed a certain decision produced by the plaintiff in support of his allegation on this point; but we think that this omission ought not to be allowed to operate as a valid ground of special appeal, so as to justify our interference with the decision of the Lower Appellate Court. There was a heavy burden on the plaintiff to prove most clearly and distinctly the special allegation on which he came to Court; and having heard the decision on which his pleader relies, we think that the omission by the Lower Appellate Court to notice it in its judgment is not such an error in law as would warrant us to remand this case for further investigation, when that Court has expressed a clear opinion that the plaintiff failed to give any proof whatever to show that the 3 annas of Chunder Kant were purchased by him from his own exclusive funds. But notwithstanding that, we uphold the Judge's decision on this point. A further question arises as to whether the plaintiff, as one of the members of the joint family, is not entitled to recover in this suit his share of the property by the purchase.

On this point, we think the decision of the Lower Appellate Court requires some modification. Admitting the correctness of the defendant's allegation, *viz.*, that the purchase of Chunder Kant's share was made by the plaintiff for the benefit of the joint undivided family and with funds belonging to it, it seems to be clear that the plaintiff would be entitled to such a share of the property covered by the purchase as would be equal to his original share in the *corpus* of the estate. The increment must follow the same rule as the *corpus*, and according to that rule, a 10-18th share of Chunder Kant's 3 annas, equal to 2 annas 6 and 12-13th gundahs, ought to be awarded to the plaintiff.

Under these circumstances we think that the plaintiff's claim ought to be decreed to the extent of a 12 annas 6$\frac{2}{13}$ gundahs share of the money due under the bond on which this suit was brought.

The defendant No. 4 must pay to the plaintiff half the costs incurred by the latter in all the Courts. The remaining costs ought to be borne by the parties respectively.

The 13th April 1872.

Present :

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Contribution—Bond—Consideration—Mutual Benefit.

Case No. 1367 of 1871.

Special Appeal from a decision passed by the Officiating Judge of Rajshahye, dated the 12th September 1871, affirming a decision of the Subordinate Judge of Boaleah, dated the 22nd November 1870.

Kashee Doss Sandyal (Plaintiff) *Appellant,*

versus

Gobind Nath Lahory (Defendant) *Respondent.*

Baboo Kashee Kant Sen for Appellant.

Baboo Bhyrub Chunder Banerjee for Respondent.

In a suit for contribution it must be distinctly proved that both parties enjoyed the *benefit* of the object to the gaining of which they executed a bond jointly.

Bayley, J.—THERE is no ground for this special appeal. It may be true that, in regard to the raising of the money for the consideration for the price of the carriage referred to in this litigation, the plaintiff zemindar and his mookhtear joined in the bond, and further a joint decree may have been passed against them, under which they would be liable for payment to the person to whom the bond was executed; but in a suit for contribution like this, it has to be distinctly proved that both the parties enjoyed the *benefit* of the object to the gaining of which, *viz.* the possession of the carriage, they executed the bond jointly. There is no proof in this case that the mookhtear enjoyed that benefit, although the Judge has found that the mookhtear may have once or twice used the carriage in going to the Court, and there is a finding of fact that the purchase was made for the benefit of the zemindar only.

The judgment of the Lower Appellate Court seems to be perfectly correct; at any rate there is no such error in law as would justify our interference in special appeal.

We, therefore, dismiss this special appeal with costs.

The 15th April 1872.

Present :

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge.*

Limitation—Act XI of 1859 *s.* 1 *cl.* 13—*Co-sharers—No Division of Money or Payment.*

Case No. 111 of 1872.

Special Appeal from a decision passed by the Officiating Judge of Backergunge, dated the 10th July 1871, reversing a decision of the Moonsiff of Mehendeegunge, dated the 31st December 1870.

Bhujohuree Paul (Defendant) *Appellant,*

versus

Huro Shoonduree Debee (Plaintiff) *Respondent.*

Baboo Motee Lall Mookerjee for Appellant.

Baboos Doorga Mohun Doss and *Kashee Kant Sen* for Respondent.

Proof of payment is not necessary to bring a case within Clause 13 Section 1 Act XIV of 1859; but the limitation therein prescribed will apply to the case of a person entitled to a share in property and simply enjoying the property with the co-sharers, there being no division of money or any payment at all made between them.

Couch, C.J.—There are two objections raised in this case—the first, that the Appellate Court was wrong in not allowing the objection to be raised before it that there was no proof of the conveyance to the plaintiff from her husband; the second, that the finding of the Appellate Court was wrong with regard to the law of limitation, because it was not sufficient to show that Doya Moyee was in possession of the property with the other parties entitled to share in it; it was necessary also to prove some payment to her to bring the case within the 13th Clause of the 1st Section of the Limitation Act.

With regard to the first question, it appears that the defendant did, in his written statement, raise the question that the conveyance to the plaintiff was false; but issues were framed of which the first was, had the plaintiff's vendor, a childless widow, power to sell? There being no issue framed whether there was an actual sale or conveyance to the plaintiff. Therefore, not only was there an omission to raise the issue, but there was an issue which implied that there had been a sale. The fourth issue implies that, and raises the question, whether there was power to sell.

It appears that, after these issues had been framed, a day was fixed for the hearing, and the case was heard, the defendant being represented by a pleader, and no objection was taken to the issue as framed. It was not said that the question now raised was omitted to be raised by the Moonsiff, but the suit was allowed to proceed upon those issues and the judgment to be given. We think, under those circumstances, it was not competent for the defendant to take the objection afterwards. If it had then been taken, no doubt, a formal issue would have been framed; and looking to what there is in the proceedings, we think there can be no doubt what the finding upon that issue would have been, and that, in reality, the defendant has not been affected by the omission to raise the issue, as regards the merits of the case. Consequently, it is not an objection which can be given effect to on special appeal.

With regard to the other question arising on the law of limitation, there is the decision of this Court which is quoted by the Appellate Court reported in XI Weekly Reporter, p. 338, expressly in point, and we quite agree in that decision. The law of limitation must receive a construction which will make it applicable to cases which must arise of a person entitled to a share in property and simply enjoying the property with the co-sharers, there being no division of money or any payment at all made between them. If the law of limitation did not receive a construction which would include such cases, it would leave many cases quite unprovided for. The language of the Limitation Act, we think, must be construed so as to include such cases. We quite concur in the decision referred to and think the appeal must be dismissed with costs.

The 15th April 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Auction-sale for Arrears of Revenue—Purchaser (bound by Conditions of Sale, not by Representations of Private Parties).

Case No. 1364 of 1871.

Special Appeal from a decision passed by the Judicial Commissioner of Assam, dated the 19th July 1871, *affirming a decision of the Officiating Deputy Commissioner of Goalparah, dated the* 11*th August* 1870.

Pirthee Ram Chowdhry Roy Bahadoor (Plaintiff) *Appellant,*

versus

The Collector of Goalparah (Defendant) *Respondent.*

Mr. J. S. Rochfort and *Baboos Mohinee Mohun Roy* and *Prionath Banerjee* for Appellant.

Baboos Unnoda Pershad Banerjee and *Jugodanund Mookerjee* for Respondent.

A purchaser at an auction-sale for arrears of revenue is to be bound not by what is represented to him by private parties (*i. e.* the Serishtadar and other officers as in this case), but by the conditions which, previous to the sale, are published by a notification in the Official Gazette.

Bayley, J.—This is a suit by the plaintiff against the Government for declaration of the revenue-free character of a certain *julkur* which, he alleged, he purchased at an auction-sale for the sum of Rs. 1,225 under the impression that the *mehal* would be revenue-free subject only to the payment of seven annas per annum on account of "road cess." The plaintiff avers that before the sale he was told by the Serishtadar and other officers, but not by the Collector the presiding officer, that the *mehal* would pass under the purchase free of Government revenue. It is true that, subsequent to the sale, the *mehal* was entered in the registry under the head of (निष्कर) "rent-free," but the law is clear, *viz.* that a purchaser at auction is to be bound not by what is represented to him by private parties, but by the conditions which, previous to the sale, are published in the notification contained in the Government or Official Gazette, and it is admitted that in this case the notification in the Government Gazette and other notifications have not the slightest reference to the *mehal* being about to be sold revenue-free, but that on the contrary it was distinctly stated in those notifications that the *mehal* would be subject to the payment of the usual Government revenue, and this is also mentioned in the sale certificate which forms the title-deed of the plaintiff. The suit, therefore, being for a declaration of right, and it being found, under the circumstances stated above, that no such right can possibly accrue to the plaintiff, we cannot make the declaration that is asked for.

The special appeal must, therefore, be dismissed. We think the defendant is entitled to his costs of this appeal, because even if it were the case that the Serishtadar had told the plaintiff that the *mehal* was being sold free of revenue, still the plaintiff was bound to look to the conditions notified for general information in the Government or Official Gazette which, it is admitted, he did not do. Moreover, there is no proof that any statement was made by any officer officially that the *mehal* was to be free from payment of Government revenue.

The 16th April 1872.

Present :

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble A. G. Macpherson, *Judge.*

Railway Company—Railway Receipt (Effect of) —Wrongful Delivery—Authority coupled with Interest—Revocation—Equitable Title.

On Appeal from the judgment of the Hon'ble W. Markby exercising the Original Civil Jurisdiction of the High Courts

Francis Arthur Engleton (Plaintiff)
Appellant,

versus

The East Indian Railway Company
(Defendants) *Respondents.*

Mr. Evans and *Mr. Macrae* for the Appellant.

Mr. Marindin and *Mr. Marsden* for the Respondents.

Suit against a Railway Company for the value of poppy seeds consigned by C and Co. to plaintiff in order to meet the acceptances which he had given for the accommodation of C and Co., which seeds had been received by defendants at Patna for delivery to plaintiff or his order at Howrah according to a railway receipt sent to plaintiff by C and Co., wherein plaintiff was named as consignee, but which seeds, instead of being delivered to plaintiff or to S and Co. (plaintiff's vendees) by plaintiff's order upon payment of the freight by S and Co., had been delivered by defendants to T and Co.

Held, that the handing over by C and Co. of the railway receipt to the plaintiff passed the right of possession and property in the seeds from C and Co. to plaintiff, and that the putting of the seeds into S and Co.'s bags at Patna did not vest the property in S and Co. and affect plaintiff's right; that plaintiff was not a mere agent of C and Co., but had a substantial interest in the consignment, and that the authority given by C and Co. to plaintiff was an authority coupled with an interest which neither C and Co. nor defendants could revoke; and that as there was nothing in the correspondence to show that plaintiff had notice of T and Co.'s equitable title, defendants were not justified in delivering the goods to T and Co. and were liable for the wrongful delivery.

In this case the plaintiff sued the defendant for the recovery of Rs. 5,588-4, being the value of 747 bags of poppy seed, with interest thereon from the 26th June 1871.

The facts of the case will sufficiently appear from the judgments of the Lower and Appellate Courts. The former was given as follows by—

Markby, J.—In this suit the plaintiff claims to recover from the defendants the value of 747 bags of poppy seed, which were in the possession of the defendants, and which, the plaintiff says, ought to have been delivered to him, but were not.

The plaintiff does not claim to be the owner of the goods, the short history of which is as follows :—A person trading as Cohen Brothers had, through a firm of brokers, known as Toulmin and Co., entered into a contract with Messrs. Schilizzi and Co., of Calcutta, for the delivery to them of 200 tons of poppy seed, to be delivered at Howrah during May and June in lots of 50 tons at a time or more. In part performance of this contract, the 747 bags of poppy seed, containing 1,494 maunds, or 55 tons, were despatched by the plaintiff's agent at Patna to be sent by the defendants' railway to Howrah, and in the railway receipt which the defendants then gave, and which was in the usual form, the plaintiff was named as the consignee ; and when the goods arrived at Howrah, the defendants notified their arrival to the plaintiff, who directed that the goods should be delivered to Schilizzi and Co., but the defendants, notwithstanding, delivered them to Toulmin and Co.

Upon these bare facts which were admitted, the plaintiff claimed a decree without going into evidence, unless the defendants could make some answer ; but I declined to call upon the defendants to go into their case upon these admissions, the plaintiff being only the consignee, and not having, so far as yet appeared, any contract with the defendants, or any property in the goods whatsoever.

The plaintiff then opened his whole case, which was, that the goods were despatched by Cohen Brothers to him for the specific purpose of meeting a bill for Rs. 10,000, drawn by Cohen Brothers, and accepted by himself, which bill would fall due on the 26th of June, and the plaintiff alleged that the goods were so despatched, in fulfilment of a promise by Cohen Brothers that this acceptance should be covered before maturity. On the part of the plaintiff I was asked to raise the following issues :—

1. Whether the plaintiff had any such interest in the goods as would entitle him to the possession of them ?
2. Whether the plaintiff had not obtained constructive possession of the goods before the conversion of them by the defendants ?

The defendants asked to raise the following issues :—

3. In whom was the property in these goods at the date of the alleged conversion ?
4. Whether or not the plaintiff had any right of possession, and, if so, whether the defendants had any notice of such right ?
5. Whether, if the plaintiff had at any time any right in or over these goods or the proceeds, that right was not itself subject to the prior right of Toulmin and Co. ?
6. Whether, if the plaintiff had at any time any right, that right was not determined, and, if so, when ?
7. Whether there was any conversion ?

Both plaintiff and defendants, whilst each insisting on their own right to establish a special claim to these goods, objected to the other side doing so, but I considered that the best course was to raise all the issues.

The facts of the case, as I find them to be, are that a certain Mr. Cohen, under the name of Cohen Brothers, had been doing an up-country trade in cotton seed and other produce, evidently on a very limited capital, and, as is usual in such cases, was constantly pressing his correspondents in Calcutta to the utmost for advances. He had been in correspondence with Toulmin and Co. upon this subject ; and in December 1870, Toulmin and Co. agreed to allow him to draw Rs. 5,000 against cotton to arrive in Calcutta before the drafts matured. Mr. Cohen thereupon authorised Toulmin and Co. to receive payment on account of Cohen Brothers on goods sold and delivered through Toulmin and Co. In February Mr. Cohen was contemplating an extension of his operations to the purchase of oil seeds, and a good deal of correspondence ensued as to the terms on which he was to get advances. In his letter of February 25th, he asks permission "to draw upon Toulmin and Co. in the usual way, and to meet the bill which would fall due before the time of delivery. We would," he says, "draw upon the buyers, and place you in funds." On the 2nd March Toulmin and Co. informed Mr. Cohen that they had sold on his account to Messrs. Schilizzi and Co. 200 tons of poppy seed on the terms which I have already stated, but added that this firm would not allow itself to be drawn upon. In order to meet this difficulty, and to enable Cohen Brothers to make a beginning, Toulmin and Co. said :—"We will allow you to draw on ourselves to the extent of the value of 50 tons before despatch." To this letter Mr. Cohen sent rather a vague reply, hinting at his intention to seek accommodation elsewhere. On the 14th April Mr. Cohen asked permission to draw on Toulmin and Co. at 61 days for Rs. 10,000, saying that poppy and cotton would be sent soon. Toulmin and Co. declined, however, to go beyond their permission to draw in advance to the extent of 50 tons of seed. Accordingly Mr. Cohen, on the 18th April, enquired of his agent at Fyzabad, Mr. W. Landeshut, what amount he could draw against 50 tons of poppy seed, to which the answer given was Rs. 5,000. Cohen Brothers, on the following day, drew for that sum on Toulmin and Co. at 61 days, and in the letter which advised the draft they said :—"Our agent at Fyzabad has purchased the poppy seed, and will shortly make the first despatch ; in fact, we expect he will be able to make the despatch 100 tons." No further communication of any importance took place between Toulmin and Co. and Mr. Cohen until the 14th June, when Mr. Cohen telegraphed to say that the "poppy has just reached Patna, sending Howrah by rail," and asking to draw for Rs. 10,000 more. This request Toulmin and Co. refused, and reminded Mr. Cohen of his promise to deliver 50 tons of poppy seed on the following day. The 747 bags of poppy seed in question were despatched from Patna on the 20th of June, and arrived at Howrah on 22nd, where it was claimed by Toulmin and Co., as specifically appropriated to the draft for Rs. 5,000 accepted by them, as above stated, which fell due on the 19th of June, and which they paid on the 22nd.

I will now state the transactions between Mr. Cohen and the plaintiff. It will be recollected that in March Mr. Cohen had intimated to Toulmin and Co. his intention of seeking elsewhere the accommodation which they had refused; and, in fact, towards the end of that month, Mr. Cohen entered into a general arrangement with the plaintiff that he should look to Cohen Brothers' interest, receiving two annas per cent. on all business done, and that the plaintiff should allow Mr. Cohen to draw at the rate of Rs. 50,000 a month upon an arrangement that all drafts would be covered before they matured. In pursuance of this arrangement, Mr. Cohen drew upon the plaintiff at 61 days for Rs. 10,000 on the 26th April, and again for Rs. 10,000 at 51 days on the 18th May. Besides these there were other bills for the amount of Rs. 12,500, drawn by Mr. Cohen on the plaintiff falling due on the 16th of June, and consequently towards the end of May, the plaintiff was anxiously enquiring after the arrival of seeds. On the 25th of May, he was informed by Mr. Landeshut, the agent of Mr. Cohen in Calcutta, that it was impossible to give with accuracy the dates when they would receive any seeds, but that as they were bound to deliver 200 tons of poppy in May and June, and 100 tons of linseed in June, the goods would be down in ample time to cover the plaintiff's acceptances due on the 16th of June. On the 5th of June, Mr. Cohen writes to advise the departure of consignments by water to Patna, which (it was said) ought to reach Howrah by rail on the 18th, and it is added that, should they not arrive by that date, they trust that the railway receipt will enable the plaintiff to finance so as to take up the drafts on himself at maturity. This letter no doubt refers to *a portion* of the 747 bags of poppy seed now in question, and to the bills which fell due on the 16th of June. On the 8th June plaintiff writes to Cohen Brothers pressing for cash to meet these bills, and on the 12th June Mr. Landeshut writes from Fyzabad that he has ordered the station-master at Patna to consign all goods despatched from Fyzabad to the plaintiff's address, and on the 14th June Cohen Brothers write to plaintiff empowering him to take delivery of, and give receipts for, all despatches of linseed and poppy seed consigned by their Fyzabad agent through the Patna station-master to Cohen Brothers' care at the Howrah railway-station. Notwithstanding these efforts, however, neither goods nor railway receipt arrived in Calcutta in time to meet the acceptances falling due on the 16th, but Mr. Cohen, in some way or other, found the cash to meet them, and they were retired.

No sooner, however, were these bills got rid of, than it became necessary to consider how others were to be met. Besides the drafts on the plaintiff which fell due on the 29th of June and the 6th of July respectively, there was the still earlier draft on Toulmin and Co., which fell due on the 19th, and which was, therefore, the next to be provided for. Of course, the plaintiff was still pressing for goods, and got the two following letters. The first is from Mr. W. Landeshut from Fyzabad, and is as follows :—

Fyzabad, June 16, 1871.

MESSRS. EAGLETON AND CO., *Calcutta.*

DEAR SIRS,—We have your favors of the 9th and 12th.

We enclose memo. of goods despatched and about to be so. I have sent you per pattern-post three samples of linseed of different marks, and one of poppy.

The poppy was sold to Messrs. Schilizzi and Co. through Messrs. Toulmin and Co., and delivery has to be made to Schilizzi and Co. through Toulmin and Co.

One hundred tons linseed, according to sample LSS, were sold to James Leicester and Co. for delivery in June at Rs. 4-2-6. and 50 tons were sold to the same gentlemen, *not on sample*, for delivery by 20th July at Rs. 4-3-6. LSS is best quality, LS is second ditto, Ls is third ditto. Yours faithfully, (Sd.) COHEN BROTHERS AND Co., per W. LANDESHUT.

The letter enclosed a list of consignments, showing that the 747 bags now in question should reach Howrah by the 22nd of June. The second is from Mr. S. M. Landeshut from Meerut, and is as follows :—

Meerut, June 17, 1871.

MY DEAR EAGLETON,—We have telegraphed you that I start to-day for Patna. Of course, if you care to come up there, do so by all means, but I scarcely think it will be necessary.

I am going to send you down all consignments as they come to hand, so that there shall be no further difficulty in covering drafts as they fall due.

With kind regards to Mrs. Eagleton and yourself, believe me, Yours sincerely, (Sd.) S. M. LANDESHUT.

The plaintiff replied to the letter of the 16th June as follows :—

Calcutta, June 19, 1871.

MESSRS. COHEN BROTHERS & CO., *Meerut.*

DEAR SIRS,—We have to acknowlege the receipt of your favors of the 15th and 16th instant, advising having drawn on us at 21 days in favor of the Bank of Upper India for Rs. 12,500, by two drafts for Rs. 10,000 and 2,500, each draft to be presented by the Oriental Bank. These drafts have as yet not been presented. We shall, however, accept the same on presentation, but we must ask you not again to draw on us.

We have received advice of goods from Fyzabad as per enclosed statement, from which we note that not quite 100 tons of poppy seed will be in Calcutta this month for Schilizzi and Co. Prices for poppy seed here are now Rs. 4-8, with very little in the market; and we think it not improbable that, should Schilizzi and Co. go into the market to buy 100 tons, prices would immediately still further advance. Small-grain linseed is to-day worth Rs. 4-3 to 4-4 per maund, and stocks are light.

Awaiting your advices concerning deliveries of linseed, We remain, Dear Sirs, Yours faithfully, (Sd.) EAGLETON AND CO.

P. S.—We return you Mr. McLeary's letter to Mr. Cohen. (Sd.) E. AND CO.

P. P. S.—The drafts have just been presented by the Oriental Bank, and accepted by the writer. We perceive you have drawn on him, not on Eagleton and Co. (Sd.) E. AND CO.

On the 20th June Mr. S. M. Landeshut wrote from Patna as follows :—

Patna, June 20, 1871.

MY DEAR EAGLETON,—The mail leaves this at 1 o'clock in the day. As I have but just returned from the railway station, I have but little time to write a long letter.

We are despatching from here to-day to your address 747 bags (1,494 maunds) poppy, and 255 bags (510 maunds) linseed, which will reach Howrah the day after railway receipt. The value of this will not be sufficient to cover your acceptance due on the 29th. I would therefore recommend you, if possible, to draw upon Cohen for what you require. I have not time to write more fully, but will do so later in the day. Yours sincerely, (Sd.) S. M. LANDESHUT.

P. S.—I hope you have paid my *pre.* Grace expires to-morrow. (Sd.) S. M. L.

And again on the 21st as follows :—

Bankipore, June 21, 1871.

MY DEAR EAGLETON,—Under a separate cover, registered, I have sent you railway receipt for 1,002 bags of seed, 747 poppy, and 255 linseed, bearing freight Rs. 1,021-2-9. On receipt of the poppy, I would advise you to give notice of arrival to Schilizzi and Co., and take payment from them at the rate of Rs. 4-4 per maund, as per contract; they taking delivery from Howrah.

With regard to the linseed, you had better wait until further supplies come to hand, which I expect in a few days; and in the meantime use your judgment as to the best way of raising money on the stuff to meet the draft due on the 29th. Cohen, I hope, has sent you general instructions since I left Meerut. According to my brother's programme, you ought to have receipts for 978 more bags of seed between this and the 30th, of which 512 are poppy. Cohen is, I believe, writing to Toulmin to finish up Schilizzi's contract by buying and supplying in Calcutta. Yours sincerely, (Sd.) S. M. LANDESHUT.

To the first of these letters the plaintiff replied by writing to Meerut as follows :—

104, *Canning Street, Calcutta, June* 21, 1871.

MESSRS. COHEN BROTHERS & CO., *Meerut.*

DEAR SIRS,—Mr. S. M. Landeshut writes us from Patna that receipts for 1,494 maunds poppy seed, and 510 maunds linseed, will arrive in Calcutta before your draft for Rs. 10,000 matures on 29th instant.

The value of these seeds is...	Rs.	8,469	3	0
Less freight	„	1,002	0	0
	„	7,467	3	0
Less margin of 25 per cent....	„	1,866	15	3
Total...	„	5,600	3	9

We must therefore ask you immediately on receipt of this to remit us (say) Rs. 5,000, and telegraphing us that you have done so.

We regret that so much anxiety is caused by our acceptances not being covered in the usual course. We had hoped that, after the last matter was settled, the business would proceed in order. At Mr. Landeshut's request, we have again accepted your drafts to the extent of Rs. 12,500; but had we for an instant anticipated that sufficient seeds would not have been down in time to cover our next acceptance falling due, we most certainly should not have done so. We are, Dear Sirs, Yours faithfully, (Sd.) EAGLETON AND Co.

I have set out these six letters at length, because it is on them that the plaintiff must rely to establish his claim. I do not of course mean that the prior dealings between the parties are to be put entirely out of sight, but it is clear that up to the 14th of June the parties were corresponding upon a different matter, namely how the bills were to be met which fell due on the 16th.

What happened when the goods arrived at Howrah was this. The plaintiff got the railway receipt on the 22nd. On that day an assistant of Toulmin and Co. demanded it from the plaintiff on his employer's behalf, with which demand the plaintiff refused to comply, but telegraphed at once to Cohen Brothers for instructions. Mr. Cohen replied on the 23rd, directing the plaintiff to deliver to Toulmin and Co., and at the same time telegraphed to Toulmin and Co., that they were to demand the poppy seed from the plaintiff. The plaintiff replied by telegraph, refusing to deliver the poppy seed to Toulmin and Co. until his draft due on the 29th was covered. Whereupon Mr. Cohen telegraphed to the station-master at Howrah to deliver the poppy seed to Toulmin and Co., and to no one else.

The plaintiff, when he got the railway receipt, endorsed it to Schilizzi and Co., and sent to Howrah on the 24th his own sircar, accompanied by a sircar of Schilizzi and Co. to demand that the poppy seed should be delivered to Schilizzi and Co., who on that day paid the freight, but the goods were not delivered. There is some dispute whether the delivery was refused by the Railway Company on the 24th or not, but it does not appear to me to be of much importance. Anyhow on the same evening the plaintiff wrote to the defendants, expressing his surprise at their having refused to deliver to Schilizzi and Co., and giving them notice not to deliver to any one on the present endorsements of the receipt. This notice he withdrew on the 26th, on which date he again made some demand, I suppose the same as before, that the goods should be delivered to Schilizzi and Co. This was not done, and the goods were afterwards delivered to Toulmin and Co. under a guarantee. The plaintiff had not up to that time given to the defendants any notice of the true nature of their claim to these goods. Messrs. Schilizzi and Co. remained quite passive.

These being the facts of the case, I think they do not support plaintiff's claim. All that the defendants knew about the matter was that the plaintiff was the bare consignee of the goods, who did not claim that the goods should be delivered to himself, but to another person who had paid the freight. Under these circumstances, I think the defendants would naturally assume that the plaintiff was a mere agent of the vendor for delivery, and very properly (I think) referred the matter to the consignor for instructions, and obeyed those instructions. Nor upon the facts and correspondence does it appear to me that the plaintiff had in any respect a better claim to the possession of these goods than the defendants. I am not now called upon to decide whether or no possession of these goods could or could not have been demanded by Toulmin and Co. as against the instructions of the consignor. What I am called upon to decide is, whether under the circumstances it could be demanded by the plaintiff as against the defendants, who had the consignor's express orders to deliver to Toulmin and Co. And, in my opinion, even if all the circumstances had been made known to the defendants, they would still have been bound to deliver to Toulmin and Co. If we look to the correspondence on and after the 16th of June, which more nearly concerns this case, we find that the plaintiff was expressly told in the letter of the 16th of June (the most important of all) that the poppy seed was sold to Schilizzi and Co., and delivery was to be made *through Toulmin and Co.* If we look to the earlier correspondence, we find that, by letters written by W. Landeshut to Cohen Brothers at Calcutta, and to Cohen Brothers at Meerut, which letters the plaintiff was authorised to read, and did read, he was informed that "our Calcutta firm (*i. e.*, Cohen Brothers) will deliver the poppy to Toulmin and Co." And again:—"Do your best and hurry off despatches of 50 tons poppy. *The rest of the poppy* and linseed can go to Eagleton." Surely this was a notice to any man of business that Toulmin and Co had some claim against this poppy seed to the extent of 50 tons; and when the order to deliver to Toulmin and Co. was repeated in the letter of the 16th June, it was obvious that this had reference to that claim. If, as the plaintiff says, this had only reference to Toulmin and Co.'s position as brokers, the direction would have been general as to the whole 200 tons, and would not have been limited to 50 tons only. Nor do I think that the letters of Mr. S. M. Landeshut of the 20th and 21st can have the effect of displacing the previous orders to deliver to Toulmin and Co., and substituting a right on the part of the plaintiff to have these goods delivered to himself. They are rather in the character of friendly advice to the plaintiff how to act, so as to extricate himself from his difficult position. But, even assuming that they are more, still they do not in my opinion give the plaintiff a right to claim delivery of these goods, superior to the undoubtedly prior claim of Toulmin and Co., backed as it was by the orders of the consignor; for though Mr. Cohen was greatly pressed for money, I do not think he was guilty of any deliberate dishonesty, and it would have been deliberately dishonest if he had diverted these 50 tons of poppy seed, which had been clearly promised to Toulmin and Co., into any other direction, and just when Toulmin and Co.'s bill was falling due, and when it was impossible that any other goods could arrive to meet it.

Apart, therefore, from the question of notice, on a comparison of the situation of the two claimants to the property, I think the plaintiff has failed to make out his case.

Failing, however, this his main contention, the plaintiff says he is entitled to something in respect of the surplus over 50 tons. It appears that only 50 tons of poppy seed, out of nearly 55 which Toulmin and Co. received, were delivered to Schilizzi and Co., that firm refusing to recognise Toulmin and Co.'s authority to receive payment for any larger quantity. Accordingly Toulmin and Co. applied to Mr. Cohen to know what they were do with the surplus. Mr. Cohen thereupon authorised Toulmin and Co. to tender this quantity (65 bags) to Schilizzi and Co., and, if they refused it, then to dispose of the seed to the best advantage. Schilizzi and Co. did refuse it, and Toulmin and Co. sold the seed in the market. The plaintiff contends that these 65 bags ought at any rate, to have been delivered to him, and he relies on a letter written on the 23rd of June by Mr. Cohen to the defendants, which is as follows :—

Meerut, June 23, 1871.

To the Station-master, *East Indian Railway, Howrah.*

Dear Sir,—We beg to confirm the following telegram sent you this day :—

Deliver our poppy seed to Toulmin, and to no other party who may apply for it.

We mean a quantity equal to 50 tons. Yours faithfully, (Sd.) Cohen Brothers and Co.

P. S.—The rest can be delivered according to documents.—(Sd.) C. B. and Co.

That letter arrived in Calcutta on the 26th (see Mr. Conroy's evidence), but whether before or after the seed was delivered to Toulmin and Co. is not certain. Mr. Conroy thinks the seed was delivered on that day. I do not, however, think I can give the plaintiff a decree for anything on this account. I cannot find that any demand was ever made by the plaintiff that this surplus quantity should be delivered to him, though he knew the exact quantity which had arrived, and the extent of Toulmin and Co.'s claim, for it was stated in the letter of the 2nd June, which the plaintiff saw. Throughout he claimed the whole, and it seems to me that the claim to this surplus is entirely an after-thought. Had it been made earlier, the defendants would no doubt have referred the plaintiff to Toulmin and Co., who would doubtless have taken Mr. Cohen's instructions, and the result might have been different. It would, in my opinion, be most unjust towards the defendants to allow this claim now to be sprung upon them, of which no one, as far as I can discover, had thought until this plaint was filed. I therefore think that the suit must be dismissed with costs on scale No. 2.

From this judgment the plaintiff appealed on the following grounds :—

First.—For that the learned Judge held that the plaintiff had in no respect a better claim to the possession of the goods in the plaint mentioned than the defendants, whereas the learned Judge ought to have held that the plaintiff had a better claim thereto than the defendants.

Second.—For that the learned Judge found that the plaintiff did not give the defendants sufficient notice of the nature of his claim to the said goods, whereas the learned Judge ought to have held that the plaintiff did give sufficient notice to the defendants of the nature of his claim to the said goods.

Third.—For that the learned Judge erroneously held that the plaintiff's right to have the said goods depended on his informing the defendants of the exact nature of his claim thereto, whereas the learned Judge ought to have held that it was not necessary for the plaintiff so to do.

Fourth.—For that the learned Judge held that, even if all the circumstances had been made known to the defendants, they would still have been bound to deliver the said goods to Messrs. Toulmin and Co., whereas the learned Judge ought to have held that the defendants ought not then to have delivered the said goods to the said Messrs.

Toulmin and Co., but ought to have delivered them to the plaintiff.

Fifth.—For that the learned Judge held that the said Messrs. Toulmin and Co. had a prior claim to the said goods to that of the plaintiff, whereas the learned Judge ought to have held that, under the circumstances proved in the case, the said Messrs. Toulmin and Co. had no such prior claim to the said goods.

Sixth.—For that the learned Judge ought to have found that the transit of the said goods was at an end, and that the said goods were converted by the defendants when they were in the custody of the defendants as agents of the plaintiff.

Seventh.—For that the learned Judge ought to have held that the said goods had come into the possession of the plaintiff, and that he, having an interest thereon, was entitled to retain possession of them against the consignor thereof and the said Messrs. Toulmin and Co.

Eighth.—For that the learned Judge held that the plaintiff was not entitled to a decree against the defendants for at least the value of the surplus of the said goods over fifty tons, whereas he ought to have held that the plaintiff was at least entitled to a decree for that amount.

Ninth.—For that the learned Judge has dismissed the plaintiff's suit, whereas he ought to have made a decree for the plaintiff according to his right.

Mr. Evans (for the appellant) contended that the transit was at an end, and that there had been a complete attornment by the defendants to the plaintiff, when the goods arrived at Howrah, and when delivery was offered to the plaintiff's sircar, and would have been taken, if it had not been raining at the time. Moreover, the goods having been consigned to Eagleton under advances, he was, as regards the Railway Company, in the same position as if he had been the real owner of the goods, and no letter from Cohen and Co. countermanding the delivery to the plaintiff could exonerate the defendants, nor had defendants any right to set up Toulmin and Co.'s paramount title.

He cited *Holl* v. *Griffin* (10 Bing., 246) and *Anderson* v. *Clark* (2 Bing., 20). He urged that the evidence, as well as the defendants' own admission in their written statement, showed that they had agreed to look on plaintiff as consignee. Where a consignment is made, if the consignee has an interest in the matter, it is only right that he should sue, for the consignor acts as agent. Then there was a distinct stipulation to cover the drafts, and it must be taken that they were to be covered by the goods in suit, as no other goods could have arrived in time to cover the drafts when due.

He contended that there was no right to revoke delivery when once the goods arrived; that there was constructive possession in plaintiff when defendants told him "we hold the goods to your order," and that he would be charged demurrage if the goods were not taken at once; and that, as to Toulmin and Co.'s paramount title, there was nothing to show that they had a specific right to those specific goods.

Mr. Macrae (on same side) argued that the suit was one against a carrier for non-delivery of goods accepted by him under a promise to deliver them to the plaintiff. The carrier justifies on the ground that the destination before delivery was diverted by the consignor. But if the transit came to an end, the consignor had no right to divest the destruction of the goods after they had come into the possession of the person who has a lien upon them by reason of advances made upon them. See *Evans* v. *Nicholls* (3 Man. & Gr., 614) and *Haille* v. *Smith* (1 Bos. & Pul., 563).

The former case was in point. Although a railway receipt may not have the full force of a bill of lading, it is an instrument the holder of which has a right to deal with the goods. It can be dealt with in a certain way as a bill of lading; the consignee may attend to receive the goods mentioned in it, or he may endorse it to a third party. If the document had the full force of a bill of lading, cases like *Haille* v. *Smith* would apply. As it is, *Evans* v. *Nicholls* was in point. The document there was of an inferior kind to a railway receipt, and it was held that the plaintiffs were entitled to bring trover. Therefore, *à fortiori*, the plaintiff in this suit could maintain an action.

Mr. Marindin (for the respondents) contended that there was nothing in the railway receipt or in what occurred at the Howrah railway station on the arrival of the goods, that could possibly be taken to amount to constructive delivery, or to put an end to the transit, or which, upon the authority of *Clark* v. *Evans*, operated as an attornment by the Railway Company to the plaintiff. The attornment, if any, was to Schilizzi and Co., not to plaintiff. In *Holl* v. *Griffin*, there was a direct promise to deliver; here there was nothing of the sort. As to the charge for demurrage, there was simply an assertion to the right to claim demurrage against the person (whoever he may be) that was to receive the goods; but it did not amount to a promise. As to defendants' right to set up the *jus tertii* as against the plaintiff, he cited *Biddle* v. *Bond* (6 Best & Smith, 225) and *Thorne* v. *Tilbury* (3 Hurl. & Nor., 584); see also *Bryans* v. *Nix* (4 M. & W., 775); judgment of Blackburn, J., in *The Calcutta and Burmah Steam Navigation Company* v. *DeMattos* (32 L. J., N. S, Q. B., 322) affirmed on appeal by Court of Exchequer Chamber (33 L. J., N. S, Q. B., 214); and *Tregelles* v. *Sewell* (7 H. & N., 574).

Mr. Evans replied that the goods had come into the constructive possession of the plaintiff, and that no such title was shown on the part of Toulmin and Co. as would overcome such constructive possession of the plaintiff.

The judgment of the Appellate Court was given as follows by—

Couch, C.J.—This suit was brought by the plaintiff against the East Indian Railway Company for wrongfully delivering to Messrs. Toulmin and Co. a quantity of poppy-seed which had been received by the defendants at Patna to be carried to Calcutta, and to be delivered to the plaintiff according to the terms of the receipt, which was given by a servant of the Railway Company at Patna. The receipt is set out in the plaint, and it states that the goods were received from Cohen Brothers and Co. for conveyance to the Howrah station by goods-train. Then, under the heading of the consignee, is the name of the plaintiff, who was trading under the firm of Engleton and Co., and there is the description of the articles, *viz.* 747 bags of poppy-seed, and 255 bags of linseed, with the weight and rate and the amount which was to be paid as freight.

The goods arrived at the Howrah station, and were claimed by the plaintiff, to whom Cohen Brothers and Co. had sent the railway receipt, they having had certain transactions with him which appear from the correspondence which was put in evidence, and which having been fully stated in the judgment of Mr. Justice Markby, I do not think it necessary to go through again. Mr. Engleton, upon the arrival of the goods, gave a direction that, upon Messrs. Schilizzi and Co. paying the freight, the goods should be delivered to them; but a claim having been made on the part of Messrs. Toulmin and Co., the Railway Company, the defendants, refused to recognize the plaintiff as entitled to receive the goods, and delivered them to Messrs. Toulmin and Co., under an indemnity.

As I have already said, the facts of the case, as regards the title of both the plaintiff and Toulmin and Co., are so fully set forth in the judgment of Mr. Justice Markby that I need not go through them again. The first question which I think it is necessary to consider is, what was the effect of the handing over by Cohen Brothers and Co. to the plaintiff of the railway receipt, in connection with the transactions which had taken place between them, and the agreement which is derived from the correspondence. Now, as to the effect of the delivery of the railway receipt, there is a very decided authority that that would pass the property from Cohen Brothers and Co., to the plaintiff, and that is the first question which we have to determine. Upon that matter there is, first, the judgment of Mr. Justice Bosanquet in the case of *Holl* v. *Griffin* (10 Bing., 249,) which was referred to in the course of the argument of the appeal. The facts there were that a person named Wilson, who was possessed of a wharfinger's receipt at Stockton-upon-Tees, handed it over, together with the invoice, to the plaintiff upon an advance of money made to him by the plaintiff, and, at the same time, addressed an order to the defendants, who were wharfingers at London, to deliver the goods upon their arrival to the plaintiff. The plaintiff called at the defendants' wharf, apprized them of his claim, and left the wharfinger's receipt with them. The defendants' clerks said that the vessel by which the goods were to be conveyed had not arrived, but that they would be delivered to the plaintiff on arrival. Mr. Justice Bosanquet said, with reference to the handing over of the receipt:—"The original owner of the goods was Wilson; the goods were lying on a wharf at Stockton-upon-Tees; the wharfinger there gave Wilson a receipt for them; and Wilson, having that receipt and the invoice, handed both over to the plaintiff, upon obtaining an advance of money." Here Cohen Brothers and Co., having the railway receipt, sent it by post to the plaintiff in consequence of the plaintiff having put himself by an agreement with Cohen Brothers and Co. under obligations to meet bills, which bills it was intended by Cohen Brothers and Co. (as appears from the correspondence) he should have the means of meeting by making use of the railway receipt. What Mr. Justice Bosanquet then says applies precisely to the present case :—"As between Wilson and the plaintiff, this was a symbolical transfer of the property to the plaintiff, and may be considered the same as if the goods had passed from hand to hand. It is objected that the wharfinger's receipt, by virtue of which the plaintiff claims a property in the goods, is not the receipt of the defendants, but of the wharfinger at Stockton-upon-Tees." Then the learned Judge meets that, by showing that the defendants had recognized the receipt by promising to hold the goods by virtue of it. That question does not arise, in this case, because the receipt here was given by the defendants' servants, and was, therefore, the receipt of the defendants. This judgment then is an authority that by that transaction between Cohen Brothers and Co. and the plaintiff, the property in these bags of poppy-seed passed to the latter.

To the same effect is the judgment of Mr. Justice Maule in *Evans* v. *Nicholls* (3 M. & Gr., 620.) There the case was that the plaintiffs were chemists and dry-salters, and also factors and brokers, carrying on trade in London. The defendants were the London agents of Nicholl, Ludlow and Co., who carried on business at Newcastle as shipowners and wharfingers. The plaintiffs acted as factors and brokers for Anthony Clapham, an alkali manufacturer at Newcastle, who was in the habit of consigning alkali to the plaintiffs in London for sale on his account, he being allowed to draw upon them to the extent of two-thirds of the supposed value, but sometimes drawing, in fact for the full amount. On the 2nd May 1840, the plaintiffs were under acceptances for Clapham beyond the amount for which Clapham was entitled to draw in respect of goods in their hands belonging to him, if not to the full value of these goods. On that day Clapham wrote to the plaintiffs that he had drawn on them at four months' date for £500, adding :—"I hope to be able to ship twenty tons of soda and alkali at the beginning of the ensuing week." The goods were shipped, and no bill of lading was given, but the receipt, signed by the mate of the vessel for the goods, was sent to the plaintiffs. Mr. Justice Maule said :—"Upon the shipment of the goods on board the *London* (the vessel) upon the terms of being delivered to the plaintiffs, and the acceptance of the goods by the shipowners upon those terms, the property vested in the plaintiffs to the extent of their interest, which was the interest of persons with whom goods are pledged—*Bryans* v. *Nix*. It is admitted that, if the plaintiffs had been vendees, instead of pawnees, of these goods, their right to recover could not have been disputed. The goods having been shipped by Clapham for the purpose of meeting the plaintiffs' acceptance of the £500 bill, and the shipowners having accepted those goods for the purpose of delivering them to the plaintiffs, it appears to me that the plaintiffs acquired such a property and right of possession as to entitle them to maintain trover against the defendants."

So in this case these goods were delivered to the Railway Company for the purpose of being sent to the plaintiff to enable him to meet the acceptances which he had given for the accommodation of Cohen Brothers and Co. They were accepted by the defendants for the purpose of delivering them to the plaintiff, and therefore the property and the right of possession in them passed to the plaintiff. I have dwelt upon this because, as will be seen hereafter, it is necessary to show that the existence of a bill of lading makes no difference with regard to the rights of the parties in the present case, which, it was argued before us, it did. So long as the property and the right of possession passed, it is immaterial whether it was by the delivery of a bill of lading, or the delivery of a receipt when we come to consider the rights of the parties with reference to the subsequent transactions.

It was argued that the property in these seeds vested in Schilizzi and Co. at Patna, and the circumstance relied upon to show this was that, in accordance with the contract between Cohen Brothers and Co. and Schilizzi and Co., the purchasers were to provide the bags. I think the answer to that argument will be found clearly stated in the judgment of the Court in *Waite* v. *Baker* (2 Exch. Reports, 1.) There the contract was for a quantity of barley, which was to be delivered at Kingsbridge, or some neighbouring port, for a certain sum for cash, and a vessel was loaded with barley. The bill of lading was taken, and that was subsequently left unendorsed at the counting-house of the defendant. Some dispute then appears to have arisen, and the bill of lading was taken away. The only matter for which it is necessary to quote this judgment is to show that the property did not pass merely by putting it aside, or by despatching it to Howrah, for the purpose of being delivered to Schilizzi and Co. Baron Parke says :—"It is perfectly clear that the original contract between the parties was not for a specific chattel. The contract would be satisfied by the delivery of any 500 quarters of corn, provided the corn answered the character of that which was agreed to be delivered" (which was the case here with regard to the contract with Schilizzi and Co. for poppy-seed). "By the original contract, therefore, no property passed, and that matter admits of no doubt whatever. In order, therefore, to deprive the original owner of the property, it must be shown in this form of action,—the action being for the recovery of the property,—that at some subsequent time the property passed. It may be admitted that, if goods are ordered by a person, although they are to be selected by the vendor, and to be delivered to a common carrier to be sent to the person by whom they have been ordered, the moment the goods, which have been selected in pursuance of the contract, are delivered to the carrier, the carrier becomes the agent of the vendee, and such a delivery amounts to a delivery to the vendee; and if there is a binding contract between the vendor and the vendee, either by note in writing, or by part payment, or subsequently by part acceptance, then there is no doubt that the property passes by such delivery to the carrier. It is necessary, of course, that the goods should agree with the contract. In this case it is said that the delivery of the goods on ship board is equivalent to the delivery I have mentioned, because the ship was engaged on the part of Lethbridge, as agent for the defendant. But, assuming that it was so, the delivery of the goods on board the ship was not a delivery of them to the defendant, but a delivery to the captain of the vessel to be carried under a bill of lading, and that bill of lading indicated the person for whom they were to be carried. By that bill of lading the goods were to be carried by the master of the vessel for and on account of Lethbridge, to be delivered to him in case the bill of lading should not be assigned, and, if it should, then to the assignee. The goods, therefore, still continued in the possession of the master of the vessel, not as in the case of a common carrier, but as a person carrying them on behalf of Lethbridge. There is no breach of duty on the part of Lethbridge, as he stipulated under the original contract that the price is to be paid on the delivery of the bill of lading. It is clearly contemplated by the original contract that, by the bill of lading, Lethbridge should retain control over the property."

Now, here those goods were delivered by Cohen Brothers and Co, it is true, in the bags which had been sent by Schilizzi and Co., but they were made over to the defendants in order to be delivered by them to Eagleton and Co., who were intended by Cohen Brothers and Co. to retain control over the property. It is a question of intention really. With what intention were the poppy-seeds put into the bags at Patna, and delivered to the Railway Company? Not with the intention certainly that the property should pass at once to Schilizzi and Co., because the parties did not intend to part with the property till the price was paid. What they intended was either that the goods should remain their property, or that (as they had arranged) they should be the property of the plaintiff Eagleton until he received the price from Schilizzi and Co., and delivered over the goods. Therefore the objection which was taken that the matter was decided by the putting of the seeds into the bags of Schilizzi and Co. at Patna, and that the property passed to them thereby, I think, fails.

The defendants rest their defence upon two grounds. They say that, when the goods had arrived at Howrah, and the claim was made by Toulmin and Co., they telegraphed to Cohen Brothers and Co., who were the principals, and who had delivered the goods to them, and they received instructions from Cohen Brothers and Co. not to deliver to the plaintiff, and were directed to deliver, as they did, to Toulmin and Co. Now, if Cohen Brothers and Co. had no power to revoke their authority, or to recede from what they had agreed to with Eagleton, the defendants, the Railway Company, could not be in a better position; they could not derive from Cohen Brothers and Co. any greater authority than Cohen Brothers and Co. had.

There is a circumstance in the case which looks as if the plaintiff was not then aware of his precise position, and thought that Cohen Brothers and Co. still retained some power over the goods, because he said he would telegraph to them for instructions. But his doing that would not alter his legal position. He was in the position of a person who was an agent, having what is commonly called an authority coupled with an interest. In reality it was this. An agreement had been entered into between Cohen Brothers and Co. and the plaintiff upon a sufficient consideration, by virtue of which the plaintiff had accepted bills, and put himself under pecuniary liabilities, and Cohen Brothers and Co. had given to the plaintiff the right to receive those goods to meet the liabilities. It was an authority given for the purpose of securing a benefit to Eagleton upon a good consideration proceeding from him. That could not be revoked. It was an authority coupled with an interest, and Cohen Brothers and Co. had no right to revoke it. If they could do that, they would be receding from an agreement which was binding on them, and resuming property which had passed to Eagleton and Co. for a good consideration. They had no power to say to Eagleton:—"We won't allow you to get the goods; you are bound to pay the bills you have accepted for us, but the goods must go to some one else."

The defendants rested their case also upon another ground. They said,—"Toulmin and Co. were the persons entitled to receive these goods; we have delivered them to the proper persons and are, therefore, not liable to the plaintiff." That they might set up such a case as that is shown by a decision which was not referred to in the course of the argument before us, though several other cases nearly to the same effect were cited. In Sheridan *vs.* The New Quay Co., 4 C. B., N. S., 618 (also reported in 28 L. J., C. P., 58), it was held by the Court that a carrier is not estopped from disputing the title of the sender of the goods, and may deliver to the true owner. According to that doctrine, if the defendants could show that Toulmin and Co. were the true owners of the poppy seed, I think they might have had a good answer to the plaintiff's suit. It therefore becomes necessary to see precisely what was the nature of the title of Toulmin and Co. It is set out by Mr. Justice Markby in his judgment thus. He says that Mr. Cohen, who was trading under the firm of Cohen Brothers, "had been in correspondence with Toulmin and Co. upon this subject, and, in December 1870, Toulmin and Co. agreed to allow him to draw Rs. 25,000 against cotton to arrive in Calcutta before the drafts matured. Mr. Cohen thereupon authorised Toulmin and Co. to receive payment on account of Cohen Brothers on goods sold and delivered through Toulmin and Co. In February, Mr. Cohen was contemplating an extension of his operations to the purchase of oil seeds, and a good deal of correspondence ensued as to the terms on which he was to get advances. In his letter of the 25th February he asks permission 'to draw upon Toulmin and Co. in the usual way, and to meet the bills which would fall due before the time of delivery.' 'We would' (he says,) 'draw upon the buyers and place you in funds'. On the 2nd March Toulmin and Co. informed Mr. Cohen that they had sold on his account to Messrs. Schilizzi and Co. 200 tons of poppy seed, on the terms which I have already stated, but added that the firm would not allow itself to be drawn upon. In order to meet this difficulty, and to enable Cohen Brothers to make a beginning, Toulmin and Co. said, 'we will allow you to draw on ourselves to the extent of the value of 50 tons before despatch.' To this letter Mr. Cohen sent rather a vague reply hinting at his intention to seek accommodation elsewhere. On the 14th April Mr. Cohen asked permission to draw on Toulmin and Co. at 61 days for Rs. 10,000, saying that poppy and cotton would be sent soon. Toulmin and Co. declined, however, to go beyond their permission to draw in advance to the extent of 50 tons of seed. Accordingly Mr. Cohen on the 18th April enquired of his agent at Fyzabad, Mr. W. Landeshut, what amount he could draw against 50 tons poppy seed, to which the answer given was Rs. 5,000. Cohen Brothers, on the following day, drew for that sum on Toulmin and Co. at 61 days, and in the letter which advised the draft they said, 'our agent at Fyzabad has purchased the poppy seed, and will shortly make the first despatch; in fact, we expect he will be able to make the despatch 100 tons.' No further communication of any importance took place between Toulmin and Co. and Mr. Cohen until the 14th June, when Mr. Cohen telegraphed to say that the 'poppy has just reached Patna, sending Howrah by Railway,' and asking to draw for Rs. 10,000 more. This request Toulmin and Co. refused, and reminded Mr. Cohen of his promise to deliver 50 tons of poppy seed on the following day. The 747 bags of poppy seed in question were despatched from Patna on the 20th of June, and arrived at Howrah on the 22nd, where they were claimed by Toulmin and Co. as specifically appropriated to the draft for Rs. 5,000 accepted by them as above stated, which fell due on the 19th of June, and which they paid on the 22nd." Now the learned Judge came to the conclusion that the property was in Toulmin and Co., and that the Railway Company had a right to deliver the goods to them; but the principles which are applicable to the present case are laid down in the judgment of the House of Lords in the case of *Hoare* v. *Dresser*, 7 H. L. Cases, 290. It is necessary to state the facts in that case to show how the law as there laid down is applicable to this case. The facts there were these. "N, a timber merchant in Sweden, had dealings with D, a merchant in London, and sent him cargoes of timber, which D disposed of on a *del credere* commission, and, in respect of which, N drew bills on D. In September 1853, the accounts between them were unsettled, but D claimed a considerable balance as due to himself. On the 29th September N wrote to say that he expected bills of lading from two captains (whom he named), and that he had drawn for a certain amount on D. On the 24th October H and Co., merchants in London, received through K, their agent, and the manager of their business in Sweden, a letter from N, in which he enclosed a letter to D, whereby he drew on D for £1,312, which he claimed as due to himself from D. In the letter to H and Co., N desired that this enclosure might be handed to D, and on his accepting the draft, and acknowledging the correctness of an accompanying account, and the fact that N had duly delivered all the cargoes of timber contracted for between them, except one particularly named, that then H and Co. were to hand to D the three bills of lading of three ships, also named; but if he would not accept the draft, nor give the required acknowledgment, then H and Co. were to insure the cargoes, and sell them; and N drew on H and Co. drafts to the amount of £1,300. This letter was read to D, who hesitated to accept the draft for £1,312, declaring that he was largely in advance to N. It was left in his bill box for acceptance on the morning of the 24th October, and a formal letter, demanding compliance with the conditions of N, was written to him by H and Co. In the course of the same day, D wrote to H and Co., requesting the loan of the bills of lading, saying 'we will return them to you, if from any cause we do not accept the bill for £1,312.' They were sent to him on the same day, but after D's request had been complied with, H and Co. accepted the first of N's drafts, and wrote to him that they would 'give protection' to all. On the morning of the 25th October, a clerk of H and Co. learned at D's counting house that the draft for £1,312 had not been accepted; but in the middle of that day it was sent to H and Co. H and Co. accepted. D however refused to give up the bills of lading, and, on the advice of a solicitor (obtained before he had accepted the draft for £1,312), attached the goods in the hands of H and Co. They brought an action against him to recover the bills of lading, and he filed a bill to stay the action."

It was held by the House of Lords that D (Dresser) had not such an equitable right on account of anything that occurred on the 24th of October as would prevail against the legal rights which the plaintiff had acquired by receiving the bill of lading. The Solicitor General, Lord Cairns, in arguing the case for Dresser, raised three questions showing clearly the view which was taken of the nature of the case, and the title which would be given by such a transaction as this. He said:, "The questions here are three:—*First*, whether as between Norrbom and Dresser," (in this case, between Cohen Brothers and Co. and Toulmin and Co.) "there was, in equity, a right on the part of Dresser to require that the particular cargoes, mentioned in Norrbom's letters, should be sent to him? *Secondly*, whether Hoare and Co. having been originally the agents, and nothing more of Norrbom acquired a higher title to the timber by reason of the engagements which they came under in respect of these cargoes?" Here the question is whether Eagleton, having been an agent of Cohen and Co., would acquire a higher title by reason of the engagements he came under in respect of the seeds which were sent. *Thirdly*, whether at the time Hoare and Co. came under these engagements, they had notice of the rights of Dresser as against Norrbom with respect to the equity already mentioned?"

The whole case was put as the case of an equitable title as against a legal title, and the necessity of there being notice of the equitable title in order that it should prevail. Lord Cranworth said (and this remark applies to the nature of the title of Toulmin and Co.), "The difference between law and equity I take to be this, that if there has been an engagement to appropriate a particular cargo, or an engagement to satisfy a contract out of a particular thing, such as to appropriate a part of a larger cargo, in either of these cases, equity will interfere, in the one case, to decree what in truth is a specific performance, or something very like a specific performance of the contract to appropriate a particular cargo; and in the other, to give the purchaser a lien upon the larger cargo, in order to enable him to satisfy himself of the smaller demand." He then gave an illustration, and said, "But I apprehend that neither in equity nor in law can there be any jurisdiction to say that, because there is property of the person who ought to have fulfilled his contract, therefore you can make that property available for the specific performance of the engagement." His lordship said he thought it necessary to say that much although the question did not properly arise in that case, and then he made a remark which is applicable to the contention in this case that there was sufficient in the correspondence to fix Eagleton and Co. with notice of the nature of the title of Toulmin and Co. He said, speaking of what took place with the clerk in the counting-house, "But when that is looked at strictly and critically, I quite agree with an observation that was made in the course of the argument, that mercantile transactions would be altogether unsafe if that is to be taken as notice." So here I think it may be said that, if the expressions in the letters that these seeds were to be delivered to Schilizzi and Co. through Toulmin and Co. were to be treated as notice to the plaintiff Eagleton of the rights which Toulmin and Co. had under the contract with Cohen Brothers and Co., mercantile transactions would be altogether unsafe. There was nothing in the correspondence which could lead Eagleton to suppose that there was any special arrangement between Cohen Brothers and Co. and Toulmin and Co. I think that we ought not to hold that the plaintiff had notice by the letters of the title of Toulmin and Co.

There is another remark in the course of that case which is applicable to the present,—what passed when the clerks met in the counting-house, and one said to the other that the proceeding was a strange one, and, on Norrbom's part, a regular swindle.

Lord Wensleydale also gave judgment to the same effect as the Lord Chancellor and Lord Cranworth. He spoke of there being a bill of lading. But I have already shown that the bill of lading makes no difference, because the real question is, whether the property passed to the plaintiff, and whether it passed by the indorsement of a bill of lading or by delivery of the railway receipt does not matter.

Therefore the result is this, that the title of Toulmin and Co. was at most only an equitable one. It did not even amount to an equitable lien on these particular goods. It was a right which Toulmin and Co. could have enforced against Cohen Brothers and Co., but, being only a right, it could not prevail against a person who had had transferred to him the property in the goods, and who had the right of possession, unless at the time of the transfer he had notice of it. If it were clear that Eagleton had notice of these transactions between Toulmin and Co. and Cohen and Co., the right of Toulmin and Co. would have prevailed against his. But I do not think it can be said that he had notice. He had acquired a property in the seeds by the delivery of the railway receipt. The defendants had engaged to deliver them to him, and unless they could show that Toulmin and Co. had a superior title to his,—a title which would have enabled them to recover the goods from him,—the defendants were not justified in delivering the goods to them, and are liable for the wrongful delivery.

In my opinion the decision to which the learned Judge came that Eagleton's title was to be treated merely as the right of an agent, and not that of a person who had a property and right of possession in these goods, is not correct. The decree in favor of the defendants must be reversed, and a decree made in favor of the plaintiff for Rs. 5,588-4, with interest at the ordinary rate of six per cent. from the 26th June 1871, and costs of suit to be taxed on scale No. 2.

Macpherson, J.—I am of the same opinion. The plaintiff accepted bills to a large amount for Cohen Brothers and Co. upon their promise that seeds would be sent down to him at once to place him in funds to meet these bills; and there was an express understanding (as appears from the letters which passed between Cohen Brothers and the plaintiff), that, when goods were despatched to Calcutta, they should be consigned to Eagleton and Co., who were to use the railway receipts for such goods for the purpose of what is called financing. The bags of seed, the subject of this suit, were consigned to Eagleton and Co. under that agreement, and the railway receipt was made out in Eagleton and Co.'s name and was sent to the plaintiff; and I have no doubt whatever that the intention of Cohen Brothers and Co. in so consigning the goods and giving the railway receipt to Eagleton and Co., was that it should pass,—as in law I think it did pass,—the right of possession and property in these bags of seed to Eagleton and Co., so as to enable the plaintiff to receive the price payable for them. The plaintiff then had a substantial interest in the consignment, and was not a mere agent of Cohen Brothers. Under these circumstances the Railway Company, having in the first instance granted a receipt for the goods in which they named Eagleton and Co., as consignees, and stated that the goods would not be given up except upon the order of the consignees, received from Eagleton and Co. the freight which had to be paid for this consignment before delivery. I say that they received the freight from Eagleton and Co. because, although it was received from the hands of Schilizzi and Co.'s sircar, it was so received upon the order of Eagleton and Co., and on their indicating by their written order on the railway receipt the person to whom actual delivery was to be made and by whom the freight was to be paid. The Railway Company having received the freight from the plaintiff, further promised to deliver the bags of seed as directed by him. Looking at all these circumstances, it appears to me that the Railway Company were not entitled eventually to refuse delivery of the goods to Eagleton and Co., and that they were not justified in delivering to Toulmin and Co. under the telegram from Cohen Brothers. It may be that Cohen Brothers have broken the agreement which they made with Toulmin and Co. and that, as against Cohen Brothers, Toulmin and Co. would have been entitled to recover the price of these goods. But the plaintiff had no notice of any rights existing in these specific bags of seeds on the part of Toulmin and Co., and he had a substantial interest in the goods, and was not the mere agent of Cohen Brothers, and I think that he was entitled to hold them as against Cohen Brothers, and therefore as against Toulmin and Co.

The 16th April 1864.

Present:

The Hon'ble Sir R. Couch, *Kt., Chief Justice,* and the Hon'ble W. Markby, *Judge.*

Construction—Shipping Order—Measurement at the Screw-house.

Schilizzi and Company

versus.

Cox, Steel and Company.

Where a shipping order authorised the receipt of "800 bales of cotton not exceeding 52 cubic feet measurement at the screw-house," the fair meaning of the contract was taken to be, considering that it was a mercantile contract, and looking at the surrounding circumstances, that the measurement by which the parties were to be bound was a measurement at the screw-house; and that if the agent of the defendants was present there and passed the bales as of the proper measurement, or waived the right to measure and did not measure, the defendants could not afterwards insist upon a right to measure or go into an enquiry of what was the size of the bales.

The following case was stated for the opinion of the High Court in its Ordinary Original Civil Jurisdiction, under Section 55 of Act IX of 1850, by the First Judge of the Small Cause Court of Calcutta :—

Case.—The plaintiffs sued for Rs. 219 on the following cause of action:—"For that the "defendants, on the 14th December 1871, "contracted to receive on board the ship "*Daphne* 800 bales of cotton, to be shipped "between the 25th December 1871 and the "5th January 1872, and the plaintiffs sent the "said 300 bales of cotton alongside the said "ship, but the defendants refused to receive "the same, and the same were kept in consequence on board the cargo boats in which "the same were sent for shipment, whereby "the plaintiffs sustained damages to the "amount stated."

The defendants put in four pleas, but the substantial defence was that the contract was one to receive 800 bales of cotton, guaranteed 5 bales to the ton, not to exceed 52 cubic feet, and bales measuring 58 or 59 cubic feet had been tendered under it.

The shipping order marked A is as follows :—

No. 6.

A.

Calcutta, 14*th December* 1871.

To the Commanding Officer of the *Daphne* for London.

Sir,—Please to receive on board from Messrs. Schilizzi and Co. the undermentioned goods, and sign accompanying receipt : three hundred bales cotton, freight (£4.7.6) four pounds seven shillings and six pence per ton of 5 bales, not exceeding 52 cubic feet measurement at the screw-house, to be shipped as ready from 25th instant to 5th January.

Cox, Steel and Co.,
Agents.

The evidence of the broker who negotiated the contract showed that the shipping order, if it was not in this case the very contract itself, must certainly be taken as containing every term of it, and none beyond. Though it does not strictly and in terms correspond with the contract as set up by either party in its pleadings, yet it was what both relied on, and the point in dispute between them narrowed itself to the question, what is the meaning and effect of the words "measurement at the screw-house?" The plaintiffs contended that, by the custom of the port of Calcutta, measurement of cotton bales must always take place at the screw-house, and that such measurement is by the same custom final and binding. They also contended that these words in the shipping order have the same meaning as would have been imported into the contract without them by the custom. The defendants denied the existence of the custom, and insisted that these words ought not to be construed to indicate that the parties intended measurement at the screw-house to be final, but merely as pointing out a mode and place of measurement which would be convenient to both parties, and which both would, under ordinary circumstances, be disposed, though not under every circumstance bound, to abide by.

I think I may set aside at once all the evidence adduced to prove the existence of the custom. Such a custom is of so much importance, and opens so wide a door to fraud, that it ought to be established, I think, by evidence of a much more cogent and universal character than that by which it was sought by the plaintiffs to support it.

The defendants wish to represent the words "not to exceed 52 cubic feet" as an unlimited guarantee, which they would no doubt be if they stood alone. Coupled with the words that follow, "measurement at the screw-house," I do not think they can be so construed. Suppose the case of a horse advertised for sale, and guaranteed to be 16 hands high, and the measurement of which it was said must be taken at the livery stables where it then stood. Suppose this horse to be bought subject to a guarantee or representation of this kind, and that the purchaser went to the stables and saw the horse, and cursorily glanced at it, and believing it to be 16 hands high, took it away, could it be contended that the purchaser, if he afterwards measured the horse at his own stable, and found him really only 15 hands high, would be at liberty to return him? I apprehend that the affording of an opportunity of examination and measurement at a stipulated time and place destroys the continuing force of the guarantee. It converts what was before a purchase by guarantee into a purchase of specific goods after inspection.

Well, then, treating the contract as independent of custom, and looking at it, as I do, as containing only a limited guarantee, and as amounting only to an undertaking on the part of the plaintiffs to have certain bales of cotton described as of a certain measurement, ready at a certain time and place for the inspection of the defendants, and as an undertaking on the part of the defendants to attend at that time and place for the purpose of satisfying themselves as to the measurement of those bales, and to accept them if satisfied, what were the facts? With regard to 200 out of 800 bales, the master of the *Daphne* on the part of the defendants went to the screw-house, two hundred bales were then shown to him, piled up, no doubt, in a manner which rendered them somewhat difficult of access and inconvenient for examination; but still there they were for inspection. Ten bales were pulled down from one end and measured, but no more. These came to a trifle over 52 cubic feet, and the master was satisfied with them. It was contended, and indeed the master himself did allege, that he was misled into examining no further by the assurance from some one, named Narain Doss, on the part of the plaintiffs, that the rest of the bales were all like those then, but I do not think that that was so. Narain Doss appears in fact to have made that statement, and it may perhaps be assumed, though it was not quite satisfactorily proved, that he was the plaintiff's man; still the master did not act on that statement, for he himself afterwards stated that he did not ask for more bales to be pulled down, because 5 per cent. was supposed to be the number to be examined. The fact is there was no fraud. The master had the opportunity of a full and satisfactory examination and measurement at the time and place appointed by the contract; but from mixed motives of delicacy, courtesy, convenience, hurry, and indolence, he elected to satisfy himself with an offhand measurement by average, and afterwards he sought to rectify his error by re-measurement at a time and place which the evidence shows was purposely excluded by the contract, and he claims now in Court, without the shadow of a reason, as it appears to me, to have all along possessed the right to do so. It appears to me that, upon the expression of the master's satisfaction, the property in those 200 bales passed at once from the plaintiffs to the defendants, subject only to the possession of the plaintiffs, and the duty on their part of delivering them on board.

A great deal of evidence was also gone into for the purpose of showing that goods, which measured 52 feet at the screw-house, could not possibly expand to such an extent as to measure 58 or 59 feet alongside the vessel two or three days afterwards, as the evidence shows that a small portion did; and thence to raise the inference that the two sets of goods were in this instance not the same.

If this line of defence could have been made out, it would, of course, have been a complete answer to the plaintiff's claim, for neither under the custom, nor under the express terms of the contract, could the plaintiffs have been entitled to measure one batch of cotton and deliver another. But the cotton was in fact satisfactorily traced from the screw-house to the ship in both cases, and shown by the person who accompanied it to be the same cotton in the same bales. It was also no doubt shown, on the other hand, that bales could not expand in the transit from the screw-house to the ship, five, six, or seven feet—not more, in fact, than two or three; and the inference deducible from this established physical fact would be, under the circumstances, of a real and actual measurement at the screw-house, that the persons who swore to the identity of the bales must have sworn falsely. But where the measurement has been only by average, both on board and at the screw-house, no such inference can be raised. It may well be that the average measurement in both cases, or at any rate in one or other of them, was based on specimens which were exceptional. Several of the bales exhibited at the screw-house may have measured in fact 58 or 59 feet, and these may have been some of those very bales which came first to hand on board or alongside the ship, and were proved to have been of those dimensions. The plaintiffs themselves did, in fact, make it a part of their case that the average of the bales was 56 or 57 cubic feet when re-shipped on the *Rajpoot*; but I consider this unimportant, as it was admitted on both sides that some expansion always does take place (say two or three feet), and under the contract the bales were to be measured at the screw-house, and were in fact measured and accepted there.

With regard to the remaining 100 bales, a similar process was gone through, with this difference that the measurer was one Koylas Chunder, a sircar, and not the master himself, and it was contended for the defendants that the master himself, being only their agent, could not depute the sircar to make the measurement, unless specially authorized to do so, which he was not; and that therefore the sircar's measurement was not binding on the defendants. This argument is no doubt correct. But what then is the result? Why, that the plaintiffs had 100 bales ready for examination at the screw-house, and defendants had nobody there prepared and authorized to measure them. There is good *primâ facie* evidence that these bales were of the stipulated measurement, and there is absolutely none that points in the contrary direction, for these goods were not alongside at all. The breach with regard to these 100 bales, therefore, was committed by the defendants at an earlier stage than with regard to the first 200 bales. It was contended again that these 100 bales were never tendered, because the boat containing them was never alongside. This would be unimportant if the breach was already committed, as I think it was, by the defendants with regard to them at the screw-house; but I think further, that, with regard to them also, there was sufficient evidence of readiness and willingness on the part of the plaintiffs to deliver on board. Two boat-loads were alongside; and these 100 bales were in a third boat close at hand attached to a buoy: and the master admits that he knew this third boat to contain the plaintiff's cotton. An actual tender is not necessary.

I consider, therefore, that the defendants undertook, by the contract expressed in the shipping order, to accept or refuse after measurement at the screw-house with regard to the whole 300 bales; and that, with regard to the first 200 bales, they did measure and accept there; while, with regard to the 100 bales, they either accepted after measurement in the same way, or else failed altogether to attend at the screw-house for the purpose of measuring goods which were ready there for the purpose of being measured, and which the evidence shows to have been of the required dimensions. In either case the breach of the contract was on the part of the defendants, though at different stages of the transaction. As to the 200 bales, the breach was in refusing to receive on board the same bales which had been measured and accepted at the screw-house. As to the third hundred, it consisted in not being ready and willing to measure at the place appointed. The damages have, I think, been correctly estimated and proved, and I give judgment for plaintiffs for the full sum claimed, and certify the case as a fit one for the employment of an attorney.

As to the points of law which I have been asked by the defendants' counsel to reserve for the opinion of the High Court, they are numbered 8, but are in fact only 7. Of these 7 I shall refer only 3, *viz.*, those numbered 3, 7, and 8. The rest do not arise out of the facts as I have found them; though they would no doubt have arisen, had I found the custom contended for by the plaintiffs to be proved and applicable. These three points are :—

1st.—Whether the defendants' contract in this case binds them to measure at the screw-house, and to accept or refuse the bales according to such measurement, although it afterwards appeared to have been incorrect.

2nd.—Does Narain Doss's representation that the 200 bales were all alike bind the plaintiffs.

3rd.—Are the plaintiffs, on the whole of the facts as found by this Court, entitled to recover.

I think I have found all the facts necessary to enable the High Court to express an opinion as to these points, and my judgment is, of course, contingent on the opinion which the High Court may express on them.

Mr. Evans for the Plaintiffs

Mr. Phillips for the Defendants.

Mr. Evans.—The whole of the dispute is as to the construction to be put on the words "measurement at the screw-house." Plaintiffs contend that the words mean simply that the defendants, or somebody representing them, should come to the screw-house to see that the bales were according to the prescribed measurement, and that (to avoid the worry of repeated measurements) this measurement should take place once for all at the screw-house. This appears to be a reasonable construction, because the tendency of these goods is to increase afterwards in transit, and therefore it was the more necessary to introduce such a stipulation as that into the agreement. In all these cases there is an acceptance which precludes the purchaser from objecting afterwards. In *Macfarlane* v. *Carr* (17 W. R., 244), the defendants agreed to purchase from plaintiffs 2,000 maunds of indigo seed "guaranteed growth of the season 1870-71." Defendants' agent took delivery of 865 maunds after he had full opportunity of examining them ; and it was held that the defendants must be considered to have accepted the 865 maunds as being in accordance with the contract, although they were not really so ; and that though the acceptance was such as to preclude the defendants from objecting that that portion did not comply with the warranty in the contract, yet the plaintiffs, not having delivered the whole quantity contracted for, could not recover for the 865 maunds according to the rate mentioned in the contract, but as upon a new contract according to their value at the time when they were accepted.

Mr. Phillips.—With regard to the contention that re-measurement was excluded by the contract, if your Lordships should think that the learned Judge meant to take evidence outside of the contract, I submit that it was not open to him to do so, and that the case should go back to him to say what the evidence was. The words of the contract were "not exceeding 52 cubic feet measurement at the screw-house ;" and what was meant was "not exceeding 52 cubic feet *in* measurement at the screw-house." *Bird* v. *Smith* (17 L. J., Q. B., 309) is a distinct authority for our contention that the mere fact of our stipulating for a certain size, and at the same time stipulating for a measurement, should not preclude us from afterwards saying that the bales were not of the right size. No doubt that will throw the burden of proof upon us, but that is a burden which we have discharged by showing that they were not of the right size. As to "measurement at the screw-house," that merely points out where they are to be 52 cubic feet in measurement ; and no sufficient reason has been shown why your Lordships should allow such an interpretation that the measurement must be at the screw-house, and that the bales must there be either accepted or rejected.

Mr. Evans (in reply.)—The words "measurement at the screw-house" were inserted in the contract for the purpose of ascertaining the measurement there and for the purpose of precluding re-measurement afterwards. That is the defendants' own contention in the Court below, as stated by the Judge.

The judgment of the High Court was delivered as follows by—

Couch, C. J.—The first question which has been put to us is, whether the defendants' contract in this case binds them to measure at the screw-house, and to accept or refuse the bales according to such measurement, although it afterwards appeared to have been incorrect. The terms of the contract are to be found in the shipping order, which, though addressed by the defendants to the commanding officer of the ship, may be taken to be a note or memorandum of what the contract between the parties was, and the answer to this question depends upon the construction to be put upon the words in the shipping order, "300 bales of cotton not exceeding 52 cubic feet measurement at the screw-house." Now, in putting a construction upon these words, we must remember that this is a mercantile contract, and, like all such contracts, may not be expressed with that fulness of language in which contracts of a formal kind are drawn up. Mercantile contracts are often drawn up in what may be described as an eliptical form. Many expressions are omitted, because the parties are well aware of what is intended by the words used.

We must also look at the surrounding circumstances,—that bales of cotton were liable to expand,—that questions might arise at different periods as to what the precise measurement was,—and that it would be most desirable for persons entering into a contract to convey cotton for freight that there should be no opportunity of having questions raised at any time as to what the measurement was.

Taking these matters into consideration, I think that the fair meaning of the words is that a measurement at the screw-house was to be taken as what was to determine the size of the bales for the purpose of the contract. Even if we insert the word which Mr. Phillips wanted to put in, and read the contract, "not exceeding 52 cubic feet *in* measurement," the question would still be, not exceeding 52 cubic feet in measurement, where? and the answer, I think, is clear, at the screw-house. It shows that the measurement was to be ascertained at the screw-house. And if you read it simply thus, "not exceeding 52 cubic feet: measurement at the screw-house," the meaning is the same, the measurement was to be made there. The construction which I put on this contract, looking at the surrounding circumstances and the mischief which the parties would be desirous to avoid, is that the measurement was to be at the screw-house, and that it was by that measurement that the parties agreed to be bound. Therefore I think that the question which has been put as to whether the contract binds the defendants to measure at the screw-house, and according to that very measurement either to accept or refuse the bales, ought to be answered in the affirmative.

We are then asked, "Does Narain Doss's representation that the 200 bales were all alike bind the plaintiffs?" That question appears to me not to be a question of law at all, or so far as it may be a question of law, that the Judge of the Small Cause Court has conclusively answered it, because he has found that there was no fraud in the statement which Narain Doss made. The master was there, and he had 10 bales examined. He did not think fit to have any more examined, and the statement made by Narain Doss set out in the case, if it was made without fraud, certainly could not affect the plaintiffs. Assuming that they might be liable for a fraudulent representation made by him, he had no authority from them to make such a statement, or to undertake for them that the bales were of that particular size. He was present to see the measurement; and if the statement was honestly made, the plaintiffs could not be liable if it turned out afterwards to be untrue. I do not quite understand what is meant by the question where it says "bound by the representation." His statement would bind them only if it was made with their authority express or implied from his employment.

The third question is, "Are the plaintiffs, on the whole of the facts as found by this Court, entitled to recover?" I must say I cannot approve of this mode of reserving questions for the opinion of this Court. The Judges of the Small Cause Court are authorized to reserve for the opinion of this Court questions of law or equity, but they ought to find the facts themselves. I do not think they are justified in saying to this Court, "Here are the facts," (in the present case they are not put as findings of facts, but merely as a statement of the evidence) "and will you decide for the plaintiff or the defendant?" That is not the way in which questions of law or equity should be referred. But taking the question to be one which we can answer, I think the facts are these:—With regard to the 200 bales, the master, the agent of the shipowners, was present to measure, and had the opportunity offered to him of measuring the whole of the bales. He was content, rightly or wrongly, properly or improperly, to have only 10 bales measured. These came, as stated in the reference, to a trifle more than 52 cubic feet, and he was satisfied. The master representing the shipowners had power to measure the whole of the 200 bales. To say that the trifle over 52 cubic feet was of any consequence would be an unfortunate state of things for parties who enter into contracts of this kind. The master was satisfied and passed those bales, which must be taken as being in accordance with the shipping order. With regard to the remainder, he waived the right to measure; and though he was offered the opportunity of doing so, he refused to measure them. After that I think the defendants could not, at a subsequent period, say, "we will see what the bales measure, and, according to what we find them measure, we will accept or refuse them."

According to my view of the contract, the measurement was to be at the screw-house. The defendants waived the right to measure there, and they could not afterwards insist upon a right to measure.

With regard to the 100 bales, the case is somewhat different. It would seem that the master was not present when these were offered for measurement, but a sircar, one Koylas Chunder, was, and the measurement was made by him. It was objected that the master had no power to delegate the measurement to the sircar. I am by no means certain that this is so. If the master had been present, it would not be expected that he would make the measurement himself, but some other person would measure, and he would look over it.

Notwithstanding the rule that a person cannot delegate to another a power which has been delegated to him, it might be that the master might employ a person to measure without being himself present. It is, however, not necessary to determine that, if the sircar had not power to measure, the plaintiffs did all they were required to do. They offered the 100 bales at the screw-house. The defendants did not think fit to be present either themselves, or by the master, to measure the bales, and they cannot, I think, be allowed to raise the question of measurement at a subsequent period. I think the fair meaning of the contract was, as I have said, that the measurement by which the parties were to be bound was a measurement at the screw-house. If the agent of the defendants was present at that time, and passed the bales as of the proper measurement, or waive the right to measure, and did not measure, the defendants could not, at a subsequent time, go into an enquiry of what was the size of the bales.

I therefore think that the judgment come to by the Judge of the Small Cause Court was right, and that it ought to be confirmed. The plaintiffs will have the costs of reserving this case on the usual scale of costs for cases under Rs. 500 in value.

Markby, J.—I am of the same opinion.

The 16th April 1872.

Present:

The Hon'ble Dwarkanath Mitter and W. Ainslie, *Judges.*

Evidence—Act VIII of 1859, *s.* 170—*Enmity between one Party and his Opponent's Witnesses.*

Case No. 1330 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Pubna, dated the 26*th June* 1871, *reversing a decision of the Moonsiff of that district, dated the* 27*th March* 1871.

Kasheenath Shaha (Plaintiff) *Appellant,*

versus

Dwarkanath Sircar and another (two of the Defendants), *Respondents.*

Baboos Nullit Chunder Sen and *Grish Chunder Mookerjee* for Appellant.

Baboos Debendro Narain Bose and *Mohinee Mohun Roy* for Respondents.

There is nothing in the Code of Civil Procedure or any other law which says that the provisions of s. 170, Act VIII of 1859 apply to those cases only in which the party summoning his opponent is not in a position to prove his case otherwise than by the evidence of that opponent.

Nor can a Judge refuse to rely upon the evidence of witnesses produced by one party, merely because the other party says from beforehand that he and the witnesses are not on good terms.

Mitter, J.—We are of opinion that this case falls within the purview of the case of Eshan Chunder Ghose *v.* Hurish Chunder Banerjee, reported at page 969, Volume XIII, Weekly Reporter. The suit was for possession of a piece of land which the plaintiff claimed by virtue of an alleged *jotedaree* right. The Moonsiff, who heard the case in the first instance, ordered all the defendants to appear and give evidence. Two of them appeared and admitted the title of the plaintiff. The others failed to appear without any lawful excuse, and the Moonsiff gave judgment against them under the provisions of Section 170 of the Civil Procedure Code. The Moonsiff also went into the evidence which had been produced by the plaintiff, and held upon that evidence that the plaintiff was entitled to a decree.

On appeal, the Subordinate Judge has reversed the decision of the Moonsiff upon the ground that the evidence produced by the plaintiff was not sufficient to prove his case, and that the Moonsiff was wrong in applying the provisions of Section 170 to a case of this kind in which the plaintiff did not allege that he could not prove his case otherwise than by the evidence of the defendants. With reference to this latter point the Subordinate Judge observes—"Under these circumstances, the Court below "was not justified in passing judgment "against the defendants on their failure to "appear as witnesses before him, for such "a procedure is only applicable when a "party to a suit refuses to attend and give "evidence though summoned to do so, and "when the party desirous of examining him "is unable to prove his case without his "evidence, and when the matter which he is "unable to establish turns upon such a question of fact as may justly be considered "to be only within the knowledge of the "party who refuses to give evidence." In this case, there is no dispute whatever that the defendants were duly ordered by the Court to appear and give their evidence, and consequently the first portion of the Judge's remark does not appear to be of much importance.

With reference to the other portion it seems clear that there is nothing in the Code of Civil Procedure or any other law that we are aware of, which says that the provisions of Section 170 apply to those cases only in which the party summoning his opponent is not in a position to prove his case otherwise than by the evidence of that opponent, nor is there any law which says that it is in those cases only where the fact to be proved is solely and exclusively within the knowledge of the party summoned to appear, that the Court can apply the provisions of the Section above referred to. This reasoning of the Subordinate Judge appears to be quite erroneous.

We wish further to observe that we are by no means satisfied with the mode in which the Subordinate Judge has dealt with the evidence adduced by the plaintiff. The Subordinate Judge says, with reference to one of the plaintiff's witnesses, that his evidence cannot be relied upon, inasmuch as the defendants had previously mentioned in their written statement that they and the witnesses were not on good terms. Such reasoning appears to us to be manifestly erroneous; otherwise a party may get rid of all his opponent's witnesses by simply saying beforehand that they are not on good terms with him. The Subordinate Judge seems to have wholly overlooked the defendant's persistent and contumacious refusal to give evidence upon the merits of the case; and taking all the circumstances into consideration, we think that the judgment of the Lower Appellate Court ought to be reversed and that of the first Court restored with all costs.

The 16th April 1872.

Present:

The Hon'ble Dwarkanath Mitter and W. Ainslie, *Judges.*

Minors (Custody of)—Act IX of 1861—*Act XVI of* 1868—*Act VI of* 1871—*Appeal—Transfer of Case by Judge to Subordinate Judge.*

Case No. 16 of 1872.

Miscellaneous Appeal from an order passed by the Judge of Mymensingh, dated the 3rd *October* 1871, *reversing an order of the Subordinate Judge of that district, dated the* 25*th March* 1871.

Sonamonee Dossee (Petitioner) *Appellant,*

versus

Joy Doorga Dossee (Opposite Party), *Respondent.*

Baboo Rajendro Nath Bose for Appellant.

No one for Respondent.

HELD that the Judge had not improperly exercised the discretion vested in him by Act IX of 1861, s. 3, in not removing a minor 5½ years old from the custody of his natural mother.

An appeal lies, under Act VI of 1871, to the Judge from an order of the Subordinate Judge passed under Act IX of 1861.

The Judge has power, under Act XVI of 1868, s. 19, to transfer to the Subordinate Judge a case under Act IX of 1861, an application under the latter Act not being a suit.

Mitter, J.—THIS appeal ought to be dismissed. We are by no means prepared to say that the Judge has improperly exercised the discretion vested in him by the 3rd Section of Act IX of 1861. The minor is only 5½ years old; and under all the circumstances of the case, we think the Judge was quite right in holding that it would be improper to remove him from the custody of his natural mother, the respondent.

Another objection taken is that the Judge had no right to entertain the appeal. As the case clearly fell within the provisions of Act VI of 1871, and as that Act clearly provides for an appeal to the Judge, we feel no doubt whatever as to the legality of the Judge's proceedings.

We think that, under Section 19 Act XVI of 1868, the Judge had power to transfer the case to the Subordinate Judge. There is nothing in Act IX of 1861 which says that an application made under that Act is to be considered as an original suit.

The appeal is dismissed but without costs, as the respondent has not appeared.

The 17th April 1872.

Present :

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Act X of 1859; ss. 6 and 7—Right of Occupancy—Evidence—Dakhilas—Jotedaree Right under expired Ijara—Express—Stipulation—Tacit Understanding—Estoppel.

Case No. 27 of 1872.

Regular Appeal from a decision passed by the Moonsiff of Kythee, dated the 7th December 1868.

Golam Panja and others (Defendants), *Appellants,*

versus

Hurish Chunder Ghose (Plaintiff), *Respondent.*

Baboo Komola Kant Sen for Appellants.

Baboo Taruck Nath Sen for Respondent.

Dakhilas are not the only evidence to prove a right of occupancy under Section 6, Act X of 1859.

Per Mitter, J.—The *expiration* of the lease of the *ijaradar* under whom the ryot's possession under a jotedaree right commenced cannot affect the application of that Section.

A tacit understanding that the *ijaradar* should givé up possession on the expiry of his lease, is not an express stipulation within the meaning of Section 7.

Quære.—Whether such an understanding between the zemindar's predecessor and the *ijaradar* can affect the ryot.

Bayley, J.—THIS case was, after remand, converted into a regular appeal; and the only question for determination is whether the defendant has acquired a right of occupancy under Section 6 Act X of 1859. We have heard the evidence and the pleaders, and we are of opinion that the defendant has acquired a right of occupancy under Section 6, Act X of 1859. There are *Dakhilas* filed from 1259 to 1272, with the exception of one year. It is urged that these *Dakhilas* are not attested. Granting they are not, and so far putting them aside, still *Dakhilas* are not the only papers that can prove a right of occupancy. We have the plaintiff's own witnesses proving that he occupied the land at least for a period of above 12 years, and that they had all known the land itself.

We are referred to a case reported in page 15, Volume X, Weekly Reporter, by the respondent in support of his case, but that is altogether a different case. There the plea raised was one of limitation and adverse possession, which is a general plea in bar of any suit brought for possession or proprietary right. But here is a party whose only claim, as far as we are concerned with it, is a right of occupancy. I am of opinion that that right is fully established by the evidence.

I would reverse the judgment of the Lower Court and dismiss the plaintiff's suit with all costs.

Mitter, J.— I am of the same opinion. It has been said that the possession of the defendants commenced under a *jotedaree* right created in their favor by the *ijaradar,* and that the plaintiff is not bound to recognise a possession held under such a right, now that the term of the *ijarah* has come to an end. I think this circumstance cannot affect the application of Section 6 to this case. That Section lays down a particular condition which must be fulfilled in order that a ryot may claim a right of occupancy, that condition being continuous holding as a ryot for a period of 12 years. It is not denied that the defendants have held the disputed land as ryots for that period and upwards, at least it is not denied in the evidence produced by the plaintiff; and that being so, I cannot understand on what ground it can be contended that the defendants are not entitled to the benefit of the Section above referred to.

It is said that there was an implied understanding between the *ijaradar* and the plaintiff's predecessor that the former should give up possession of the lands covered by the *ijarah* on the expiry of the term of his lease. Without, however, expressing any opinion as to how far such an understanding can affect the defendants, it is sufficient to say that this tacit understanding cannot be treated as an *express* stipulation within the meaning of Section 7, *viz.*, an express stipulation to the effect that the defendants in this particular case should not acquire a right of occupancy notwithstanding their continuous possession of the disputed lands for a period of more than 12 years, in the capacity of ryots. It is clear, therefore, that this case is governed by the provisions of Section 6, Act X of 1859.

The 20th April 1872.

Present :

Sir James W. Colvile, Sir Montague E. Smith, and Sir Robert P. Collier, *Judges.*

Hindoo Law of Succession—Impartible Inheritance—First born Son—Priority (of Birth or Marriage)—Status of first Wife—Evidence—Proof of Custom—Admission of Documents.

On Appeal from the High Court at Madras.

Ramalakhmi Ammal

versus

Sivanánantha Perumal Sethurayer.

According to the principles of Hindoo law, when regarded apart from any special custom prevailing in a particular district or family, where there are sons by different wives, priority of birth and not of marriage, certainly as regards the sons by any wives after the first, must determine the succession of an impartible inheritance. Accordingly the son of a third wife, born before the son of the second wife, was held entitled to inherit.

Semble—No just analogy can be established between the *status* of the first wife and that of any subsequent wife, the title of the first wife to special rank and privileges resting upon grounds peculiar to her and which can have no application to others.

It is of the essence of special usages modifying the ordinary law of succession, that they should be ancient and invariable, and that they should be established to be so by clear and unambiguous evidence.

With reference to the laxity prevailing in the Indian Courts in admitting documents, the Privy Council remarked that, whilst it might not be desirable in all cases to apply strict and technical rules to the admissibility of evidence in the Courts in India, the substantial principles on which the authenticity and value of all evidence rest should be observed.

THIS is an appeal from the High Court of Madras in a suit raising the question of the right of succession to an impartible zemindary called Urcadu, in Tinnevelly. The litigants are two sons by different wives of Kolalinga Sethurayer, the late zemindar.

Kolalinga Sethurayer, who was a Hindoo, married three wives. The first, Kanthunathi Ammal, had no child. His other wives were Ramalakshmi Ammal, the mother of Muttee Ramalinga Sethurayer (the appellant) and Vellaithai Perumal Ammal, the mother of Sivananantha Perumal Sethurayer (the respondent).

Although the mother, Ramalakshmi, is appellant as guardian of her son, it will be convenient to speak of him as the appellant, and of the other claimant as the respondent.

The marriages of the two mothers took place on the same day in June 1836, but at different hours, and the priority in time of these marriages was a subject of contest in the suit.

The Courts in India have held that the marriage of the appellant's mother was first solemnized, and that she, therefore, in order of time, was the second wife, and the respondent's mother the third wife of the zemindar.

In the view their Lordships take of this case, it is not necessary to consider the correctness of this finding, and they therefore adopt it in dealing with the present appeal.

It appears that at the date of the marriages the appellant's mother was a child only ten years old, whilst the mother of the respondent was a girl of sixteen. The respondent, as might naturally be expected from the relative ages of the mothers, was born many years before the appellant, and he seeks to recover the zemindary in this suit as the first-born son of the zemindar. The appellant resists his claim on the ground that he, as the son by the earlier marriage, is the rightful heir. The question is thus raised whether the son of the second wife, although born after the son of the third wife, is entitled to inherit; in other words, whether the priority in birth of the sons, or the priority in the marriages of their mothers, both being of the same caste, is to prevail in determining the succession to an impartible zemindary in this district of Madras.

It appears from the pleadings and issues that the respondent, the first-born son, relies on the general Hindoo law of succession, and on the custom of the family which he affirms to be in accordance with it.

The appellant alleges that, by the custom of the district, he is entitled to the succession, and he also denies that the general Hindoo law is in favor of the respondent's claim.

Their Lordships are fully sensible of the importance and justice of giving effect to long established usages existing in particular districts and families in India, but it is of the essence of special usages, modifying the ordinary law of succession that they should be ancient and invariable; and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends.

In the present case their Lordships agree in opinion with the High Court that the appellant has failed to prove the special custom which he undertook to establish.

It appears from the record that, in 1861, during the life of their father the late zemindar, the appellant brought a suit in the Civil Court of Tinnevelly against the present respondent, to have his right to the succession declared. He founded his claim on his usage in the father's zemindary and "other zemindaries." The present respondent then relied, as he still does, on the general Hindoo law, and the usage of the family. The Civil Judge was of opinion that the evidence to support a family usage was insufficient for the purpose, but he thought there was sufficient proof of a usage prevailing amongst the zemindars of the district that the son of the senior wife was to succeed. The decision of this Judge in favor of the present appellant appears to have been reversed on appeal, on the ground that the suit was not maintainable during the life of the father; but it has been necessary to advert to the suit, because the evidence taken in it has by consent been brought into the present suit, and is the only evidence in it.

This evidence consisted, so far as proof of the family usage went, principally of the testimony of the late zemindar himself, who was a party to the declaratory suit, and evidently he is not a trustworthy witness, for whilst in that suit he espoused the cause of the present appellant, and gave evidence of the family usage in his favor, he had some years before, and after both sons were born, given equally strong evidence of a custom the other way in support of the claim of the present respondent. It is obvious that the zemindar's testimony was influenced by his partiality for one son or the other at the time of giving it, and is thus entirely untrustworthy. The other evidence is conflicting and wholly insufficient to establish any family custom. Indeed, in the present suit both the Courts in India have so regarded it.

Then, with respect to the usage of the district, set up by the appellant, the only evidence apart from the conflicting testimony just referred to, which appears on the record, is a statement of certain declarations alleged to have been made by some zemindars under the following circumstances. In the year 1849 the Board of Revenue, acting as the Court of Wards, desiring to know which of the two minor sons of the zemindar of Parayur was to succeed him, requested the Collector of Tinnevelly and Madura to ascertain the rule of succession "as regards sons by different wives," and it appears from the Collector's letter to the Secretary of the Board, that the opinions of twenty zemindars and poligars were collected, copies of which he sent, giving also, at the same time, an abstract of them in his letter. It seems that the Court of Wards acted upon the opinions thus obtained.

The only evidence offered of these opinions was the above letter and abstract of the Collector, and objections were made to its reception in proof of the custom.

Considerable, and perhaps undue, laxity in admitting documents has been sometimes allowed by the Indian Courts; but their Lordships consider that, whilst it may not be desirable, in all cases, to apply strict and technical rules to the admissibility of evidence in the Courts in India, the substantial principles on which the authenticity and value of all evidence rest should be observed. One of these principles is that the best evidence of which the subject is capable ought to be produced, or its absence reasonably accounted for or explained before secondary and inferior evidence is received. There seems to be no reason in this case why the zemindars or some of them might not have been called as witnesses, when, of course, they would have been subject to cross-examination; but not only were none examined, but even their written opinions, as they give them, were not produced. Their Lordships consider, agreeing with the High Court, that the only evidence offered, *viz.*, the Collector's letter and summary, was not properly admissible, and if received, could not be safely relied on as affording clear and unambiguous proof of the existence of an ancient and invariable custom in the district.

The summary of the Collector (if it may be looked at) discloses that the zemindars were not unanimous in their view of the custom; and it further appears that their opinions were given with reference to the succession to a zemindary in a family of a different caste. The late zemindar, who was one of those vouched, differed from the majority, and declared that the eldest son, although by the junior wife, would succeed. It is true that, for the reasons already given, much reliance cannot be placed on his statement, but, so far as it may be of any value, it negatives the alleged custom, at all events as one prevailing in his own caste and zemindary.

It was insisted by the learned counsel for the appellant that the fact that the priority of the marriages of the second and third wives was made a question in the declaratory suit and in this suit, and strongly contested, indicated an impression on the minds of the litigants that a custom existed to the effect alleged by the appellants, for if there were no such custom, the contest as to the priority of the marriages was immaterial. At first sight this seemed to be so. But the inference from it is greatly weakened, if not destroyed, by the consideration that in the declaratory suit brought in the zemindar's lifetime, and to which he was a party, the zemindar himself, contrary to his former view, set up the custom which would give the succession to the appellant, whom he was then supporting, in opposition to the respondent, his eldest son. When the father, from whatever motive, put forward this view of the custom, it was natural that the fact of the priority of the marriages should be made a question in the suit, as well as the nature of the custom.

The attempt on both sides to prove a special custom having failed, it remains to consider what is the general Hindoo Law applicable to this disputed succession.

The case stands in this respect in the same category as that in the appeal relating to the zemindary of Shivagunga, which was decided by this Board in 1868. Their Lordships, in giving judgment in that appeal, say: "The zemindary is in the nature of a principality, impartible, and capable of enjoyment by only one member of a family at a time; but whatever suggestions of a special custom of descent may heretofore have been made (and there are traces of such in the proceedings) the rule of succession to it is now admitted to be that of the general Hindoo law prevalent in that part of India, with such qualifications only as flow from the impartible character of the subject." Such, also, must be the rule of succession to be applied in the case now under appeal.

The High Court, in their judgment in the present case, declare that "no work of authority or decision" had been cited or found directly giving the rule of descent. That this should be so may, perhaps, be explained by the fact that succession by primogeniture is the rare exception to the ordinary rule in Hindoo families, taking place only upon the descent of some impartible subject, as a Raj or office, and that in most cases of the kind there has probably been found some local or family usage regulating such descent.

If, however, it really be that the rule of succession is not directly declared in books of authority, or in decided cases, then it must be deduced from those rules which are settled, and the principles on which they are founded.

The learned counsel on both sides referred to various texts with this view; and it appears to their Lordships that many of these supply authority from which the law may, with reasonable certainty, be inferred and declared.

One great rule of religion binding upon every Hindoo is the duty of having a son, not only for the sake of the spiritual benefits he obtains for himself by his birth, but because he thereby discharges the pious debt he owes to his ancestors. And, as a consequence naturally flowing from this law, the first-born son is, throughout the books of authority, treated as pre-eminent amongst his brothers, and held to be entitled to many special privileges.

It will be found, from numerous authorities and instances, that, although the father's property, by the general rule, descends upon all his sons, yet, whenever it becomes necessary to make a distinction, precedence is given to the first-born.

Thus, Menu, after laying down the cardinal rule of succession that brothers divide the paternal property among them, adds, "The eldest brother may take entire possession of the patrimony; and the others may live under him as they lived under their father, unless they choose to be separated" (c. 9, s. 105).

"By the eldest, at the moment of his birth, the father having begotten a son, discharges a debt to his own progenitors. The eldest son, therefore, ought, before partition, to manage the whole patrimony"(c 9, s, 106).

"That son alone, by whose birth alone he discharges his debt, and through whom he attains immortality, was begotten from a sense of duty" (c 9, s. 107). See also s. 137, 138.

Many of the precepts of Menu have been undoubtedly altered and modified by modern law and usage; but his authority may properly be referred to when it is necessary to resort to first principles in order to ascertain and declare the law. The general doctrines above alluded to are also found in other old authorities, and are treated as part of the foundation of the Hindoo law of succession by modern writers and compilers. (See 1 "Strange's Hindoo Law," 192, Col. Dig., Book V.).

It is true that these doctrines occur in passages treating of divisible inheritances; but the presumption from them is irresistible, that in the case of an inheritance which is from its nature indivisible, and can therefore go to one only of several sons, the first-born by reason of his general pre-eminence, should be preferred to his younger brother.

It was not disputed that this would be so in the case of several sons by the same mother; but it was contended that, where there were sons by different wives, the priority of marriage and not of birth was to be regarded. No authority whatever was cited to support this contention, certainly none as regards the sons by any wives after the first. On the contrary, there is a good deal of authority pointing to the conclusion that there is no distinction, except seniority of birth, amongst the sons of wives of the same caste and class.

Thus Menu says, "a younger son being born of a first marriage after an elder son had been born of a wife last married *but of a lower class*, it may be a doubt *in that case* how the division shall be made." (C. 9, sec. 123.)

The doubt thus suggested whether, even in the case of a wife of a lower class, there would be inequality of division amongst the sons, raises a strong presumption that there would be none where the mothers were of the same class. But the matter does not rest on presumption, for the 125th Section runs thus:—

"As between sons borne of wives equal in their class, and without any other distinction, there can be no seniority in right of the mother; *but the seniority ordained by law is according to birth.*"

It is true the writer is in this section treating of partible successions, but he is at the same time proclaiming the privileges to which the eldest son is entitled, and one of them he had just declared in a preceding Section (119) thus:—

"Let them never divide the value of a single goat or sheep; a single goat or sheep, remaining after an equal distribution, belongs to the first-born."

Now, when it is said that the single goat or sheep is to belong to one son, it is apparently for the same reason that a zemindary so descends, *viz.*, that the subject is in its nature impartible; and, therefore, the rule that is laid down with reference to one impartible subject, *viz.*, that "it belongs to the first-born," appears by reasonable and just implication to be the rule applicable to all such subjects. And which of several sons is to be deemed the first-born is declared by Section 125 above cited, "there can be no seniority in right of the mother, but the seniority ordained by law is according to birth."

It appears to their Lordships that the rules just cited approach very nearly to a distinct declaration of the general Hindoo law upon the question, when regarded apart from any special custom prevailing in a particular district or family.

Great reliance was placed, during the argument, on the admission supposed to have been made, that the son of the first wife would succeed before an elder brother by a subsequent wife, and it was contended that, by analogy, the son of the second wife must be entitled to the like precedence over the son of the third. There are, undoubtedly, authorities which show that the first wife occupies a position of honour and precedence above all others, but it is not necessary for their Lordships to decide whether the admission made in this case is in accordance with general Hindoo law; for supposing the law to be so, no just analogy can be established between the *status* of the first wife and that of any subsequent wife. Her title to special rank and privileges rests upon grounds peculiar to the first wife, and which can have no application to others. (See 1 Strange's Hindoo Law, pp. 55 and 56). The reasons upon which she alone, of all the wives, is entitled to peculiar honour and privileges, rather point to the conclusion that the wives subsequently married, if of the same caste and class, are on an equal footing.

It is right to observe that, if the decision had to rest only upon reasons of policy and convenience, these reasons would seem greatly to preponderate in favor of the right of the first-born son. The inheritances of Hindoos which descend on a single heir, are almost entirely confined to zemindaries, in the nature of a Raj, and to offices (see "Norton's Leading Cases," part I, p. 278), and it is obviously in accordance with reason and convenience that such successions should devolve upon the son who would, in natural course, first reach manhood, and be capable of discharging the duties attaching to inheritances of this kind. But their Lordships do not find it necessary to place their decision on these grounds; they are of opinion, that upon the principles of law deducible from the authorities, the judgment of the High Court is correct, and ought to be upheld.

It appears that the decision under appeal has been followed by the High Court of Bombay (Bhujangra bin Ghorpade against Malojira bin Ghorpade, 5 Bombay High Court Reports, 161).

Their Lordships are glad that they are able to come to a conclusion which will not disturb the rule of succession declared by the concurrent judgments of the High Court in two Presidencies; and they will, in this case, humbly advise Her Majesty to affirm the judgment of the High Court of Madras and to dismiss this appeal with costs.

The 20th April 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Settlement after Resumption—Title of Purchaser—Opinion of Deputy Collector—Possession—Limitation.

Case No. 1826 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Sylhet, dated the 22nd August 1871, *reversing a decision of the Moonsiff of Parkool, dated the 29th June* 1870.

Shib Ram Doss and another (Defendants), *Appellants,*

versus

Sudanund Surmah (Plaintiff), *Respondent.*

Baboo Womesh Chunder Banerjee for Appellants.

Baboo Sreenath Banerjee for Respondent.

The title of the purchaser of an estate settled by Government after resumption must depend upon the resumption decree.

Thus the opinion of a Deputy Collector to the Resumption and Settlement Officers that certain lands belonged to an estate settled by Government in 1844 after resumption, was held to give the purchaser of that estate from Government no right to disturb the uninterrupted possession of defendants at least from 1842, where there was an express finding by the first Court that the lands in question were not covered by the resumption decree, and it also appeared that the opinion of the Deputy Collector had notwithstanding become a dead letter.

Any special law of limitation laid down to protect the rights of Government, cannot have any bearing on the determination of a question of proprietary right between two neighbouring landholders.

Mitter, J.—THE points to be determined in this case were clearly indicated in the previous order of remand, particularly in the concluding part of that order. The Subordinate Judge has now found upon the evidence that neither the party with whom the first settlement was made in 1844, nor the Government, nor the plaintiff who is a purchaser from Government, has been in possession of the disputed lands at any time prior to the institution of this suit. The Subordinate Judge has also found as a fact on the evidence that the lands are not covered by the resumption decree on the basis of which the settlement of 1844 was made. But notwithstanding these two findings, the Subordinate Judge relying upon a proceeding of the Deputy Collector, Baboo Gobind Pershad Pundit, bearing date the 31st August 1842, in which the said officer, acting as a mere ministerial Revenue officer, expressed an opinion that the lands in question were covered by the resumption decree, has decreed the claim of the plaintiff, holding, as he says towards the latter part of his judgment, that the disputed lands belong to the talook of which the plaintiff is the purchaser, and that it would therefore be hard upon the plaintiff to deprive him of those lands although the defendants have been in uninterrupted possession thereof at least from before the year 1842. This conclusion of the Subordinate Judge appears to us to be clearly erroneous in law. Without entering into any question as to the applicability of the law of limitation, it is sufficient to say that the finding of the Subordinate Judge to the effect that the disputed lands are not covered by the resumption decree is fatal to the plaintiff's case. The opinion expressed by the Deputy Collector, Baboo Gobind Pershad Pundit, in his proceeding of 1842, an opinion which has never been acted upon down to the present moment, cannot in our opinion give to the plaintiff any right to disturb the long and uninterrupted possession held by the defendants. The plaintiff is the purchaser of an estate which was settled by the Government after resumption, and his title therefore must depend upon the resumption decree. The question whether the disputed lands are covered by that decree or not was not a question which the Deputy Collector, Baboo Gobind Pershad Pundit, had authority to determine between the parties except as a ministerial officer, his duty merely being to prepare papers and express opinion which he had to supply to the resumption and settlement officers. But be that as it may, the opinion of the Deputy Collector has substantially become a dead letter, inasmuch as it has never been acted up by the Government nor has the possession of the defendants been interfered with by reason of that opinion, and it would, therefore be unjust to allow the plaintiff on the strength of the said opinion to eject the defendants after the expiration of this long period of time. The Subordinate Judge says in one part of his judgment that, as 60 years have not elapsed from the date of the decree, it cannot be said that the rights of Government have been barred by limitation. But the Subordinate Judge had not to determine any question with reference to any public right on behalf of Government. What he had to determine was a question of proprietary right between two neighbouring landholders, and no special law of limitation laid down by the legislature for the protection of the rights of Government can have any possible bearing upon the determination of that question.

For the above reasons, we reverse the decision of the Subordinate Judge and dismiss this suit with all costs against the plaintiff.

The 20th April 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Enhancement—Act X of 1859, *s.* 17, *cl.* 3*—Evidence (alleged Excess and Rate).*

Cases Nos. 26 to 40 of 1872.

Special Appeals from a decision passed by the Subordinate Judge of Rungpore, dated the 11*th July* 1871, *affirming a decision of the Officiating Moonsiff of Bograh, dated the* 28*th January* 1871.

Nubo Kishore Mundul (Plaintiff), *Appellant,*

versus

Fukeer Paramanick and others (Defendants), *Respondents.*

Baboo Kalee Kishen Sen for Appellant,

Boboo Greeja Sunkur Mojoomdar for Respondents.

In order to maintain a suit for enhancement on the ground mentioned in Clause 3, Section 17, Act X of 1859, it is necessary to prove the existence of the alleged *excess* and the *rate* at which such excess land ought to be assessed.

Mitter, J.—These were suits for enhancement of rent, the ground of enhancement being that mentioned in the 3rd Clause of Section 17, Act X of 1859. In order to maintain an action of this description, it is necessary for the plaintiff, *firstly*, to prove the existence of the alleged *excess* by showing the quantity of land for which the ryot had formerly paid his rent and the quantity now in his occupation; and, *secondly*, to prove the *rate* at which such excess lands ought to be assessed. The Lower Appellate Court has found upon the evidence that the plaintiff has failed to prove the rate. It is urged that the Lower Appellate Court ought to have determined the question as to whether the defendant was in possession of the excess quantity alleged by the plaintiff. But assuming that excess to be as much as it is represented to be by the special appellant, it is still clear that the plaintiff cannot succeed in this suit. He is seeking to enhance the defendant's rent from Rs. 36 to Rs. 49. But it has been found by the Ameen on measurement that the lands in the possession of the defendant were assessable at Rs. 18 only. The alleged difference in the length of the measurement rod cannot possibly make up the difference between the 18 rupees thus found by the Ameen and the 49 rupees claimed by the plaintiff. It is, therefore, clear that the rate had to be proved, and consequently the decision arrived at by the Lower Appellate Court is correct, and that these special appeals must be dismissed with costs.

The 20th April 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Evidence—Using Decree to explain Inconsistency—Non-filing of Decree in First Court—Reversal of Judgment.

Case No. 1384 of 1871.

Special Appeal from a decision passed by the Subordinate Judge of Sylhet, dated the 5th July 1871, *reversing a decision of the Moonsiff of Russoolgunge, dated the* 30*th January* 1871.

Radhanath Doss (one of the Defendants), *Appellant,*

versus

Khellut Chunder Ghose (Plaintiff), *Respondent.*

Baboo Bama Churn Banerjee for Appellant.

Baboos Romesh Chunder Mitter and *Rash Beharee Ghose* for Respondent.

Held that the Subordinate Judge was quite justified in using a decree between other parties to explain an apparent inconsistency between certain statements in the plaint and in the evidence of the plaintiff's witnesses, on the ground of which inconsistency the Moonsiff had rejected that evidence; and that the non-filing of this decree in the first Court was a matter entirely within the discretion of the Judge and ought not to be made a ground for reversing a judgment.

Mitter, J.—THIS seems to be a very clear case. The Subordinate Judge was quite justified in using the decree of 1868 so far as it showed that the previous putneedar not being in possession of his putnee tenure, sued for recovery of possession and got a decree on the 9th July 1862, against the zemindar from whom his title was derived. The Subordinate Judge has evidently used this document in order to explain an alleged inconsistency which apparently existed between certain statements made in the plaint, and in the evidence of the plaintiff's witnesses, on the ground of which inconsistency the Moonsiff had rejected that evidence; and we think that in so doing the Subordinate Judge was quite right both in law and in fact.

The other objection taken is that this decree was not filed in the first Court. But this was a matter entirely within the discretion of the Subordinate Judge, and irrespective of any question as to whether he has exercised that discretion properly or not, it appears to have been settled by a decision of the Privy Council that an objection of this sort ought not to be made a ground for reversing a judgment.

We further add that the Subordinate Judge was quite justified in admitting the document in question which cleared up a supposed difficulty which the Moonsiff had found in decreeing the plaintiff's claim which was otherwise proved. The Subordinate Judge has gone thoroughly into the evidence, and come to his conclusion of fact. We have, therefore, no legal reason in special appeal to disturb that conclusion.

The appeal is dismissed with costs.

The 22nd April 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Onus Probandi—Compromise—Exchange—Evidence.

Case No. 958 of 1871.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 22nd March 1871, *reversing a decision of the Subordinate Judge of that district, dated the 20th December* 1869.

Dhunraj Roy and others (Defendants), *Appellants,*

versus

Mussamut Chundrabutty Kooeree (Plaintiff), *Respondent.*

Baboo Chunder Madhub Ghose for Appellants.

Mr. C. Gregory and *Baboo Hem Chunder Banerjee* for Respondent.

Where a deed of compromise clearly showed that the lands granted to the plaintiff were in exchange for the alleged *khoodkasht* and *khamut* lands of her father, HELD that the *onus* was not on the defendants to prove the fact of the exchange, but on the plaintiff to start her case by some *primâ facie* evidence.

Mitter, J.—WE think that this case ought to be sent back to the Lower Appellate Court for a fresh decision on the merits. It seems to be quite clear that the Judge has misconstrued the deed of compromise referred to in his judgment. The words "*be was*" in that document clearly shew that the lands granted to the plaintiff by the factory were granted to her in exchange of the original *khoodkasht* or *khamut* lands of her father. The Judge says, "looking at all these facts and bearing in mind that there is no evidence whatever "of any overtures of a transfer of any lands "or any reason assigned for such transfer, or "of Jankee Ram's *khamut* being situated "elsewhere, I conclude there was no such "transfer and the 28 beegahs 3 cottahs "12 D. refer to Jankee Ram's original *khood*-"*khast* lands" The meaning of the words "*be was*" is obvious, *viz.*, *be* (in) *was* (exchange), and it was not for the defendant to give any proof of the fact of the exchange. But it is upon the defendant's failure to give such proof that the Judge finds that there was no exchange at all. This error in the decision of the Judge appears to have produced an error in the decision of the case on the merits, and we therefore remand the case to the Lower Appellate Court for a fresh trial.

We wish further to remark that the burden of proof in this case is primarily on the plaintiff, and that it lies on her in the first instance to start her case by some *primâ facie* evidence. We do not mean to say that the whole evidence on both sides should not be gone through in estimating the value of the evidence given by the plaintiff. On the contrary, it is only by strictly observing this rule that we can hope to arrive at a satisfactory conclusion on a disputed question of fact. Of course, if the plaintiff can prove that the lands now sued for by her are identical with those mentioned in the pottah granted to her by the factory, the deed of compromise above referred to would be very strong evidence in support of her right.

The 22nd April 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Mortgage—Covenant against subsequent Incumbrance—Lease—Assignment of Rent.

Case No. 952 of 1871.

Special Appeal from a decision passed by the Officiating Judge of Bhaugulpore, dated the 2nd June 1871, *affirming a decision of the Subordinate Judge of that district, dated the 30th May* 1870.

Gossain Mungul Doss (Defendant), *Appellant,*

versus

Rughoonath Sahoy and others (Plaintiffs), *Respondents.*

Mr. C. Gregory for Appellant.

Baboo Nil Madhub Sen for Respondents.

The lands in suit having been mortgaged to plaintiff under a bond which covenanted that, until the whole debt due under the bond was not paid off, the mortgagor should not create any new incumbrance upon the mortgaged property, HELD that the mortgagor had no right, under the terms of the mortgage-deed, to grant a subsequent lease to the defendant in consideration of a loan upon a bond, the rents being assigned over in liquidation of the debt, and that plaintiff's prior mortgage must prevail over defendant's lease.

Bayley, J.—WE think this special appeal must be dismissed with costs.

It is admitted that the plaintiff is the prior mortgagee to whom the lands in suit were mortgaged under a bond which covenanted that, until the whole debt due under the bond were not paid off, the mortgagor should not create any incumbrance upon the property so mortgaged by him.

The plaintiff's allegation is that having obtained a decree on the bond, on his attempting to take possession of the lands, he was opposed by the defendant who set up a lease from the mortgagor subsequent to the date of his (plaintiff's) mortgage.

The answer of the defendant is that he is a lessee from the plaintiff's mortgagor who had a perfect right to give him that lease; that he is quite ready to pay the plaintiff rent according to the terms of his lease; that the plaintiff has no right to obtain *khas* possession so long as defendant's lease continues, and that the plaintiff has no cause of action.

Both the Lower Courts have given the plaintiff a decree on the ground that his mortgagor had no right under the terms of the mortgage-deed to create the incumbrance which he did by giving the lease to the defendant, which lease, the Courts held, was of the nature of an usufructuary mortgage.

In special appeal the only contention of the special appellant pressed before us is that the lease to the defendant was a simple lease and not of the character of a second mortgage.

I am of opinion that the lease is not a simple lease. It was a lease given to the defendant in consequence of a loan advanced by him upon a bond and where the rents were assigned over in liquidation of the debt. The plaintiff's mortgagor under the terms of the mortgage-deed had no right to create *such* a lease, and it follows therefore that the title of the plaintiff, the prior mortgagee, must prevail as against that of the defendant.

The judgment of the Lower Courts appear to me to be quite correct, and I would therefore dismiss this special appeal with costs.

Mitter, J.—I am of the same opinion. After the mortgage all that remained to the mortgagor was the mere equity of redemption, and every title created by him subsequent to that date must cease with the cessation of that right, so far as the mortgagor or persons deriving their title through him are concerned. I give no opinion as to the nature of the deed relied upon by the defendant.

The 22nd April 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Minor (Death of)—Court of Wards (Representative Power of)—Act IV of 1870, *B. C. s.* 79.

Case No. 226 of 1871.

Regular Appeal from a decision passed by the Deputy Commissioner of Hazareebagh, dated the 27th June 1871.

Mussamut Soomungul Kooer (Defendant), *Appellant,*

versus

The Court of Wards, on behalf of the Ramgurh Raj (Plaintiff), *Respondent.*

Baboos Mokesh Chunder Chowdhry and *Gopal Chunder Mookerjee* for Appellant.

Baboo Unnoda Pershad Banerjee for Respondent.

Held, with reference as well to s. 79, Act IV of 1870, B. C., as to the justice and equity of the case, that the power of the Court of Wards to represent the estate or bring a suit on behalf of a minor, does not cease with the death of the minor

Kemp, J.—The defendant is the appellant in this case. The facts of the case are very clearly stated in the decision of the Deputy Commissioner of Hazareebagh, and we do not think it necessary to repeat them here. The issues laid down by the Court below seem to embrace all the points at issue in the case. The first point that was decided, and a very important point, was whether the original grant, for it was admitted that there was a grant, was made to Purbul Singh, or to a more remote ancestor Bishen Dutt Roy. Upon this point the Deputy Commissioner, after taking into consideration the nature of the former litigation as disclosed in the decision passed in 1814, as well as the probabilities of the case, and the evidence of the witnesses, was of opinion that the grant was made to Purbul Singh. The next point was whether, after the death of Omrao Singh, the properties granted to Purbul Singh lapsed, and were resumed by the then Maharajah, and subsequently a portion of them were granted as maintenance to the widow and mother of Omrao Singh. On this point, the Deputy Commissioner, although he was of opinion that the evidence on the part of the plaintiff was somewhat weak, on the whole he was of opinion that the villages originally granted were resumed, and a portion of them, namely, the villages in dispute, were given to the widow and mother of Omrao Singh, to enjoy during their lifetime, and that on the death of the widow, which took place in 1867, the plaintiff, the Court of Wards representing the Ramgurh estate, was entitled to possession. A decree was, therefore, passed in favor of the plaintiff for possession of the properties in dispute; the defendant paying mesne profits Rs. 675, with costs.

A preliminary objection was taken by the appellant, an objection which was not raised in the Court below, to the effect that, as the Ramgurh Raj came into the hands of the Court of Wards on account of the minority of the late infant Maharajah Triloke Nath Singh, the power to represent that estate on the part of the Court of Wards ceased with the death of the infant; that the continued possession of the Raj by the Court of Wards is a mere accident arising from the circumstance of the title of the several claimants to that Raj not having yet been finally determined that the possession of the Court of Wards is that of a stake-holder; and that in such a capacity the Court of Wards has no right to institute a suit of this description.

On the merits, it is contended that there is no reliable evidence that any part of the grant was resumed by any of the former Rajahs, and that there is no evidence of a re-grant for life to the defendant or to the mother and widow of Omrao Singh.

With reference to the first point, it was, as already observed, not taken below; and as contended by Baboo Unnoda Pershad Banerjee for the respondent, had it been so taken, he would have been in a position to have met it by showing that the Court of Wards had authority for bringing the suit. It appears that this suit was brought after the death of the minor; but that at the time it was brought, there was a contention, which is still going on, for the Ramgurh Raj, between the mother of the late Rajah, a *sapinda*, and a sister's son. As the case at present stands, the *sapinda* has succeeded in this Court, but an appeal is now pending before Her Majesty's Privy Council, and it appears that the party who has obtained a decree in this Court has not yet taken out execution. The Court of Wards on the death of the minor remained in possession of the estate, and was directed by a competent Court so to remain in possession until an order for making over possession and management of the estate to the proper party was passed by a competent Court.

Under Section 79, Act IV of 1870, B. C., it is enacted that if, on the death of any ward, the succession to his property or any part thereof be in dispute, it shall be competent to the Court, if it think fit, to continue the charge and management of such property or part thereof under the provisions of this Act until an order for making over the possession and management of such estate shall have been made by a competent Court. Therefore there is law in favor of the suit being brought by the Court of Wards. We also think, looking to the justice of the case, that the Court of Wards were right in bringing this suit. They are in charge of the estate, for, whoever may be declared the owner, they are answerable for the proper management of that estate, they are acting entirely for the benefit of the estate, and this is a claim which might well run out under the statute of limitation if it were allowed to stand over while the several claimants were disputing for the Raj. Under all these circumstances, whether under the law, or looking to the justice and equity of the case, we think that this suit has been properly brought, and we reject this preliminary objection.

Coming now to the merits of the case, it is clear that a grant of 13 villages was originally made by some former Rajah. There is no very distinct evidence whether this grant was made to Bishen Dutt, the remote ancestor, or to Purbul Singh, but we think with the Deputy Commissioner that the litigation of 1814 and all the probabilities of the case, taken with the evidence such as it is, point to the conclusion which he has arrived at, namely, that the grant was made to Purbul Singh. Looking to the genealogical tree put in by the defendant, which traces the family as far back as Bishen Dutt Roy, it is very clear that, if these 13 villages had been granted to Bishen Dutt Roy, it is not easy to conceive how the whole of these 13 villages descended to Omrao Singh, who is the descendant of a younger member of the family, namely, Purbul Singh.

On the question of resumption, it appears to us that the statement made by the defendant is altogether unsupported by evidence, and is also inconsistent with the probabilities of the case. Her story is that Omrao Singh during his lifetime resigned 11 out of the 13 mouzahs to the zemindar, because he was unable to pay the rent of the same. Setting aside the fact that this has not been proved, and that it could, if true, have been easily proved, as observed by the Deputy Commissioner, it is highly improbable, looking to the previous litigation in 1814 between the father and uncle of Omrao Singh and the Rajah's manager, that any such resignation could have been made; but, be that as it may, the allegation is entirely without proof.

The theory set up by the plaintiff that, on the death of Omrao Singh, the last male heir of Purbul Singh, the Rajah resumed these properties, and then, as a matter of compassion, made a life-grant to the widows of Nirunjun Singh and Omrao Singh, is very probable, and is supported to some extent by the evidence. There is the evidence of some of the Rajah's witnesses to the fact of the grant having been made as maintenance to the widows, and the Lower Court, although admitting that the case has not been very clearly proved by the Court of Wards is of opinion that there is sufficient *primâ facie* evidence in support of the plaintiff's claim, and we think that, in the absence of any evidence on the part of the defendant as to the relinquishment by Omrao Singh of these mouzahs because he was unable to pay rent, and also looking to the fact that the Court of Wards, representing the owner of the estate whoever he may be declared to be, would be entitled to receive the rent of all the lands of that estate, unless the defendant, who is in possession of the lands in dispute, can show that she is entitled by some grant to hold these lands, the plaintiff must succeed in the suit. The defendant, as the widow of Nirunjun Singh is holding one-half of this estate for her life and for her maintenance; but on the death of the widow and mother of Omrao Singh who were holding the disputed properties as maintenance from the Rajah, we think that the owner of the estate, who is now represented by the Court of Wards, is entitled to recover possession.

We, therefore, confirm the decision of the Lower Court, and dismiss this appeal with costs, payable by the appellant.

The 23rd April 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Certificate—Act XXVII of 1860—*Party in Possession—Full Sister's Son—Half Brother.*

Case No. 57 of 1872.

Miscellaneous Appeal from an order passed by the Judge of Bhaugulpore, dated the 22nd November 1871.

Shaikh Lall Mahomed (Petitioner), *Appellant,*

versus

Buzlool Hossein (Opposite Party), *Respondent.*

Moonshee Mahomed Yusoof for Appellant.

Mr. R. E. Twidale and *Baboo Romanath Bose* for Respondent.

Held that the certificate in this case was given to the party best entitled to it with reference to the object of Act XXVII of 1860, i.e. the deceased's full sister's son, who was the party in possession, in preference to the deceased's half brother.

Bayley, J.—We think this appeal must be dismissed with costs.

The certificate has been given to the party in possession, who claimed it upon the ground of a devise from the deceased. It is urged in appeal that the appellant is the half brother of the deceased, and as such entitled to an 8-anna share of his property, the only other heir being the full sister, who does not contest the special appellant's claim, and the sister's son Buzlool Hossein, who, according to Baillie's Digest of the Mahomedan Law, page 691, only comes after these heirs, has no right to contest the appellant's claim.

We think that the certificate has been given to the party best entitled to it with reference to the object of Act XXVII of 1860, *viz.*, to collect the debts due from the deceased, and to give acquittances therefor, the respondent Buzlool Hossein being the sister's son and the party in possession.

On the whole, we see no reason, for the purposes of Act XXVII of 1860, to disturb the order of the Lower Court, and we, therefore dismiss this appeal with costs.

The 23rd April 1872.

Present :

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Act VIII of 1859, *s.* 170 (*when operative*)—*Non-attendance and Refusal of Defendant to give Evidence.*

Case No. 960 of 1871.

Special Appeal from a decision passed by the Officiating Judge of Bhaugulpore, dated the 8th June 1871, *affirming a decision of the Subordinate Judge of that district, dated the 12th August* 1870.

Syud Shah Aleh Ahmed Sajjadanusheen (Defendant), *Appellant,*

versus

Bebee Nuseebun (Plaintiff), *Respondent.*

Messrs. Piffard and *R. E. Twidale* for Appellant.

Mr. R. T. Allan for Respondent.

Where the plaintiff gave no evidence at all in support of her case, it was held not just to put in force against the defendant who, when summoned to appear and give evidence, deliberately declined to do so, the stringent provisions of Section 170 Act VIII of 1859. The exercise of the discretion conferred by that Section must be reasonable and judicial.

Bayley, J.—In this case the plaintiff sued for an account of profits (*hissab-i-monafa*) in a certain endowment in which she alleged she held a certain share, and the defendant was the *sajjadanusheen*, or the party entrusted with the management of the endowment.

The answer of the defendant was that he was not liable to the plaintiff for the amount claimed ; that certain amounts due to her had been paid ; that the suit was barred by limitation ; and that the plaintiff was not entitled to the share claimed by her.

Both the Lower Courts have given the plaintiff a decree, and the ground of their decisions is that, as the defendant was summoned to appear and give evidence, and deliberately declined to do so, Section 170 of Act VIII of 1859 warranted a decree in favor of the plaintiff, and a verdict against the defendant.

In special appeal by the defendant, two objections have been taken before us here to the judgment of the Lower Appellate Court : *firstly*, that Section 170 should only be operative as against a defendant when the plaintiff has made out a case on evidence which the defendant has to answer, and that here there is no such evidence adduced by the plaintiff ; and, *secondly*, that the Lower Appellate Court should not have applied Section 170 to this case, without first considering whether, in the face of the plaintiff's claim, limitation did not bar the suit.

On the other hand, it is contended for the special respondent that in this case no one but the defendant, who was the manager of the endowment and had therefore full knowledge of and command over the affairs of that endowment, could be so properly cited, as he was the best witness ; further, that, as he persistently refused to appear and give evidence, the Lower Courts were quite justified in giving a verdict against him.

Now, there may no doubt be cases of a peculiar kind where the application of Section 170 at once against the defendant would be quite justifiable ; but in this case there were other shareholders, equally sharing in the profits of the endowment who could have been called to give their evidence, or failing that, there were again other means open to the plaintiff to make out a *primâ facie* case of her co-parceny right which the defendant could be called to answer. We do not think that, where the plaintiff here has given *no* evidence at all in support of her case, it would be just to put in force the stringent provisions of Section 170 against the defendant where the plaintiff might, if she chose, have started her case on evidence, and did not do so.

While, on the one hand, in Section 170, the word "may" makes it clearly discretionary with the Court to apply those provisions or not, still, on the other hand, the exercise of that discretion must be reasonable and judicial, otherwise any plaintiff, without producing any evidence whatever in support of his cause, might cause his adversary to be called to give evidence, and on his failure to do so might claim a verdict under Section 170. This, too, might be when the application of Section 170 against a defendant runs counter to strong, conscientious, and honest prejudices of a party without plaintiff having any case at all.

Recurring to the facts of *this* case, we find the plaintiff has not produced any evidence to start his case, and had other means than the evidence of the defendant for this purpose. Therefore, we think, it would here be unjust to apply the stringent provisions of Section 170 as against the defendant without calling upon the plaintiff to make out a case which the defendant may reasonably be called to answer.

It has been urged that the plaintiff, being a *purdonusheen* woman, could not give her own evidence in Court; but the same opportunity which she had of verifying and speaking to the truth of the substance of her claim as laid in the plaint, she also had to depose in her own case, or she might, if she chose, be examined by commission, without the least prejudice to her position as a lady of rank.

In regard to the plea of limitation, we think there is some finding by the Lower Appellate Court, where it says that the plaintiff's claim is not barred by limitation, because it falls not under Clause 9 of Section 1, Act XIV of 1859, or breach of contract clause, but under the general Clause 16. That finding does not answer all the questions raised by the defendant, and it might be a question as to whether Clause 16 would apply at all; but as the case goes back on remand to the Lower Appellate Court, that Court will consider the date on which the cause of action arose, and also whether there was a trusteeship on the part of the defendant, and taking these and all the other facts into consideration, to pass such a decision in the case as may appear to be just and proper.

We think that the costs of this special appeal ought to be paid by the special appellant, who, when he sought to have his case adjudicated in Court, was bound to give every assistance to that Court, and refused to do so.

The 23rd April 1872.

Present :

The Hon'ble Louis S. Jackson and W. Markby,
Judges.

Joint Hindoo Family—Presumption.

Case No. 214 of 1871.

Regular Appeal from a decision passed by the First Subordinate Judge of 24-Pergunnahs, dated the 28th July 1871.

Hurish Chunder Mookerjee (Defendant),
Appellant,

versus

Mokhoda Debia (Plaintiff), *Respondent.*

Baboos Romesh Chunder Mitter and *Ashootosh Dhur* for Appellant.

Baboos Unnoda Pershaud Banerjee and *Hem Chunder Banerjee* for Respondent.

The fact of one brother (plaintiff's husband) remitting certain sums of money to another brother (defendant), and no receipts being taken for them, and no accountability being stated, leads to the conclusion of the brothers being joint in property and in mess.

Per Markby, J.—So also the fact of the two brothers being sued jointly upon a bond given by both, and of defendant discharging the debt alone, raises the presumption that the defendant discharged the debt out of the joint funds.

Jackson, J.—We think in this case that we ought not to trouble the vakeel of the respondent. The decree of the Lower Court which is founded on the evidence is manifestly just.

The facts of the case appear to take it quite beyond the region of the precedent to which reference has been made (in which the question arose whether the mere fact of commensality should lead to the presumption of joint acquisition of property); because the facts with which we have to deal here go very much beyond that.

It is admitted in the first place that the three brothers, namely, the plaintiff's husband Greesh, the principal defendant Hurish, and the third Mohesh, started with the possession of some small ancestral property in land. It also appears that all three brothers, but more especially Greesh, the plaintiff's husband, and Hurish, were each in the employment of Government, and in the Commissariat Department. It further appears that, during the lifetime of Greesh, he, as well as Hurish, accumulated money, and that Greesh did, on at least two occasions, remit to his brothers two considerable sums—

one of Rs. 700, and the other of Rs. 1,100. This fact, indeed, is not specifically admitted by the defendant, but it was credited in the Court below, and it has not been impugned here on appeal.

It is also clear that parcels of immovable property, aggregating over Rs. 1,600 in value, were acquired in the lifetime of Greesh, and that Government promissory notes of the value of Rs. 3,000 at least were likewise acquired at that time. In short, property amounting to about Rs. 5,000, out of the whole property of which a share is claimed, was acquired during the lifetime of Greesh.

Now, the fact of Greesh Chunder's remitting these sums of money to the defendant, and no receipts being taken for them, and no accountability being stated, leads to the conclusion of the brothers being joint—joint in property and in mess—and to no other conclusion.

Now, we must bear in mind what the ground taken by the defendant was. It is not pleaded that the gains were small, or that the brothers were associated only in small transactions, and that their unity ceased after a time. But his statement was that from the beginning the family was separate, and he coupled that statement of separation with an odious charge against the plaintiff, which has been completely disproved.

He cannot now fall back upon the ground which he might perhaps have taken, namely, that at first they were joined together in business, and that afterwards he separated from his brother, and began earning with his own money, or that such separation followed on the death of Greesh. But, in point of fact, the defendant has failed to establish any distinction in the nature and application of his business and earning before and after the death of Greesh.

The observations of the Subordinate Judge are significant as to the defendant's attempt to conceal the date of Greesh Chunder's death. The date of his death has been established beyond doubt, and it is of importance, for, comparing the dates when the properties were acquired with the date of the death of Greesh, it brings the time of their acquisition within the lifetime of Greesh.

On these considerations, and contrasting the facts proved with the defendant's statements, I have no doubt that the plaintiff's allegations are materially true; and as the defendant has given us no criterion by which we can determine when the properties were acquired, we must uphold the presumption of joint property and joint acquisition, and dismiss this appeal with costs.

Markby, J.—I am of the same opinion. Possibly the cases quoted to us go as far as to show that the plaintiff could not establish her claim to an interest in the property which stands in the name of Hurish Chunder or his wife simply on the evidence that Hurish Chunder and her (plaintiff's) deceased husband were two brothers living in commensality.

Possibly, also, the small amount of admitted ancestral property which these brothers inherited might not amount to what is sometimes called a sufficient *nucleus* from the savings of which we could infer that the property now in suit was purchased.

But the case of the plaintiff goes farther. It is in evidence that both the brothers were employed, and were likely to make equal gains; and when we have to consider whether each kept his own gains as a separate acquisition, or put them into a common fund, there are two facts which turn the balance in the plaintiff's favor, and lead to the conclusion that the funds were joint.

We have a distinct admission that, in the case of a bond given by the two brothers, the two brothers were sued jointly, and Hurish Chunder discharged the debt alone, and the Subordinate Judge was, I think, perfectly justified in rejecting the explanation given by Hurish that this was done out of charity for his brother's family. I have no doubt that the true explanation is that Hurish Chunder discharged the debt out of the joint funds.

The other fact is that the Subordinate Judge has found, as I think he was fully entitled to do on the evidence of the plaintiff, and against the denial of the defendant Hurish Chunder, that two sums of Rs. 700 and Rs. 1,100 were remitted by Greesh Chunder to Hurish Chunder, and that these sums were invested, no doubt, along with other funds of his own, in the purchase of 3,000 rupees worth of Government promissory notes.

These facts lead to the inference that the brothers were dealing with their acquisitions as joint up to the death of Greesh Chunder.

As pointed out by my brother Jackson, a change might not improbably have taken place at that time. Greesh having ceased to earn anything, Hurish Chunder might not improbably have ceased to throw his earnings into the joint funds. But it is not necessary to go into that. Hurish set up a case of separate acquisition from the first; and he has not produced any accounts or any evidence to support that which is really a mere suggestion that there have been separate acquisitions since the death of Greesh Chunder. I think, therefore, that the plaintiff is entitled to say that all the property was joint; and I concur in thinking that the appeal ought to be dismissed with costs.

The 24th April 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Act XXVII of 1860—*Certificate—Security—Appeal.*

Case No. 68 of 1872.

Miscellaneous Appeal from an order passed by the Judge of Dacca, dated the 29th December 1871.

Raj Mohinee Chowdhrain, *Appellant,*

versus

Dino Bundhoo Chowdhry, *Respondent.*

Baboo Grija Sunkur Mojoomdar for Appellant.

Baboo Kalee Mohun Doss for Respondent.

There is no appeal under Act XXVII of 1860 with reference to the amount of security which a Judge may think it right to demand from an applicant for a certificate under that Act.

Glover, J.—This is an appeal against an order of the Judge of Dacca calling upon Raj Mohinee Chowdhrain to deposit 10,000 rupees as security, before she could obtain a certificate for the collection of the debts due to her late husband's estate under Act XXVII of 1860. It appears that there had been a former application for a certificate by a brother of the deceased, who propounded a will, and this will, after one or two remands, was finally declared in a miscellaneous proceeding by the High Court to be a spurious one. A regular suit has now been instituted by the brother to have it declared that the will is genuine. The Judge taking this point into consideration, and also the fact that the lady has already executed and registered a bond for 5,000 rupees on account of the expenses which she has been put to in the former litigation, and thinking it probable that if this certificate is given to her without restriction the property will be wasted, and that if the decision in the will case goes against her interest there is not much chance of the opposite party getting his just dues, passed the order against which this appeal is preferred.

The only authority given by a certificate under this Act is to collect the debts due to the estate of the deceased. And we are not shewn that there are any such debts. But, putting this aside, we are of opinion that there is no appeal under the Act against the order which the Judge has passed in this case. Section 6, which is the only Section which refers to the right of appeal, limits it to the question of the grant of the certificate. This Court would be able to decide on appeal whether the Judge had selected the proper person to give the certificate to, but there is no Section which gives any appeal with reference to the amount of security which the Judge may think it right to demand from the applicant for a certificate, and there is no general Section, as there is in the cognate Act XL of 1858, with regard to appeals. This being so, we think that this application must be dismissed with costs without going into the merits of the case further than to say that, looking at all the circumstances, it does not seem unreasonable that some such order as that which the Judge has passed should have been passed in this case.

CRIMINAL RULINGS.

The 16th December 1871.

Present:

The Hon'ble F. A. Glover, *Judge.*

Amends—Wrongful Confinement—Criminal Force.

Reference to the High Court under Section 434 of the Code of Criminal Procedure, by the Officiating Magistrate of Backergunge.

Azgur Howladar *vs.* Asaruddin and others.

Where a complaint constituted a charge of wrongful confinement under Section 343, and not one of criminal force under Section 352 of the Penal Code, the order awarding amends under Section 270, Code of Criminal Procedure, was quashed as illegal.

Reference.—Azgur Howladar, on the 1st September, laid a written complaint in the Court of the Deputy Magistrate, Baboo Dinobundhoo Mullick, charging Asaruddin and others with having seized and carried away one Karamuddin, while he was on his way to cutchery, for the purpose of giving evidence in a case. The Deputy Magistrate, after examining the complainant, passed an order to the Police to release Karamuddin if he were found in confinement, and produce him before the Court.

On the 12th September, Karamuddin, being brought before the Court and examined, deposed that he had been seized, carried away by the persons charged, and kept in confinement three days in Asaruddin's house, three days in Manoo's house, and one day in Abiz's house. The Deputy Magistrate then summoned the accused and witnesses to appear on the 22nd September. On that date, for a reason which does not appear in the record, the case was not taken up, but, on the following day, the Deputy Magistrate took the examination of Azgur Howladar, Karamuddin and three witnesses who had been cited. Their depositions are to the following effect:

Azgur Howladar stated, that he had *heard* of Karamuddin's being confined by Asaruddin. Karamuddin stated that, on the 22nd Bhadro, he was coming to the Court, and had reached Asaruddin's door, when Manoo, Abiz, Zahiruddin, Mahabut Ally, and Asaruddin seized him, took him away, and kept him in confinement in Asaruddin's house for seven days, until a constable came to release him, whereupon the men placed on guard over him ran away; and he added, that, during the day-time his arms had been tied with a cloth. The three witnesses stated that they knew nothing of the matter.

The Deputy Magistrate then discharged the accused, dismissed the case, and ordered complainant to pay Rs. 20 to the accused.

This order was apparently passed under the provisions of Section 270, Code of Criminal Procedure, though the fact is not stated. The complaint was one of wrongful confinement for more than three days, an offence punishable under Section 343, Penal Code, with imprisonment up to two years, and consequently the provisions of Section 270 did not apply. The order of the Deputy Magistrate was, therefore, wrong in law. The Deputy Magistrate has submitted the explanation of his order. "The charge as laid did "not substantially appear to me as one fall-"ing under Chapter XIV. The case appeared "to me at first a summons case as falling "under Chapter XV, of using criminal force "under Section 352. In the case in question, "summons was issued in the first instance "as one under Chapter XV. The offence, "if established, would not be of such a cha-"racter as to exceed six months' imprison-"ment. The complaint, as laid, was to the "effect that Karamuddin being carried away, "it was not said in the petition that Karam-"uddin was being detained in confinement. "The act of being carried away constitutes "the use of criminal force under Section 352. "I, therefore, imposed a fine of Rs. 20 "under Section 270 on the complainant, as "compensation to the defendants." I consider this explanation extremely unsatisfactory, because although the complainant did not actually use the term "wrongful confinement" in his written petition of complaint, yet the words used "seized and carried away" were such as to leave no doubt that the meaning of the complaint was that Karamuddin had been wrongfully confined. But the Deputy Magistrate did not issue a summons to the accused on the complainant's story. In fact he did not move against them until he had examined Karamuddin himself, and what he deposed constitutes in unmistakeable language a charge of wrongful confinement.

The order of the Deputy Magistrate being illegal as above shown, I beg to move the High Court to reverse it.

I regret to have to bring the case to notice, because the illegality of the order and the general manner in which the proceedings of the Deputy Magistrate were conducted, are far from creditable to an officer of his position and standing.

Judgment of the High Court.

The case, undoubtedly, comes under Chapter XIV of the Procedure Code, and not under Chapter XV. The order awarding amends was, therefore, illegal, and is quashed.

The 4th January 1872.

Present:

The Hon'ble W. Ainslie, *Judge.*

Review of Judgment (Criminal Cases).

Application for Review of Judgment passed by the Hon'ble W. Ainslie and the Hon'ble G. C. Paul, on the Criminal appeal of

Krishno Churn and Moheram of Assam.

The Court has no power to review its judgment in criminal cases, as ruled in Full Bench judgment, 5 W. R., Cr. Rul., p. 61.

THIS is an application for a review of the judgment recorded by myself and Mr. Justice Paul in a criminal appeal. As my learned colleague is not now a Judge of this Court, the matter has come before me sitting singly. The question of the admissibility of a review of judgment in a criminal trial was considered at length by a Full Bench of the Court, whose judgment is reported in Vol. V. Weekly Reporter, Criminal Rulings, page 61, and it was decided that the Court has no power to review its judgments in criminal cases. This application must, therefore, be refused.

The 6th January 1872.

Present:

The Hon'ble G. Loch and W. Ainslie,

Judges.

Dismissal—Police Report—Circular 5A of 7th September 1868.

Reference to the High Court under Section 434 of the Code of Criminal Procedure by the Magistrate of Monghyr.

Bullee Singh

versus

Kanai Chowdhree and others.

After complainant's preliminary examination, the case was referred to the Police for report, and complainant had notice to appear on 6th November to hear the report. On 31st October, the Assistant Magistrate dismissed the case upon the report of the Police officer without giving complainant an opportunity to show cause against the dismissal. His order was set aside by the High Court, and he directed to conform to Circular 5A, dated 7th September 1868.

Reference.—THIS is an application to call for the record of the case of Bullee Singh *versus* Kanai Chowdhree and others, decided by the Assistant Magistrate of Monghyr, Mr. C. Wilkins, under order dated 31st October 1871, and to determine as to the regularity of the proceedings of the Lower Court.

The record was called for under the provisions of Section 434 Code of Criminal Procedure.

I find that the case was one, in which complainant charged the accused with offences under Sections 426 and 379, Penal Code. After complainant's preliminary examination had been recorded, the case was referred by the Assistant Magistrate to the Police for report. Such procedure being governed by Section 180, Code of Criminal Procedure, two extensions of the time allowed for the Police to reply were granted, bringing the date for hearing the report up to the 6th November on which date the complainant had notice to appear as the record shows.

The Police report coming in however at the end of the month, the Assistant Magistrate by his order of 31st October dismissed the case.

I believe this course to have been irregular. High Court's Circular 5A, dated 7th September 1868,* lays down the rule for such matters; and in contravention to this order, complainant's case has been put out of Court.

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* X. W. R., Criminal Circular Orders, p. 1.

It is hardly necessary, as the point referred is that of irregularity, to go into the merits of the order challenged; but it certainly appears to me that in justice complainant should have a hearing. The preliminary examination taken by the Assistant Magistrate is not sufficiently minute for it to be safe to allege, as the dismissal order does, that it is impossible that the case can have occurred as alleged. Complainant, if he be heard in reply to the Police report, may be able to change this view; and in fairness he should have a chance of being able to do so.

I observe that the original complainant Bullee Singh was servant of Mr. McGiveron who enters the present application. I see no prejudice in this point to the action I am taking herein.

Judgment of the High Court.

Ainslie, J.—We agree with the Magistrate in holding that the Assistant Magistrate should have followed the rule laid down in Circular Order No. 5A of 7th September 1868, and should have given the complainant an opportunity of shewing cause against the dismissal of his complaint on the Police Officer's report. The order of 31st October 1870 is set aside, and the Assistant Magistrate is directed to proceed as required by the aforesaid Circular Order.

The 5th January 1872.

Present:

The Hon'ble H. V. Bayley and W. Markby,
Judges.

Procedure—Complaint—Dismissal.

Reference to the High Court under Section 434 of the Code of Criminal Procedure by the Officiating Sessions Judge of Mymensing.

Shibu Manjee

versus

Noshee Mookerjee.

In this case the Court declined to say that, as a matter of law, the Magistrate acted illegally in calling upon complainant to produce proof *ex parte* to justify the issue of process, and upon default of such proof in dismissing the charge.

Reference.—The complainant charged the accused with abetment of house trespass, wrongful restraint, and criminal force, but there is a rule in this District against filing of *written* statements, and the examination of complainant was so brief that it is impossible to fully gather the details.

The Assistant Magistrate did not adopt either of the alternatives prescribed in Section 67 of Criminal Procedure Code. He called upon complainant to produce *proof ex parte* to *justify* the *issue* of process; and in default of such proof, he dismissed the charge on the date to which he had adjourned the hearing.

The explanation given is very brief; if he considered the story absurd, he should have dismissed the case; but, it is submitted, there was not sufficient detail on the record to enable him to form an opinion, and that it was illegal to harass the witnesses by calling on plaintiff to produce them *before summoning* the accused.

With these remarks I beg to forward the case, and solicit that the order may be set aside and the Assistant Magistrate ordered to proceed according to law.

Judgment of the High Court.

Markby, J.—In this case we think we are not in a position to say that, as a matter of law, the Magistrate acted illegally in dismissing the case.

The 6th January 1872.

Present:

The Hon'ble H. V. Bayley and W. Markby,
Judges.

Section 318 Code of Criminal Procedure—Possession of Land—Questions of Title.

Miscellaneous Criminal Case No. 139 of 1871.

Koomar Poresh Narain Roy, *Petitioner*

versus

Messrs. Watson and Co. and others, *Opposite party.*

Baboo Mohinee Mohun Roy for Petitioner.

Mr. R. T. Allan and *Baboo Dabender Narain Bose* for Opposite party.

It is a misconception of the aim and object of the law as well as a waste of time to the Court and of money to

the parties, to come up to the Court under Section 318 Code of Criminal Procedure, with questions of title to possession of land, which can only be settled in a Civil Court.

Bayley, J.—THIS is an application to set aside an order of the Deputy Magistrate of Rajshahye made under Section 318 of the Criminal Procedure Code, holding that Messrs. Watson and Co. should be retained in possession of certain lands.

In too many of these applications the aim and object of the law are entirely set at nought by the applicants to this Court. The terms of the law are these: "Whenever the "Magistrate of the District or other officer "exercising the powers of a Magistrate shall "be *satisfied* that a dispute likely to induce "a breach of the peace exists concerning any "land, premises, water, fisheries, crops or "other produce of land within the limits of "his jurisdiction, he shall record a proceed-"ing stating the grounds of his being so "satisfied and shall call on all parties con-"cerned in such dispute to attend his Court "in person or by agent within a time to be "fixed by the Magistrate or other officer as "aforesaid, and to give in a written state-"ment of their respective claims, as respects "the fact of actual possession of the subject "of dispute. The Magistrate or other officer "as aforesaid shall, *without reference to the* "*merits of the claims* of any party to a *right* "of possession, proceed to enquire which party "is in possession of the subject of dispute and "*after satisfying himself* upon that point, "shall record a proceeding declaring the party "whom he may decide to be in such posses-"sion to be entitled to retain possession *until* "*ousted by due course of law,* and forbidding "all disturbance of possession until such "time."

In this case it is not denied that the officers in charge of the District Police did apprehend a breach of the peace, and it is also admitted that the Deputy Magistrate himself went to the spot.

It is urged before us here, firstly, that the Deputy Magistrate refused to take evidence of witnesses tendered to him by the applicant; and, secondly, that he decided the case on no legal evidence whatever, and that the survey *chittahs* clearly shew that these lands were what the applicant always stated them to be *peetulgola* lands of his village Kalapahar, that is, interspersed parcels of Kalapahar situated within the topographical limits of Watson and Co.'s village Rajahpore.

I have heard the whole judgment and carefully considered it. The law says that the Magistrate should *satisfy* himself on enquiry. The Magistrate was on the spot. He takes the documentary evidence supplied by Watson and Co; and upon that evidence he states that he is satisfied on the documentary evidence that the actual possession was with Watson & Co. The pleader argued that it was the bounden duty of the Deputy Magistrate to proceed upon legal evidence, and that the documents relied on by him have no connection with the present disputed lands. Now, from passages read from that evidence it is quite clear that Rajahpore and Kalapahar were found to be distinct villages. Supposing even that the *peetulgola chittas* which the applicant's pleader filed before us did shew parcels of Kalapahar to be interspersed with those of Rajahpore, it is impossible for us to say that the Deputy Magistrate was wrong, for it is admitted that these documents were *never* laid before him. Then, again, if the High Court's finding that these were separate villages is not to satisfy a Magistrate acting under Section 318 and enquiring summarily (not to determine any question of right of title to possession when apprehending a breach of the peace) and to allow him to decide a certain party to be in possession for a certain time pending the settlement of their respective rights in the Civil Court, the object of Section 318 authorizing the Magistrate to hold a summary enquiry and so satisfy himself cannot be attained, for otherwise it would be necessary to hold a regular enquiry into questions of right and title, and pending such detailed enquiry the very breach of the peace which it is the object of the law to avoid may probably take place. On the other hand there can be no prejudice to the applicant's rights in this case by the Deputy Magistrate's order against him or by that of this Court for (if it is not the object here to make these summary decisions evidence in a Civil suit) the applicant loses no right to possession. Section 318 in express terms secures to him that right and says that the Magistrate's order acting under that Section shall not affect any right that he may have declared in his favor by a regular suit in the Civil Court. It was quite open to the applicant in this case, the very next day after the 31st August when the Deputy Magistrate's order was passed, to go to the Civil Court and have his right and title to possession established.

In this view I would reject this application.

Markby, J.—I am entirely of the same opinion with Mr. Justice Bayley, that it is a waste of time to this Court and of money to the parties to come up to this Court under Section 318 with questions of title which they know cannot be decided here and which they must go to settle in a Civil Court.

The 6th January 1872.

Present :

The Hon'ble G. Loch and W. Ainslie, *Judges.*

Section 498 Penal Code—Taking away married Woman—Presumption of Marriage—Evidence—Statements before Police Inspector and Magistrate.

The Queen

versus

Wuzeerah and Rujub Ali, Appellants.

Committed by the Magistrate and tried by the Sessions Judge of Patna on a charge of taking away with criminal intent a married woman.

Mr. C. Gregory for Appellants.

In a charge under Section 498 of the Penal Code (of taking away a married woman), marriage must be presumed from the fact of a man and woman living together and from their own evidence (altogether unrebutted) that she is his legally married wife.

Statements made before a Police Inspector are not evidence, and cannot be used as evidence in the trial; and unless it can be shown that the evidence taken before the Magistrate has been used as evidence at the Sessions trial and laid before the Judge and Assessors, and that they, after hearing that evidence, based their opinion upon it, that evidence cannot be laid before the High Court and made use of in support of an appeal.

Loch, J.—THE prisoners in this case were committed for trial by the Magistrate under Section 365 of the Indian Penal Code. The Sessions Judge added another charge under Section 498 of that Code, being the charge which was originally made against the prisoners by the complainant Ghuseetah, and the Judge, agreeing with two out of seven of the Assessors, convicted the prisoners on this charge and sentenced them to nine months' rigorous imprisonment.

In appeal the pleader for the appellant wished to read certain statements made by the witnesses before the Police Inspector: he also wished to read the evidence that was taken before the Magistrate. But the Court refused to allow either the one or the other to be read. The statements made before the Police Inspector are not evidence and could not be used as evidence in the trial; and unless the pleader could show that the evidence taken before the Magistrate had been used as evidence at the Sessions trial and laid before the Judge and the Assessors, and that they after hearing that evidence based their opinion upon it, we think that that evidence cannot now be laid before us and made use of in support of the appeal.

An objection has been taken to the conviction in this case that there is no evidence to the marriage of the parties Ghuseetah and Dowluttee. But the law says,—whoever takes or entices away any woman who is and whom he knows or has reason to believe to be the wife of any other man, from that man, &c. Now in this case it is clear that Ghuseetah and Dowluttee were living together. It appears that they had been living together in the house of Surmeen, and had removed from that house to the house of Moracho, from which the woman Dowlutee was taken away. The fact of their living together is sufficient to raise the presumption of their being man and wife; and it was for the prisoners to show that they were not married, and that Ghuseetah had no legal right to prevent her going away.

With regard to the facts of the case, it is urged that the evidence is untrustworthy, it being very contradictory. No doubt, the evidence of Ghuseetah and the evidence of his wife are contradictory on certain points, but both of them have deposed to one fact,—*viz.*, that the woman was taken away; and accepting the deposition of Dowluttee, which is most favorable to the prisoners in this case as containing the true account of the occurrence, we think that the evidence of her being taken away from the person whom the prisoners had reason to believe to be her husband, is proved, and that therefore this appeal must be dismissed.

Ainslie, J.—With regard to the point as to whether there is evidence to the marriage, I wish to add that there is evidence of Ghuseetah and the woman Dowlutee to the effect that she is his legally married wife, and that this evidence stands altogether unrebutted; and that no evidence is shown that the alleged marriage did not take place: it must therefore be taken that there was marriage. I concur with my learned colleague in dismissing this appeal.

The 6th January 1872.

Present :

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Mooktear—Suspension—Power of Magistrate—Act XX of 1865.

Reference to the High Court under Section 484 *of the Code of Criminal Procedure by the Officiating Sessions Judge of Cuttack.*

In re Banchanidhi Mahanty.

Where a Magistrate suspended a Mooktear for three months for making a wilful false statement, it was held that the Magistrate had no power to suspend the Mooktear under Act XX of 1865, and his suspension was set aside.

Reference.—It appears that on 11th September, a Mooktear called Banchanidhi Mahanty, who held a certificate under Act XX of 1865, was seen by the Magistrate to be sleeping in his (the Magistrate's) room. The Magistrate called him and asked what he meant, and he replied that he had been in the veranda and had come into Court hearing a Chaprasee calling. The Magistrate then, on 12th September, ordered that the Mooktear should be suspended for three months for telling him such a gross falsehood by saying that he had been in the veranda when he had actually been lying down in the Magistrate's Office.

The order appears to me to be illegal, because the procedure, as laid down in Section 16 Act XX of 1865, has not been followed out, and no report has been made to this Court for transmission to the High Court.

It was highly improper conduct on the part of the Mooktear to make such a wilful false statement; but as I think the order passed illegal, I refer it for the consideration and order of the High Court.

Judgment of the High Court.

Kemp, J.—We think that the conduct of the Mooktear, in this case, was highly reprehensible, but the Magistrate had no power to suspend him under the Act, *viz.*, XX of 1865. His suspension is set aside.

As the Mooktear has been under suspension for two months or so, we think no further proceedings need be taken in this matter.

The 8th January 1872.

Present :

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Dismissal of Complaint on Default—Fine—Sections 259 *and* 270 *Code of Criminal Procedure.*

Reference to the High Court under Section 484 *of the Code of Criminal Procedure by the Officiating Sessions Judge of Mymensingh.*

Ram Churn Dey

versus

Sheikh Jannu.

Where a Magistrate dismissed a complaint in default under Section 259 Code of Criminal Procedure, and fined the complainant under Section 270, the fine was remitted and ordered to be refunded.

Reference—This case was one of rescue of cattle which complainant was taking to the pound. The Assistant Magistrate, to whom it was made over for trial, dismissed the case under Section 259, as complainant did not appear, and *also* fined him Rs. 5 under Section 270.

Although the complainant asserts that he was only a little late in appearing, I do not think the order, under Section 259, can be interfered with, but the order under Section 270 appears to be illegal, for the following reasons :

(1) The case was *not heard*, and therefore no judicial decision could be arrived at whether the charge was false or true.

(2) A dismissal of a complaint on *default* is entirely distinct from a dismissal on the *merits*, and Section 270 does not apply to such cases.

(3) The Assistant Magistrate was wrong in supposing that *mere absence* from Court is sufficient ground for a *presumption* that the complainant has wilfully instituted a frivolous and vexatious charge.

(4) The complainant should not be fined under Section 270, without being allowed to *explain* his non-appearance—2 Wyman's Rep., for 1864, page 24.

Judgment of the High Court.

Markby, J.—We concur with the Judge as to remitting the fine, and order it, if paid, to be refunded.

The 9th January 1872.

Present:

The Hon'ble F. B. Kemp and E. Jackson,
Judges.

Attempt at Extortion—Dismissal of Complaint.

Reference to the High Court under Section 434 of the Code of Criminal Procedure by the Magistrate of Cuttack.

Bhim Pariru and others
versus
Bighnessur Putnaik.

The Deputy Magistrate censured for his precipitancy in dismissing a complaint of a deliberate attempt at extortion, supported as it was by evidence on the record. The prisoners having been acquitted, the Court passed no further order regarding the case.

Jackson, J.—We agree with the Magistrate that the Deputy Magistrate has been much too precipitate in dismissing this complaint.

The real gist of the complaint, which even the Magistrate has overlooked, is that the zemindar is putting the complainants in fear of injury to their persons and property with the intent to extort money from them. There is evidence to support the charge of attempt at extortion. If the witnesses are to be believed, the complainants have been injured, inasmuch as they cannot obtain the services of a barber and a washerman, as proved by their personal appearances, and certainly they have been placed in fear of such injury.

We think that the Deputy Magistrate's conduct is very censurable in passing over so slightly a deliberate attempt to extort money. But as he has acquitted the prisoners, we shall not pass any further order regarding the case.

The 13th January 1872.

Present:

The Hon'ble G. Loch and W. Ainslie,
Judges.

Abkaree Revenue Act (XXI of 1856)—Levy of Fines and Forfeitures—Simultaneous Imprisonment and Distress—Section 61 Code of Criminal Procedure.

Reference to the High Court under Section 434 of the Code of Criminal Procedure by the Magistrate of Monghyr.

Government
versus
Junglee Beldar.

The provisions of Section 61 Code of Criminal Procedure, as amended by Act VIII of 1869, are not applicable to fines and forfeitures under Act XXI of 1856, so as to allow of imprisonment and distress going on simultaneously.

Ainslie, J.—The question submitted by the Magistrate of Monghyr is, whether the provisions of Section 61 Act XXV of 1861 apply to fines and forfeitures under Act XXI of 1856.

Section 49 of Act XXI of 1856 (under which the person whose conviction has given rise to this reference was convicted) provides for the forfeiture by a person convicted thereunder of a sum not exceeding Rs. 200.

Section 71 provides that such forfeiture shall be adjudged by the Magistrate.

Section 72 enacts that the rules contained in the Regulations and Acts in force, for the trial of cases before a Magistrate, and for appeals against orders passed by a Magistrate, shall be applicable to trials under Act XXI of 1856.

Section 73 provides that, after a previous conviction of an offence under the Act, any person again convicted of a like offence shall be liable to imprisonment not exceeding 6 months.

Section 74 provides that imprisonment under Section 73, or on account of the non-payment of any sum forfeited under the Act (with certain limitations), shall be in the Civil jail.

It is to be observed, 1st, that Section 72 makes the rules for the *trial* of cases before a Magistrate applicable, but leaves the punishment to be adjudged under the Abkaree Act; and, 2nd, that it is only by inference from Section 74 that imprisonment on account of non-payment of a penalty is warranted; there is no specific provision in the Act authorising such imprisonment.

By Section 3 Act XXIII of 1860, it was specially provided that imprisonment might be awarded in default of payment of a fine or forfeiture under Act XXI of 1856.

At the time when Act XXIII of 1860 was passed, and up to the passing of Act XLV of that year, there was no law under which a fine could be realized after the person sentenced to such fine had undergone imprisonment in default of payment. Section 3 Regulation XIV of 1797 specifically declares that such imprisonment is to be held as *equivalent to the fine:* and Act II of 1839, which gave power to levy the amount of a fine by distress and sale of the goods and chattels of the offender found within the jurisdiction of the Magistrate, made imprisonment in default conditional on and therefore subsequent to the non-realization of the fine by such distress and sale. The Indian Penal Code for the first time provided in Section 70 for the realization of fines, notwithstanding imprisonment on default, and this was expressly done to take away from an offender a choice (which up to that time he had been able to exercise in most cases) whether he would suffer in person or property; but Section 70 only applied to offences under the Code (*see* Section 40), and Section 5 declares that nothing in the Act is intended to vary or affect any of the provisions of any special or local law.

By Section 5 Act I of 1868, the provisions of Sections 63 to 70, both inclusive, of the Penal Code, and of Section 61 of the Criminal Procedure Code, were declared to apply to all fines imposed under the authority of any Act *thereafter* to be passed, unless such Act shall contain an express provision to the contrary.

Section 61, as amended by Act VIII of 1869, is as follows:—"Whenever an offender is sentenced to pay a fine, the Court which sentences him, whether or not the offence be punishable with fine only, and whether or not the sentence direct that, in default of payment of the fine, the offender shall suffer imprisonment, may issue a warrant for the levy of the amount by distress and sale of any moveable property belonging to the offender * * * *." The first words of this Section are apparently very wide, but I am of opinion that they cannot operate to give a Magistrate any extended power of punishment. This Section is part of a Code of Procedure, and we must look, not to the rules of procedure, but to the law which declares an act to be an offence, and prescribes the penalty for it, to ascertain the extent of punishment that can legally be awarded. As regards offences under the Penal Code, this Section, however read, gives no extended power, for all that may be done under it, may be done under that Code. As regards offences under special or local laws, it seems to me clear, from Section 5 of the Penal Code, and Sections 9 and 21 of the Procedure Code, that it does not give such extended power. Section 5 of the Penal Code expressly excepts special and local laws from being any way affected by its enactments. Section 9 of the Procedure Code shows that "trial" does not include punishment; the words are "and the word 'determined' (shall be deemed) to comprise *trial and every subsequent proceeding, including the punishment of the offender*," and Section 21 declares that the Criminal Courts shall have jurisdiction in respect of offences punishable under any special or local law *(exceptis excipiendis)*, and in the investigation and *trial* of the offences hereby declared to be within their jurisdiction, shall be guided by the provisions of this Act. Therefore, reading this last Section with Section 9, I hold that the Procedure Code was not intended to give any power of punishment as a result of trial beyond what is given by the special or local law. A different construction would be inconsistent with Section 72 Act XXI of 1856, which certainly does not contemplate that any rule of procedure should operate to modify the substantive law.

The true construction of Section 61 of the Criminal Procedure Code appears to me to be this; that directly on passing a sentence, which includes a fine leviable by distress, whether that be the only punishment or not, and whether any provision be made for imprisonment on default of payment or not, it shall be lawful for the Magistrate to issue his warrant for the levy of the fine by distress and sale of the goods of the offender; or in other words, that the provisions of Act II of 1839, which postponed imprisonment till the distress and sale of goods had failed to realize the fine are modified, so that imprisonment and distress may be simultaneously ordered, and that imprisonment, whether as a part of the original punishment, or as a contingency arising out of it, shall not be allowed to stop the process for levy of the fine, so as to give the offender time to remove his goods beyond the reach of the law, when the law under which the fine is imposed authorizes such levy by distress and sale of the goods.

The fact that the general Clauses Act I of 1868 Section 5, and the similar Bengal Act V of 1867 Section 4 extend the provisions of Sections 68 to 70 of the Indian Penal Code, and Section 61 of the Criminal Procedure Code to all fines imposed under laws enacted *subsequently* to the passing of those Acts, without any direct recital of those Sections in such laws, shows that those provisions could only be previously applied by direct reference thereto.

Moreover, on general principles, I think, we are bound to hold that an enhanced punishment for any offence must be based on positive enactment, and not on inference.

Consequently I am of opinion that the order of the Joint Magistrate of Monghyr directing the levy of the fine imposed on Junglee Beldar, notwithstanding his having undergone imprisonment in default of payment of that fine, is without authority in law, and must be quashed, and that the fine or any part of it that may have been levied must be refunded.

Loch, J.—I concur.

The 13th January 1872.

Present :

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Dispute regarding Possession of Land—Notice on Mofussil Naib—Section 318 Code of Criminal Procedure.

Miscellaneous Criminal Case No. 166 of 1871.

Ramrunginee Dossee, *Petitioner,*

versus

Gooroo Doss Roy, *Opposite Party.*

Mr. W. J. B. Money and *Baboos Mohender Lall Seal* and *Sham Lall Mitter* for the Petitioner.

Baboo Aushootosh Dhur for Opposite Party.

The mere service of a notice upon a *mofussil naib* who takes no steps whatever to consult his employer or act under her directions, is not such a notice as is contemplated by Section 318 Code of Criminal Procedure in a case of dispute regarding possession of land.

Kemp, J.—THIS petition on behalf of Sreemuttee Ramrunginee Dossee was presented to this Court on the 8th of December 1871, and an order was issued, sending for the record, and directing that a notice be served on the opposite party, Baboo Gooroo Doss Roy. Both parties have appeared to-day, and it appears that, on the deposition of one Shahut Khân, a constable of Police, the Magistrate was satisfied that a dispute likely to induce a breach of the peace, existed with reference to certain lands in the village of Poornâ, he directed a proceeding to be recorded under Section 318, and ordered the parties concerned to appear before him in person, or by agent. Gooroo Doss Roy appeared, but Ramrunginee failed to file any written statement, or to adduce any evidence. The Magistrate upon this observes that he had duly enquired which party was in possession of the subject of dispute in as far as the failure on the one side to file any written statement, or adduce any evidence, enabled him to do, and satisfied himself on the point of possession. He declared Baboo Gooroo Doss Roy to be in possession as zemindar of the village of Poornâ, with the exception of such portions thereof as might be in the possession of others than Ramrunginee. Upon this the petitioner applied to this Court to exercise its powers of revision, and send for the record of the case. The grounds taken by the learned Counsel for the petitioner are, 1st, that no notice was served upon his client; and, 2nd, that the case has been improperly brought under the provisions of Section 318; that this is a case in which the instructions laid down in the Circular Order of this Court, No. 10 of the 16th of April 1863, applied; and that the proper procedure is that pointed out by Section 26 Regulation V of 1812, as modified by Regulation V of 1827. On the 1st ground, namely, on the question of notice, we have no doubt that the Magistrate's decision must be set aside upon this point. We find that proceedings were taken in the first instance on the 30th August 1871. A notice was served upon the *mofussil karpurdaz* of the petitioner on the 9th of September in the village of Poornâ, but no notice appears to have been served as required, under Section 318, upon the party concerned in the alleged dispute, namely, upon this lady. It appears that she heard that a case was pending on the 12th of September, she then despatched a telegram to the Magistrate of Furreedpore, stating that she had no previous knowledge of the proceedings, and asking for reasonable time to appear by agent, and to file a written statement, and adduce evidence in support of that statement. The case was, however, disposed of by the Magistrate on the 14th of September, and the lady was wholly unrepresented, and had no opportunity whatever of putting in a written statement, or of supporting her case, by adducing any evidence. On the 16th of September, she presented a petition to the Magistrate, setting forth all these facts, and the Magistrate passed an order upon it that the petition was too late, and was to remain on the record.

We think it abundantly clear that this lady has not had proper notice. The mere service of notice upon a *mofussil naib,* who took no steps whatever to consult his employer, or act under her directions, is not such a notice as the law contemplates. The law says that the Magistrate shall call on all parties concerned in such dispute to attend his Court in person or by agent within a time to be fixed by the Magistrate. There is no doubt then that this lady was entitled to notice to enable her to appear in person or by constituted agent in reasonable time.

We therefore quash the decision of the Magistrate. In re-trying this case, the Magistrate will give both parties an opportunity of appearing before him. He will then consider whether the case does not fall within the provisions of Circular Order No. 10 of the 16th April 1863. As far as the case has been submitted to us, it appears that the dispute arose in this way; that this lady being, as she alleges, a joint sharer in the property in dispute, attempted to exercise her right to receive rent in a certain proportion in the undivided estate. If such be the case, there can be no doubt we think that the provisions of the Circular Order quoted above do apply.

The Magistrate therefore, in re-trying the case, will decide whether the Circular Order does apply, and, if so, he will proceed as laid down in that Circular Order by taking steps to enforce the procedure laid down in Section 26 Regulation V of 1812, as modified by Regulation V of 1827. If, on the other hand, the Magistrate is of opinion that the case comes under Section 318, he will try it under that Section giving the parties due and proper notice.

The 16th January 1872.

Present:

The Hon'ble G. Loch and W. Ainslie,
Judges.

Claims to attached Property of Absconding Offender—Remedy by Civil Suit—Plea of Informality—Sale.

Reference to the High Court under Section 434 of the Code of Criminal Procedure, by the Officiating Sessions Judge of Gya.

In re Chunder Bhon Singh and others, *Applicants.*

The proper remedy of claimants to property attached as belonging to an absconding offender is by a civil suit.

The Court declined to quash such an attachment as made without observance of the due formalities, being of opinion that the plea of informality could be considered on the surrender of the fugitive, but cautioned the Magistrate against a sale until the needful formalities were carried out.

Ainslie, J.—PROPERTY was attached as belonging to Thakoor Singh, an absconding offender. Chunder Bhon Singh and others claimed it as theirs. The Magistrate on enquiry held the claim to be false.

They then moved the Sessions Judge, who proposes to quash the attachment on the ground that it was made without observance of the due formalities; but if the property, as found by the Magistrate, is not the claimants', they have no right to move in the matter, and, if it is the claimants', no observance of formalities can legalize the Magistrate's proceedings, but their proper remedy is by a civil suit. See VII Weekly Reporter, Criminal Rulings, 35.

The plea of informality can, if necessary, be considered when Thakoor Sing surrenders. In the mean time, the Magistrate will do well to be careful that no sale is held till all needful formalities have been carried out.

The 16th January 1872.

Present:

The Hon'ble G. Loch and W. Ainslie,
Judges.

Forcible Dispossession—Consent of Civil Court—Mistake of Complainant—Power of Magistrate.

Reference to the High Court under Section 434 of the Code of Criminal Procedure by the Officiating Sessions Judge of Gya.

In re Doolar Pandey, *Applicant.*

The sanction of the Civil Court is not necessary to a complaint of forcible dispossession by a party who was put into possession by the Civil Court, nor is the Magistrate limited in his action by the mistake of the complainant in citing Section 188 of the Penal Code as the Section under which the offence charged falls.

Reference.—ON the 24th July 1871, a *peadah* of the Gya Subordinate Judge's Court, acting under orders of his superior, gave possession to one Doolar Pandey in an execution case. The man retained possession for several days, but was on 30th August forcibly dispossessed by those who had been cast in the case.

Upon this Doolar Pandey lodged a complaint before the Magistrate, quoting Section 188 Indian Penal Code in his petition. The Magistrate (misled possibly by that quotation) declined to entertain the charge on the ground that the sanction of the Civil Court had not been obtained.

To rectify this supposed error, the complainant went to the Subordinate Judge and asked for sanction to prefer his complaint. It was however very properly refused, as the act complained of was wholly unconnected with and subsequent to the orders passed in the execution proceedings and which had been given effect to.

The result is that the complainant has been unable to obtain the redress he was entitled to look for, and has thereby been prejudiced.

The order of the Magistrate, rejecting the complaint for want of sanction, is, in my opinion, a wrong one, and should be quashed. The papers of the case are therefore submitted for the consideration and orders of the High Court.

An explanation was called for from the Magistrate, and it was intimated to him that if he thought fit he might still entertain the complaint.

Judgment of the High Court.

Ainslie, J.—The Civil Court, having given possession on the 24th July 1871, had no concern with a dispossession alleged to have taken place on the 30th August following, and no sanction was required to the prosecution.

The complaint should be received, and the accused should be dealt with under any Section of the Penal Code that, on the evidence produced, may be found applicable.

The Magistrate is no way limited in his action by the mistake of the complainant in citing Section 188 as the Section under which the offence charged falls.

The 27th January 1872.

Present :

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and F. A. Glover, *Judge.*

Appeal—Conviction—Sonthal Pergunnahs—Act XXXVII of 1855.

Reference to the High Court, under Section 380 *of the Code of Criminal Procedure, by the Deputy Commissioner of Sonthal Pergunnahs.*

Queen *versus* Boydonath Mookerjee, Rama Joogee, and Laharee Singh, Prisoners.

Mr. W. A. Montriou for the Prisoners.

No appeal lies to the High Court, under Act XXXVII of 1855, from a conviction by the Deputy Commissioner of the Sonthal Pergunnahs.

Glover, J.—THESE three prisoners have been convicted, by the Deputy Commissioner of the Sonthal Pergunnahs, of murder under Section 302 Penal Code, and sentenced to death subject to the confirmation of this Court.

Three other prisoners have been likewise convicted of murder, and sentenced to transportation for life. These three prisoners have appealed against the order of the Deputy Commissioner; but, as under Act XXXVII of 1855, no appeal lies to the High Court, we have only to do with the reference in the case of Boydonath, Rama, and Laharee. * * * *

The 3rd February 1872.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Dishonest Misappropriation—Section 403 *Penal Code—Matter of Trade.*

Reference to the High Court under Section 434 *of the Code of Criminal Procedure by the Sessions Judge of West Burdwan.*

Queen *versus* Boystum Moochee, Petitioner.

This was considered to be a matter of trade between the prosecutrix and the prisoner who took certain hides from the former but refused to pay for them, and was held not guilty of dishonest misappropriation under Section 403 of the Penal Code.

Reference.—FROM the judgment of the Officiating Joint Magistrate, Mr. Porch, it appears, that Bama Moochinee, prosecutrix, and one Kenaram Moochee brought hides to Bancoora for sale. Boystum, prisoner, purchased the hides brought by Kenaram for Rs. 29-3-2, and those by Bama for Rs. 19-14. Kenaram and Bama were not joint in business, but Boystum, alleging a former debt due from Kenaram, refused to pay the Rs. 19-14.

The Acting Magistrate proceeds to say that "the distinction between civil and criminal liability is often very narrow." And again, "I fail to see, in the case of a poor person who could not have recourse to the expensive machinery of Civil Courts, how such conduct can be characterised other than dishonest." Mr. Porch accordingly sentences the prisoner to pay a fine of Rs. 50, and in default of payment, three weeks' rigorous imprisonment under Section 403 of the Penal Code.

Against this order petitioner applies for interference of this Court, on the ground of his not having committed the offence for which he was sentenced, and the matter being cognizable by the Civil Court only.

It appears to me that from the evidence the commission of an offence under Section 403 cannot be maintained. The affair was a matter of trade between Bama and the prisoner who took the hides, and has not paid for them. Bama made over the hides to prisoner for an agreed sum of money which he has not paid. He has not thereby committed "dishonest misappropriation." The matter is certainly only cognizable by the Civil Court, and I am therefore of opinion that the sentence of the Acting Magistrate should be set aside, for Bama does not pray for restoration of the hides but for payment of the agreed price of those hides.

Judgment of the High Court.

Kemp, J.—WE concur with the Sessions Judge that this is not an offence coming within the provisions of Section 403. The conviction and sentence of the Joint Magistrate must be quashed.

The 3rd February 1872.

Present :

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Contagious Diseases Act, s. 11—*No Appeal.*

Revision of proceedings in the case of Mukta Bibee.

There is no appeal from a conviction under Section 11 Act XIV of 1868 for a registered prostitute neglecting to appear for examination.

In this case Mukta Bewa was convicted of neglecting to appear for medical examination although she was a registered prostitute, and sentenced under Section 11 Act XIV of 1868. From this conviction the prisoner appealed.

The Judgments of the High Court were delivered as follows by—

Jackson, J.—I think there is no case for the Court's interference.

Nothing in Act XIV of 1868 seems to take away the ordinary right of appeal, but in this case the appeal was barred by Section 411 of the Code of Criminal Procedure.

The grounds on which the Sessions Judge recommends the quashing of the conviction and sentence, are,—

1*st.* That the evidence for the prosecution was insufficient.

2*nd.* That no evidence was heard for the defence.

The evidence of the Police Inspector, if believed, was quite sufficient in law, the witness being, from what the Magistrate says, entitled to full credit.

As to witnesses for the defence, it is not suggested that the accused had not the opportunity of saying whether she wished to call witnesses or no. Her petition to the Sessions Judge alleges that her application to call witnesses was refused. Now the Magistrate distinctly says in his judgment, and he repeats it in another form in his letter to the Judge, that she made no such application. It appears that she was defended by a mooktear whom the Magistrate speaks of as an able mooktear; and the Sessions Judge, assuming that the omission to call witnesses was the fault of the mooktear, considers that the accused ought not to be prejudiced thereby. But the employment of qualified mooktears is recognized by law, and if an accused person chooses to employ such a person and to follow his advice, he or she must take the consequences.

Glover, J.—I concur in thinking that no ground is made out for this Court's interference. I rather think also that the powers given under Act XIV of 1868 are summary, and there would be no appeal under any circumstances to the Sessions Judge; but however that may be, the evidence as to the identity of the woman fully satisfied the Deputy Magistrate, and it is clear, from the explanation since furnished, that the woman never attempted to substantiate her defence. The punishment to which she was subjected under Act XIV has long since been undergone, but it is always open to the woman, whether she be really Mussamut Mookta or Mussamut Munjoori, to get her name taken off the Register of Prostitutes by application to the proper authorities.

The 10th February 1872.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Police Officer (under Suspension)—Conviction of —under Act V of 1861, *s.* 29.

Miscellaneous Criminal Case No. 3 of 1872.

The Queen *versus* Dinonath Gangooly, *Petitioner.*

Mr. W. C. Bonerjee and Baboo Komola Kanth Sein for the Petitioner.

Baboo Juggodanund Mookerjee, Junior Government Pleader, for the Prosecution.

A Police Officer under suspension cannot be convicted under Section 29 Act V of 1861 of withdrawing from the duties of his office without permission.

Kemp, J.—We think that the conviction in this case is illegal. The petitioner has been convicted under Section 29 of Act V of 1861 of withdrawing from the duties of his office without permission. The petitioner was a Head Constable in the Police Force. Under Section 8 Act V of 1861, which is enacted for the regulation of the Police, every Police Officer is to receive on his appointment a certificate in the form annexed to the Act. The form is to this effect: "A. B. "has been appointed a member of the Police "Force under Act V of 1861, and is vested "with the powers, functions, and privileges "of a Police officer," and under Section 8 this certificate ceases to have effect whenever the person named in it is suspended, or dismissed, or otherwise removed from employment in the Police Force, and it must be immediately surrendered to the superior officer of such person or to some other officer empowered to receive the same. It is admitted that the petitioner was under suspension, and therefore under Section 8 aforesaid the powers, functions, and privileges of a Police officer vested in him by the certificate ceased to have effect; he was no longer a Police officer, and therefore Section 29 Act V of 1861 which applies to Police officers guilty of violation of duty or wilful breach or neglect of any rule or regulation or lawful order, &c., does not apply to the petitioner who was not a Police officer within the meaning of the Act. We already showed the inclination of our minds in our order sending for the record, but at the same time we thought it proper to give the Magistrate an opportunity to appear in this Court either in person or by agent, or to submit any explanation which he might deem proper. The Junior Government Pleader has now appeared, and he contends that there are recognized in the Police Department different kinds of suspension,—suspension without any pay,—suspension on quarter pay,—and suspension on half pay;—and he referred us to the rules promulgated by Government with reference to the adjustment of the salaries of Uncovenanted officers under suspension. These rules dated 17th June 1867 which apply to the whole body of Uncovenanted officers and not to the Police Force alone, merely provide for the payment of a subsistence allowance to Uncovenanted officers under suspension. We think, as already remarked above, that the petitioner not being a police officer under the meaning of the Act, he could not be legally convicted under Section 29 of that Act.

We therefore quash the conviction, and direct that the fine be refunded to the petitioner.

The 8th February 1872.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Jurisdiction—Reference to High Court—Chapter XXIX, Code of Criminal Procedure—Restitution of Conjugal Rights—Form of Order—Mode of Enforcement.

Reference to the High Court under Chapter XXIX of the Code of Criminal Procedure by the Officiating Judicial Commissioner of Assam.

Mussamut Berey

versus

Neeah Gam.

A Dufflah hill tribe woman having refused to obey the Deputy Commissioner's order directing her to return to her husband's protection, the Commissioner of Assam directed that, in case she persisted, she should be taken across the border, and put back into her own country. On a protest by way of appeal against the order of the Deputy Commissioner, the Judicial Commissioner referred the matter to the High Court for orders under Chapter XXIX of the Code of Criminal Procedure. HELD that this was not a case which could be referred under Chapter XXIX of that Code; that the order of the Deputy Commissioner was a judicial order, not made in a criminal matter, but in a suit for restitution of conjugal rights, and as such appealable to the Judicial Commissioner; that the proper form of the order in such a case was that the woman should return to her husband and live with him; and that the only way in which such an order could be enforced was by imprisonment of the wife and attachment of her property, or both, under Section 200 Act VIII of 1859.

Reference.—IN the matter of one Mussamut Berey, a woman of the Dufflah hill tribe, a settler in Assam, protesting against the order of the Deputy Commissioner, Tezpore Durrung, Assam, summarily disposing of her person by making her over to one Neeah Gam of the Dufflah hill tribe, described as belonging to Mouzah Bakolee Bohora, Assam.

With reference to the application referred to, the Court having called for the papers of the case, and for report, the papers are brought up for disposal.

It has to be observed that the parties to which this case refers appear both of them as noticed in 2nd para. of a letter from Deputy Commissioner, Durrung, No. 1497 of the 5th December 1871, to the Dufflahs residing in the district of Tezpore Durrung, Assam; and it appears further that, under orders issued by the Government of Bengal in letters No. 2017 of the 28th June, and No. 3268 of the 7th October 1871, that it has been enjoined that, in dealing with frontier tribes, the Deputy Commissioner shall exercise his discretion; and that when difficulties arise, he shall administer justice upon a principle of broad "equity," instead of adhering to the provisions of the substantive law.

Again, the Court finds, from the record of the Deputy Commissioner's proceedings, that, in the matter of the case under consideration between Mussamut Berey and Neeah Gam, Dufflahs, that as, upon a summary enquiry held by the Deputy Commissioner according to "principle" adverted to, it appeared that Mussamat Berey had been married to Neeah Gam, and that she refused to obey the order of the Deputy Commissioner directing her to return to her husband's protection, the Commissioner of Assam, in a letter No. 660 of the 9th October 1871 written by his Personal Assistant, directed that, in the event of the woman Berey maintaining a refractory attitude, the Deputy Commissioner would cause her to be deported, to be taken across the border, and put back into her own country.

Now, with regard to the case as it stands, the Court having fully considered the question before it, though it is of opinion that the proceedings taken by the Deputy Commissioner in the case of Mussamut Berey are opposed to law, forasmuch as, with the exception of the Nagah Hills and the Khassi Hills, no portion of the province of Assam or of the races and classes of people inhabiting it have been exempted from the operation of the Civil and the Criminal Codes; yet as for obvious reasons it would be undesirable that the Court of the Judicial Commissioner of

Assam should place itself in opposition to the executive "power" as represented by the Government of Bengal and the Agent, Governor-General, N. E. Frontier, and Commissioner of Assam, if the Court determines that the proceedings connected with this case shall be submitted to the Hon'ble the Judges of the High Court, that they may be pleased, under Chapter XXIX of the Code of Criminal Procedure, to pass such orders in the case as they may deem proper.

Judgment of the High Court.

Markby, J.—We do not think that this is a case which can be referred to us under Chapter XXIX of the Code of Criminal Procedure.

It appears to us that the Deputy Commissioner has dealt with this case in the manner pointed out by para. 6 of the letter of Mr. Secretary S. C. Bayley, dated the 28th June 1871, that is to say, he has dispensed with the usual forms of procedure, and neither party objecting, there does not seem to us any reason why this should not be done, in a case in which to insist on those forms would probably amount to a denial of justice altogether.

But we think the order of the Deputy Commissioner can nevertheless only be regarded as a judicial order made, not in a criminal matter, but in a suit for restitution of conjugal rights, and as such it is appealable to the Judicial Commissioner. And as the woman appears desirous to present an appeal, we think the Judicial Commissioner should entertain it.

There seems to be some doubt in the mind of the Deputy Commissioner as to the form of the decree and the mode in which it can be enforced. It has, however, been decided by a Division Bench of this Court that the proper form of the order (if made) is that the woman shall return to her husband and live with him, and that the only way in which such an order can be enforced is by imprisonment of the wife and attachment of her property, or by both attachment and imprisonment, under Section 200 of Act VIII of 1859 (see Weekly Reporter, Vol. VI, page 105.)

The 10th February 1872.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Jurisdiction—Commitment.

Reference to the High Court under Section 434 *of the Code of Criminal Procedure by the Additional Sessions Judge of East Burdwan.*

In re Annnto Koyburt.

Prisoner, whilst under trial before the Sessions Court upon a charge framed under Section 436 of the Penal Code (mischief by fire, &c., with intent to destroy a house), was charged under Section 224 with escaping from lawful custody. The Magistrate being too late to make the latter offence the subject of another charge in the same case, made a separate commitment of the prisoner, after he had been convicted of the former offence, for the latter offence which was one cognizable by the Magistrate. The commitment was cancelled and the Magistrate directed to deal with the case himself.

Reference—THE prisoner was in the first instance committed for trial on a charge framed under Section 436 of the Penal Code, and he has been tried and convicted upon that charge. Subsequently to the conclusion of that trial, a supplementary calendar was placed before me from which it appears that the Assistant Magistrate has made a separate commitment of the same prisoner upon a charge framed under Section 224 of escaping from lawful custody. This last offence being cognizable by the Assistant Magistrate, there appears to be no reason why the case should be sent up for trial at the Sessions. It is true that the prisoner was already before this Court under trial for an offence cognizable by it alone, but if it had been thought necessary that another charge should be brought against him, the proper course would seem to have been to make that offence the subject of a second charge in the same case, and this, as I understand, the Assistant Magistrate was directed by the Judge of this district to do. The Judge's instructions however appear to have reached the Assistant Magistrate too late to allow of his carrying them out, and consequently he has made the offence charged under Section 224 the subject of a separate commitment. This, as it appears to me, is illegal. There being nothing to shew the existence of aggravated circumstances calling for a larger measure of punishment than the Assistant Magistrate can inflict, the case ought not in my opinion to have been sent to this Court. I beg therefore to recommend that the commitment be cancelled, and that the Assistant Magistrate be directed to deal with the case himself.

I must add that having looked over the depositions, it appears to me extremely doubtful whether the evidence is sufficient to support the charge, and whether it proves that the prisoner was ever really in custody at all.

Judgment of the High Court.

Kemp, J.—The Magistrate ought to have disposed of this case. The case is returned to him for that purpose. The commitment to the Sessions is cancelled. The Sessions Judge to be informed of this.

The 21st December 1871.

The Hon'ble Sir R. Couch, *Kt.*, *Chief Justice*, and the Hon'ble Louis S. Jackson and A. G. Macpherson, *Judges.*

Preliminary Investigation before Magistrate—Irregularity—Jurisdiction—Abetment of Waging War against the Queen—Error or Defect in Charge — Code of Criminal Procedure, s. 426—Issue of Warrant (under Regulation III. 1818)*—Conviction—Evidence—Letters found in house of person arrested.*

Tried before Mr. H. T. Prinsep, Sessions Judge of Patna, on a charge of abetting the waging of war against the Queen.

The Queen

versus

Ameer Khan, Mobaruck Ali, Tobaruck Ali, Hajee Deen Mahomed, and Ameenooddeen (Prisoners) *Appellants.*

The Advocate-General and the Officiating Standing Counsel (*Mr. Wilkinson*) for the Prosecution.

Messrs. Anstey and *Ingram* for Ameer Khan.

Messrs. Evans and *Lingham* for Mobaruck Ali and Tobaruck Ali.

Mr. M. M. Ghose for Hajee Deen Mahomed and Ameenooddeen.

The proceedings before a Magistrate preliminary to commitment are not impeachable for irregularity, because some of the depositions were taken before the accused persons were brought before him.

The Sessions Court at Patna was held to have jurisdiction to try the offence of abetment of waging war against the Queen, though the waging of war did not take place in Patna, the rule of law as to abetment being that, where parties concert together and have a common object, the act of one of the parties done in furtherance of the common object and in pursuance of the concerted plan is the act of the whole.

The jurisdiction of the Sessions Court at Patna was not affected by the erroneous statement in the charge of the abetment having taken place at Calcutta, when the evidence was sufficient to show the abetment at Patna; such erroneous statement being an error or defect in the charge which is cured by Section 426 of the Code of Criminal Procedure.

The issue of a warrant of commitment by the Governor-General in Council, under Regulation III. 1818, cannot be treated in the nature of a *conviction* of the person so placed under personal restraint, so as to give immunity to the person so committed and afterwards discharge from all political offences committed before that period, on the ground that he has already been tried, convicted, and punished.

The rule of evidence that letters found in the house of a person after his arrest and whilst in custody cannot be used in evidence, is subject to the exception that the existence of the letters found may be established either by direct proof or by strong presumptive evidence.

Couch, C.J.—In this case the appellant, Ameer Khan, has been convicted by the Sessions Judge of Patna of the offence of abetment at Calcutta of waging war against the Queen in the years 1861 and 1862—the first charge being laid as an offence under Act XI of 1857, and the second as an offence under Section 121 of the Penal Code.

The learned Counsel for the appellant, Ameer Khan, took three preliminary objections on his behalf. The third objection—namely, that the proceedings before the Magistrate who committed the case for trial were irregular, in that some of the depositions were taken before the accused persons were brought before him (as I understand the objection)—was disposed of in the course of the argument. It is clear, upon the decisions of this Court, as well as upon the decisions of the High Court of Bombay, that such an objection as that ought not to prevail, and I do not think it necessary to say anything more with regard to it.

The first of the remaining two objections was that the Sessions Court at Patna had no jurisdiction to try the accused for offences which were committed at Calcutta.

Now, by Section 4 Act XVII of 1862, it is provided that, "in the investigation and trial of offences committed before the 1st day of January 1862, the Criminal Courts of the several grades, and the officers of Police, shall, after the passing of this Act, be guided by the provisions of the Code of Criminal Procedure, so far as the same can be applied, wherever the said Code shall be in operation at the time of such investigation or trial; and for the trial and punishment of such offences, such Courts ***shall exercise the jurisdiction and powers vested in them under the said Code of Criminal Procedure:*** provided that no person convicted of any such offence shall be liable to any other punishment than that to which he would have been liable had he been convicted of such offence before the 1st day of January 1862, and that no such person who shall claim the same shall be deprived of any right of appeal or reference to a Sudder Court which he would have enjoyed had the trial been held under any of the Regulations or Acts hereby repealed." These words, which are very extensive, "shall exercise the jurisdiction and powers vested in them under the Code of Criminal Procedure," would give to the Sessions Court at Patna jurisdiction to try the accused Ameer Khan, not only for the offence which was charged to have been committed contrary to the provisions of the Penal

Code, but also for the offence under Act XI of 1857. In order to see whether there was jurisdiction, we must look to the provisions of the Code of Criminal Procedure.

Section 26 of that Code provides that, "except where otherwise expressly provided by this Act, every offence shall be enquired into and determined in the district in which the offence was committed: provided that nothing in this Section shall exempt European British subjects from being tried and convicted before the Supreme Courts of Judicature for offences committed beyond the local limits of such Courts." Then comes Section 27, which does not apply here; and the next Section, which is applicable to the present case, is Section 28, which provides that "the abetment of an offence, wherever such abetment shall have taken place, may be enquired into or determined in any district in which the offence abetted may be enquired into or determined by any Court which has jurisdiction to try such offence, as if the abetment had been committed at the same place at which the offence abetted was wholly or partly committed; or the abetment may be enquired into or determined in any district within which the abettor has done anything for abetting the commission of such offence."

The offence of which the accused Ameer Khan has been convicted is the abetment of waging war against the Queen, the act abetted having been committed, and the abettor, therefore, being liable to the punishment for the offence of waging war against the Queen, as provided by Section 109 of the Penal Code. Now, the waging of war did not take place in the district of Patna; and the part of this Section (28), which is applicable to the present case, is the latter which provides that "the abetment may be enquired into or determined in any district within which the abettor has done anything for abetting the commission of the offence." The abetment charged against Ameer Khan was that he had engaged in a conspiracy to wage war against the Queen, which was an offence under Section 107 of the Penal Code.

That Section provides that "a person abets the doing of a thing who instigates any person to do that thing, or engages with one or more other person or persons in any conspiracy for the doing of that thing, if any act or illegal omission takes place in pursuance of that conspiracy and in order to the doing of that thing." That was the abetment charged, and of which Ameer Khan has been found guilty by the Sessions Court.

Now, the rule of law is that, where several persons are proved to have combined together for the same illegal purpose, any act done by one of the parties in pursuance of the original concerted plan, and with reference to the common object, is, in the contemplation of the law, the act of the whole. Each party is an agent of the others in carrying out the objects of the conspiracy and doing anything in furtherance of the common design. This was determined in England in the case of Rex *vs.* Bowes, cited by Mr. Justice Grose in Rex *vs.* Brisac and Scott, 4 East, 176, and cited to us by the learned Advocate-General, and the law has, from the period when that case was decided, been the settled law in England. It rests upon a principle which is equally applicable in this country. There is not any peculiarity of English law in this matter, but it rests upon the general law which has been stated that, where parties concert together and have a common object, the act of one of the parties, done in furtherance of the common object and in pursuance of the concerted plan, is the act of the whole of them.

Now, to apply that principle to the present case. If it were proved that Ameer Khan engaged in a conspiracy to wage war against Her Majesty, acts done within the district of Patna by any one of the persons with whom he so engaged in pursuance of the original concerted plan, and with reference to the common object, would be, in point of law, the acts of the accused Ameer Khan; and it would be the same as if he himself had done the acts within the district of Patna, although at the time he might not be there, and might be remaining at Calcutta.

Thus the case is, in my opinion, brought within the provisions of Section 28 of the Code of Criminal Procedure, the abettor having done something for abetting the commission of the offence within the district of Patna; and that appears to me to be one, and a conclusive, answer to the objection taken to the want of jurisdiction in the Patna Courts to try Ameer Khan for the abetment of waging war against the Queen, of which he has been convicted.

I do not think that the offence committed can be regarded as the abetment of an abetment. It was not that Ameer Khan abetted other persons to abet the waging of war; he engaged with other persons in a conspiracy to wage war, and did acts in furtherance of that conspiracy.

There is another way in which the matter may be regarded, which equally affords an answer to the objection of want of jurisdiction. In this case the acts of abetment of which the Sessions Court has found the prisoner guilty are the sending of money on several occasions from Calcutta to Patna, in furtherance of the common design that that money should be made use of in waging war against Her Majesty. Now, the money was received at Patna, and sent by Ameer Khan there through hoondees, as proved by the evidence; and until that money reached its destination, the sending, in point of law, continued on the part of Ameer Khan; the money was in the process of being sent to the persons by whom it was intended to be received until they received it at Patna, and there was, in that view of the case, a sending of the money by Ameer Khan within the district of Patna, where he has been tried and convicted.

It is on this principle that it has been held, and it is considered settled law, that an indictment for sending a threatening letter may be tried either in the county in which the offender sent the letter, or in the county in which the prosecutor received the letter; and, in like manner, in the case of a libel or letter containing a challenge, if the letter be sent from one county to another, the trial may take place in either county. That is applicable to this case of sending the money, and would, if there was not an answer to the objection of want of jurisdiction on the ground I have previously stated, afford in itself a sufficient answer to that objection. In my opinion, therefore, the Court at Patna had jurisdiction to try the accused Ameer Khan for this offence, of which he has been convicted.

There is, no doubt, an apparent want of jurisdiction on the face of the proceedings, because both the charges upon which the conviction has taken place allege that the abetment was "at Calcutta," and there is this apparent inconsistency that the Sessions Court at Patna has found the accused guilty of an offence committed at Calcutta. But that is an error or defect in the charge, which is cured by Section 426 of the Code of Criminal Procedure. The charge might and ought properly to have been a charge of the offence of abetment at Patna; and then evidence might have been given, not merely of what he did at Calcutta, but of what the other conspirators did at Patna. It cannot be said that the defect is not one to which Section 426 would apply, or that the accused has been in any way prejudiced in his defence by the erroneous statement of the abetment having taken place at Calcutta, when the evidence was sufficient to show an abetment at Patna. In truth, the proper mode of framing the charge would have been that all the conspirators should have been jointly charged with the conspiracy, it being alleged to have been an abetment at Patna, and then the acts of the various conspirators in Calcutta and in Patna might have been given in evidence, and there would have been jurisdiction to try the accused at Patna if any acts were done in Patna. Had the accused been so charged in this case, there would have been no plausible ground even for the objection that the trial should not have been held at Patna. It cannot be contended that it is not proper or right, where persons are engaged in a conspiracy, that they should be tried at the chief place of the conspiracy; and that is really what has been done in the present case. This disposes of the first of the two preliminary objections.

Then the second objection, which was taken by the learned Counsel for Ameer Khan, was that Ameer Khan had already been tried, convicted, and punished.

I am now speaking of these two objections as applying to the case of Ameer Khan only; but, in fact, they apply to the other accused persons as well, and it will not be necessary to repeat the remarks which I have to make with regard to Ameer Khan's case when I come to deal with the case of the others.

With respect to this objection, the learned Counsel relied upon the judgment of Mr. Justice Phear, reported in the 6th volume, Bengal Law Reports, page 468. The matter was then before Mr. Justice Phear on the appeal from the decision of Mr. Justice Norman on an application for a writ of *habeas corpus*. The first passage on which the learned Counsel relied, and to which he called our attention, is to be found at page 468, where Mr. Justice Phear, speaking of the warrant which had been issued under the Regulation III of 1818, says:—"It is a warrant of commitment, reciting that which is, by virtue of the Regulation, equivalent to a conviction." In a subsequent passage, to be found at page 476, the learned Judge says, after noticing the Acts of Parliament and the Regulations with regard to the power of the Governor-General in Council to commit persons and keep them in custody:—"The real effect of these Acts is that they create and make lawful a new cause of imprisonment, and constitute the Governor-General in Council a Court endowed with the fullest discretion to adjudicate such a cause, and with power to imprison therefore during pleasure. It may indeed be taken in effect that, on the present occasion, the High Court has enquired into the legality of Ameer Khan's imprisonment, and has ascertained that he is imprisoned under a conviction and commitment of a competent tribunal, the warrant of which conviction and commitment is good on the face of it."

It appears that in the present case the commitment actually took place on the 10th July 1869; and it is to be observed that what Mr. Justice Phear said was with reference to a warrant dated the 10th August 1870, which is set out in page 434 of the 6th volume, Bengal Law Reports, and is in the form given in the Regulation. But we may assume that there was some warrant in a similar form previously; and, if not, still the objection which the learned Counsel took would arise, namely, that there had been a commitment amounting to a conviction by the Governor-General in Council under the Regulation and a subsequent discharge of the persons who had been so committed.

Now, Mr. Anstey and also Mr. Ingram, who followed on the same side, contended, and it was necessary for them to contend, that Ameer Khan, having been committed under the Regulation III of 1818, and afterwards discharged, could not be punished for any political offence committed previously to that commitment. That, as I understand, was the objection. They urged that that gave him immunity from all political offences (it cannot be supposed that the argument went beyond that) committed before that period; and it was necessary for them to go to that extent, because the warrant of commitment being in the general form given in the Regulation, no offences were specified in it, and there would be no means of ascertaining for what particular offence (if their view is correct) the commitment had been made.

The opinion expressed by Mr. Justice Phear in the passages I have referred to appears to be very distinct; and it has become necessary for us to consider whether we can concur in it. With every respect for the learned Judge by whom that opinion was pronounced, I am unable to concur in it, and it appears to me to be opposed both to the preamble and to the enactment in the Regulation III of 1818. The preamble of that Regulation says:—"Whereas *reasons* of State, embracing the due maintenance of the alliances formed by the British Government with foreign powers, the preservation of tranquillity in the territories of native princes entitled to its protection, and the security of the British dominions from foreign hostility and from internal commotion, occasionally render it necessary to place under personal restraint individuals against whom there may not be sufficient ground to institute judicial proceeding, or when such proceeding may not be adapted to the nature of the case, or may, for other reasons, be unadvisable or improper; and whereas it is fit that, in every case of the nature herein referred to, the determination to be taken should proceed immediately from the authority of the Governor-General in Council; and whereas the ends of justice require that, when it may be determined that any person shall be placed under personal restraint, otherwise than in pursuance of some judicial proceeding, the grounds of such determination should from time to time come under revision." The language of the preamble points to cases where a commitment may be made when there are not sufficient grounds for a judicial proceeding, or when a judicial proceeding may not be adapted to the nature of the case, or when it may be determined that the person shall be placed under personal restraint otherwise than in pursuance of a judicial proceeding. Looking to that language, I am unable to see that the Legislature intended that the Governor-General, in issuing a warrant of commitment under this Regulation, was in any way to act as a Court of Justice, or to act judicially, or to be considered as having adjudicated that the person placed under personal restraint had been guilty of some specific offence. I am unable to see that this proceeding was at all intended to be treated as in the nature of a conviction of the person so placed under personal restraint.

That is the language of the preamble. Then the other parts of the enactment are consistent with the preamble, and show again what was the intention of the legislative authority by which this Regulation was passed. The second Section says,—"When the reasons stated in the preamble of this Regulation may seem to the Governor-General in Council to require that an individual should be placed under personal restraint, without any immediate view to ulterior proceedings of a judicial nature, a warrant of commitment, under the authority of the Governor-General in Council, and under the hand of the Chief Secretary, or of one of the Secretaries to Government, shall be issued to the officer in whose custody such person is to be placed." The form of the warrant is next given, and it states "that, whereas the

Governor-General in Council, for good and sufficient reasons, has seen fit to determine that *(the prisoner's name)* shall be placed under personal restraint at *(the name of the place)*, you are hereby required and commanded, in pursuance of that determination, to receive the person above named into your custody," and so on. There is nothing to my mind, in the language here used, which points to the proceeding being in the nature of a judicial proceeding or of a *conviction* of the person placed under restraint. The whole of the Regulation indicates that what was intended was what is expressed by my lamented colleague, Mr. Justice Norman, in his judgment, when he refused the writ of *habeas corpus*, namely, that the Regulation does no more than give to the Governor-General in Council a power analogous to that which the Parliament of the United Kingdom exercises when by legislative enactment it suspends the Habeas Corpus Act. That is more like what the proceeding is than what the learned Counsel for Ameer Khan compared it to; and Mr. Justice Markby, who sat with Mr. Justice Phear, on the occasion when the opinion I am now considering was expressed by Mr. Justice Phear, does not appear to have concurred in the view which that learned Judge took of this question. Mr. Justice Markby concurred in refusing the writ of *habeas corpus;* but he gave his own reasons for doing so; and I do not find that he assented to the proposition which had been laid down by Mr. Justice Phear, and certainly Mr. Justice Norman did not take that view of the matter, because he expressed himself quite in the opposite way. After carefully considering the language of this Regulation, I must come to the conclusion that there is not in this case any real ground for the objection taken by the learned Counsel that the accused had already been tried and convicted and punished for the offence with which he was charged before the Sessions Court at Patna.

It was said that this proceeding under Regulation III of 1818, was like a proceeding by a Bill of Pains and Penalties, and we were referred to Bishop Atterbury's case in the State trials. But there is no similarity in the proceedings. The Bill of Pains and Penalties was a conviction by Act of Parliament of a person for an offence, or an attaching to the offence of which the person was found guilty certain pains and penalties which went beyond the common law, and was a bar to a subsequent prosecution in respect of the same matter, on the principle that a person once convicted cannot be tried again. As I have said, when we look to the language of Regulation III of 1818, it does not attach such consequences to a commitment by the Governor-General in Council for good and sufficient reasons. This disposes of the second of the preliminary objections which were taken on behalf of Ameer Khan.

It now becomes necessary for us to consider the evidence in the case, and see whether that was sufficient to support the conviction. The offence charged being the abetment of waging war against the Queen, and the punishment being, as I have stated, the punishment which is to be awarded where the offence abetted has been committed, it was necessary in the first instance to prove the actual waging of war. Although probably little doubt could be entertained that war was waged, yet, on the trial, it was necessary that evidence should be given on that point.

The first witness who deposes to that is Mahomed Israil. He says,—"I know Mulka and Sittana. They are 15 coss distant from one another. Sittana is 5-6 coss distant from my house. I have known Sittana for 20 years. I know Meer Aolad Ali, I have seen him in Sittana about 20 years ago." Then he goes on to speak of matters which occurred a considerable time ago. I do not think I need read that part of his evidence. He then says,—"Inayat Ali remained there from 1852 to 1858. Inayat Ali fell sick and died. He was succeeded by Nooroollah. He remained there one and a half years. There were then only 5 to 600 *jehadees* there. He fell sick and died. He was succeeded by Meer Muxood Ali. Nooroollah and Muxsood Ali were both Hindoostanees. Muxood remained there some one and a half years. There were then between 1,500 and 2,000 *jehadees* all armed; all Bengalees and Hindoostanees. He also fell sick and died. He was succeeded by Moulvee Abdoolla, Villayut Ali's eldest son, the Villayut Ali who was the chief of the colony. I have seen Moulvee Abdoolla. I saw him in 1863 at Mundee, a village close to Sittana. I saw him in Banskota in Banair. I have heard Abdoolla preach on Fridays at Banskota. He used to preach *hijrut* and *Jehad*, and invite the *Pathan* to join them." Then he says, and this brings us to the period applicable to the charge against Ameer Khan—"I have seen the *Majahiddeens* thrice in battle. The first fight was at *Shahi-noor-lurbee* in 1858. I was with the English. Nooroolla was *Ameer*, but the *Jemadar* was Shah Ekramoolah. The second was at a raid against Topee in 1863, about one or two months before the Umbeyla Compaign. The raid was in August, and the Umbeyla fight began in November. Topee is about one coss from my house at Kotah. I saw the attack at night. Topee is in British territory, on the boundary. Abdoolla was then Ameer, and Nujjuff Khan was the *Jemadar*. The third fight was at Umbeyla; that was at the end of 1863. The fight was between the *Jehadees* and the English, and many *Pathans* joined the former. I saw Abdoolla about three months before this fight, at Mundee. I heard him preach there war. The *Jehad* was against the English. There were about 1,200 men with him, all armed Hindoostanees and Bengalees. I know the Aghrore disturbance. I saw Abdoolla at Banskota at the time of that disturbance. He there preached and told me to assist them, and it will be profitable to your religion and worldly prospects." There then is evidence that, during the period to which the charge against Ameer Khan is applicable, there was a waging of war against the English Government,—against Her Majesty the Queen.

The next witness I shall refer to is Jan Mahomed a trooper; and he says—"my house is two or three coss from Mulka. I have known Mulka since I was young. I know Moulvee Abdoolla, I knew him there. I have known him 10-12 years. There is only one 'Musjid.' I was present at Kuttlegurh fight, also called Umbeyla. Umbeyla is the name of the village, and Kuttlegurh that of the hill. I was a soldier in the service of Government. Moulvee Abdoola was fighting against Government. I know Tobaruck Ali (points him out in Court). I have seen him at Molka before the Kuttlegurh affair. He lived with Moulvee Abdoolla, Fyaz Ali, Abdool Kurreem, Yacoob, Ishak, Mooen, his son, Abdoolla's son Ameenoolla. I saw Tobaruck Ali six months before the fight at Kuttlegurh. I saw him after the fight—one month after—at Banskota. He was there living with Abdoolla. Three months afterwards, again saw him at Banskota when he was there living. When I saw Abdoolla at Banskota, there were 2-3-400 men, Hindoostanees armed." Further on, he again speaks of the fight in his cross-examination which seems to be specially applicable to Tobaruck Ali, as shewing that he was present there.

These two witnesses show, beyond doubt, that there was a waging of war.

Then what is the evidence as to the abetment of waging of war? Now I do not think it necessary to go through the evidence either of Abdoolla Kuwaidee or Abdool Guffoor. The Judge says, as to both of these witnesses, that it would not be safe to rely upon their uncorroborated statements; and for that reason it was that the accused Hushmutdad Khan was acquitted entirely, and Ameer Khan was acquitted of certain of the charges against him. The Judge says, that Abdoolla Kuwaidee gave his evidence in a manner which impressed him favorably,—that there was calmness and self-possessed demeanour in the witness in giving his evidence. It is possible that the Judge may have attributed too much to that demeanour. It might be the demeanour of a man who was an adept in giving false evidence, as well as of a man telling the truth. I am not inclined to place reliance in the testimony of either of these witnesses.

I shall first take the witness Abdool Kureem. He says,—"I know Mahomed Shuffee. I was his servant, and I married his sister's daughter. Before that, I was his father's. I have been twenty years in their service. Mahomed Shuffee was meat contractor of Rawul Pindee, Peshawar, Mooltan, Sealkote, Kussowlie, Umballa, and Lahore. About twelve years ago or more, Mahomed Shuffee went to inspect his establishments. He returned after an absence of three months. He then ordered me that he had heard of *Jehad* from Muxood Ali, and that he had promised me to send up any drafts or money that might come from Patna brought by Jaffir, and that the money was to be paid to Muxood's people from the Peshawaree and Rawul Pindee establishments; that no money was to be paid by himself. Know Mahomed Jaffir. I first saw him three months after Shuffee's return from Peshawar. He then brought some *hoondees* and more than one hundred gold-mohurs with a letter from Ameer Khan to Shuffee. I cannot recollect the amount of the *hoondees*. He brought them in my presence. I was with Mahomed Shuffee who gave them all over to me. Having read them he said to me, keep the gold-mohurs and the *hoondees* in the *tubveel*, and write an answer to the letter. Jaffir said to Shuffee 'Do as you promised Muxood Ali, and apply this so that it may reach the *Jehad*. This money has come from Patna. It is necessary to cause it to arrive.' I read the letter, which was torn up after it was

" answered.' No letters relating to the *Jehad* " business, were kept." The witness is here speaking of what was done by Mahomed Shuffee. He then says,—" Ameer Khan's " letter said, 'I am very glad to hear that " you have joined this good undertaking. " I replied, 'I am very glad to receive your " letter, and if it please God, I will be " engaged in this business as long as my life " lasts.' A letter from Ameer Khan came " by post, saying that he was glad to get my " letter and that it was incumbent on all " Mussulmans to be engaged in this business, " and that he also was engaged in this good " business. The first letter received from " Ameer Khan was addressed from Colootolla; and therefore the reply was addressed by me to Colootollah. In answer to " his second letter, I wrote at Mahomed " Shuffee's order that he was going to Mecca, " but that his servants had received orders " and the business would go on well. After " that, at the end of 1859, Shuffee went to " Mecca. Up to that time the *Jehad* business " was not entered in the account books. " That was as long as Shuffee remained." The witness is here speaking of some matters which occurred before 1859, and therefore, before the time at which this abetment is charged to have been committed; but this is evidence against Ameer Khan, and is so far of importance as tending to show that he had then engaged in the conspiracy; and it is to be taken with other evidence showing that the conspiracy in which he was so engaged continued and that he continued to be engaged in it.

The next witness whose evidence I shall read is Hossainee, the son of Meghoo. He says, after speaking about his being a disciple of Wilayut Ali and about the preaching (which I need not read), " I know Ameer " Khan. I first saw him at Patna some four" teen years or more ago. I have seen him at " the preaching at Nunweehiya and at his " house at Allumgunge, also at Calcutta at " Colootollah, since 3-4 times. It is 10-11 " years since I saw him at Colootollah. He " went to Calcutta from Patna. Waris Ali, " a partner of Elahee Buksh in that shop, " was with me, and went with me to Calcutta. " I went to Ameer Khan's house in Colootollah, and saw him there. Waris Ali " told me that Ameer Khan would be able to " procure us a good boat. Ameer Khan said,— " 'There is some money of the *bait-oul-mal*, do you take it'. He gave some " Rs. 800, with which we bought *mal* sugar, " plates, miscellaneous goods, &c. We bought " some cloth from Sham Baboo. Waris Ali " went first, and then I followed to Patna. " The goods arrived safely and were taken to " Elahee Buksh's shop of which Yahiya Ali " was a partner. I again went to Patna " some 5-6 months afterwards some 10-11 " years ago. I went with Elahee Buksh. " I went to Ameer Khan's house. I saw him " and spoke to him. Elahee Buksh said, " 'Hossainee is my servant. I am constantly " sending him for goods when he requires " it. Will you be so good as to supply him " with boats and give him what he requires?' " When we were leaving, Motahib Ali reminded Ameer Khan that Rs. 200 had " come belonging to the *bait-oul-mal*. " Ameer Khan with his own hands gave " them to Elahee Buksh. I went again 9-10 " months afterwards, some nine or nine " and a half years ago, to Calcutta. I went " with Khoorshed Ali, another partner of " Elahee Buksh to Calcutta. We went to " Ameer Khan's. We stopped at Abdoor " Ruhman and Mahomed Ameer's house. On " this occasion Ameer Khan gave Khoorshed " Ali, in my presence, Rs. 400 of the *bait-oul-mal*."

Another witness, Moazim Sirdar, says,— " It is 9 or 10 years ago I first saw Ameer " Khan at Colootollah. He corrects him" self, it is 8 or 9 years ago. It was in 1268 " Bengalee year, Hajee Nuseerroodeen Khan " of Belaspoor, 24 Pergunnahs, sent me with " Rs. 400 to Ameer Khan. Nusseeroodeen " was Ibrahim's father." The question is put to him, "*yeh charsou rupeea, kaisa rupeea* " *tha?*" He says, " the money was *Jehad* " money. Rs. 8, 9 was my own; the re" mainder was Nusseerooddeen's. Nusseer" ooddeen was a *khuleefa* and disciple of " Inayat Ali. His son Ibrahim preached. " He sent the money. Serajooddeen and I " took a boat and arrived at Narkooldangah; " thence went to Ameer Khan's house, at " Colootollah. Serajooddeen counted out the " money." The question then is put, " was " there any conversation." The answer is, " No, why should there be; it was notorious " that it was *Jehad* money. I then went to " Abdool Jubbar's *musjid* at Misreegunge. " I met Serajjooddeen and we returned home. " I saw Ameer Khan twice at Azeemabad at " preachings. Yahiya Ali was preaching on " Tuesday night. I also saw him at Yahiya " Ali's house when his daughter died. I also " saw him constantly at Nunweehya *musjid*, " of which Yahiya Ali was the *Imam*. After " the trial of Ahmedoolla in 1274 (Bengalee), " I went on pilgrimage. I saw Ameer Khan at Mecca and Medina. I was seven months from home." In reading the depositions of these witnesses I do not forget that they are accomplices, and require corroboration.

We next come to another witness, Cazee Moorud. Now he says (and he is a very material witness), "I knew Cazee Myan Jan. He was my own brother. He is dead. He lived in Comarcolly, Zillah Pubna. He lived separately from me about two and a half paces distant. He was a disciple of Moulvee Enayut Ali, and has been so, for the last twenty-five years. I have seen Inayat Ali. My brother first became a disciple of Inayat Ali in Calcutta, and again in his own house. I saw Inayat Ali on this last occasion. I have heard Inayat Ali preach." Then he is asked what he preached, and he says. "He preached in the mosque, 'I have appointed you, Myan Jan, Sirdar here. I am going to the hills at Khorasson. Do you collect the *Zekat* and *fitra*, and send it to me for *Jehad*.' I have seen my brother collect *Zekat* and *fitra*. I never myself paid, as my brother was superior to me and *malik*. I know that my brother used to remit, money (*Zekat* and *fitra*) to the Khorasson hills. I know this because he told me so. I knew Sumeerooddeen. He lived with Cazee Myan Jan, whose adopted son he was. I have seen my brother remitting money. I have seen Sumeerooddeen and my brother pay money to the house of Ameer Khan of Lucknow. I did not go with Sumeerooddeen and see him deposit money. I have seen him take money, and I have seen receipts on the next day in his hands. They were receipts of Ameer Khan of Lucknow who lived at Patna. My brother was a *Cazee* and a registering officer. He had a zemindaree but no trade. He had no trade in books and hides." This is material with reference to the letters of which I shall speak presently. "My brother's name was Myan Jan, but for twenty years or so, he has also borne the name of Abdoor Ruhman, since he began the *Jehad* business. He was generally known as Myan Jan, but the people employed on *Jehad* knew him as Abdoor Ruhman. I went twenty-five years ago with Inayat Ali of Patna to Mulka and Sittand in the Khorasson hills. I returned home after a few days. About 9-10 years ago, I went again with a *kafila* of 6-7 men."

Then the next is a very material witness, Daimoollah, who says,—"Cazee Myan Jan I know. I was his disciple. It is 30 years since I first became his disciple. Hajee Mebroolla Jachandar is my elder brother. He was Cazee Myan Jan's disciple. Cazee Myan Jan used to preach *Namaz*, *roza*, *zekat*, *jehad*. He used to preach, 'you will get salvation if you will give *zekat* and the expenses of *jehad*.' Then he says, "my brother died about eight years ago. My brother, in my presence, took Rs. 125 from our house, saying that he was going to take this as *zekat* money to Cazee Myan Jan. Previous to this I have paid *zekat* money to Cazee Myan Jan. Sometimes Rs. 100 at a time. After the *roza* every year, sometimes I, and sometimes my brother, used to give *fitra* or *zekat* to Cazee Myan Jan. The *fitra* was after the *roza* and the *zekat* was a per-centage. One day, some eight, nine years ago, Cazee Myan Jan sent me with a letter to some *kotee* at Pubna with Rs. 200; Rs. 125 being my own money and Rs. 75 his, made up in what manner I do not know. The Rs. 125 was *jekat* money. I took the Rs. 200 to Pubna, to Ameer Khan Sahib's shop or *kotee*. I gave the money to Ameer Khan of Pubna (blind of one eye and an up-countryman). He credited the money in his book, and gave me a *hoondee* which I gave to Cazee Myan Jan."

In connection with this evidence of Daimoollah, we come to the evidence of Ameer Khan of Pubna,—the man to whom he said he gave the money; and Ameer Khan of Pubna says (and he is a very important witness),—"My home is at Lucknow where I am a trader. I know Ameer Khan (points him out) I have known him for twenty-five years. I was his (*beoparee*) trading agent, and used to send him goods to Calcutta. I used to send hides to his *arhut* (warehouse). I constantly used to go to Calcutta and put up at his house. About ten twelve years ago I recollect going to his house at Calcutta and stopping there. I saw and conversed with him, I stopped one week there." This would be a little before the time which is laid in the charge. "As I was leaving for Pubna he told me, 'If any body gives you any *jekat* money, take it and credit it and send it on to me, and I will send it on to Yahiya Ali and Ahmedoolla at Sadickpore.' Afterwards, at Comarcally, Cazee Myan Jan and Daimoollah gave me money," the money of which Daimoollah spoke—"saying, 'send it on through Ameer Khan to Yahiya Ali.' Daimoollah's brother was Meheroolla. I wrote *hoondees* and gave them to Daimoollah and Cazee Myan Jan. They were in favor of Ameer Khan and Zarowar Khan. I kept "account books. My writer of that time is "dead. I cannot read Bengalee. These "books (in Court) are my account books. "My mohurrir wrote these books regularly." Then in cross-examination he is asked, "Did "you ever pay a *hoondee* in which the name "of the payee was not entered?"—and he says, "such a thing cannot happen. Of course "it must be in favor of some body. I cannot "recollect in whose favor the *hoondee* for "Rs. 50 was drawn." "I cannot recollect regarding this *hoondee* except that the "money was remitted to Ameer Khan to be "sent to Yahiya Ali and Ahmedoolla. I "have transacted business with Ameer Khan "of Colootolla for 25 years. My books show "that I had constant transactions with him. "Can you not recollect whether the *hoondees* "of Rs. 200, 100, and 25 were not on account of salt sent down by Zorawar Khan of "Patna? No, Ahmedoolla was present when "Ameer Khan told me to take *jekat* money "from Cazee Myan Jan; no one else. It "was Ahmedoolla of Sadickpore. I did not "tell this to the Magistrate, because I was "not asked. Daimoollah, when he paid me "the money, told me that this money is going "for *jehad*. Cazee Myan Jan told me so "also when he gave me the Rs. 125. I "did not get money except on these two occasions. Daimoollah's was the first transaction, "and four, five months afterwards Cazee Myan "Jan's. Zameeroodeen was the moonshee "who wrote those account books of mine in "Court. He is dead. I recollect coming "from Nazirpoor Pubna to Lucknow in 1277 "Hijree. I do not recollect the month or "time of the year."

This witness, if corroborated, appears to me to show, conclusively, that Ameer Khan was engaged in this conspiracy. The question then arises, what corroboration there is of the statements of Ameer Khan of Pubna. I must say, however, that perhaps it is scarcely right to treat this witness as an actual accomplice, though he does show by his evidence that he knew what the money was intended for which he took part in remitting.

Now, the corroborative evidence, relied upon, consists in the three letters L1, M1a and N1a, which were found in Cazee Myan Jan's house. It was objected as to these letters by the learned Counsel for Ameer Khan that Cazee Myan Jan had been previously arrested, and that letters found in his house, subsequent to his arrest, and whilst he was in custody, could not be used in evidence. But that rule of evidence is subject to this exception, that if the previous existence of the letters found is established, either by direct proof or by strong presumptive evidence, the objection, that they were found after the arrest of the party in whose house they were found, cannot prevail. The reason for not allowing them to be received in evidence would not apply in such a case; the reason being that it is necessary to guard against the possibility of persons, after a man has been arrested and is in custody, placing in his house papers which might be used to criminate him. But if the evidence shews, the papers were in existence before the arrest, then the papers may be used in evidence. And the evidence which I am now about to notice shews, I think, conclusively that these letters were in existence previous to the arrest of Cazee Myan Jan. I do not know that it does not appear that he had been arrested before the search of his house, but I do not think that is material, seeing what the evidence is with regard to these letters.

The important evidence with regard to these letters is, firstly, that of Mosahib Ali. He says,—"I used to be in Ameer Khan's "(prisoner's) service. I live by writing and "reading. I have been in Ameer Khan's service fifteen, sixteen years. I cannot recollect "from what year, I used to be his mohurir to "read and write, I used to write his *khatta* "book. I know Ameer Khan of Pubna. "This entry of the 8th Rubbee-ool-awul "1278 (in the account book of 1878), in "Ameer Khan of Pubna's account (reading it) is in my handwriting. The Shaikh "Abdoor Ruhman referred to in this, is an "inhabitant of Comarcolly. Abdoor Ruhman "was also called Myan Jan. I gave evidence in the Umballa trial. He was a "prisoner in that case. This letter (N 1 A) "and this envelope (N 1) are in my handwriting. The letter is written to the same "Shaikh Abdoor Ruhman as the entry in the "*khatta*. Ameer Khan got that *hoondee* for "Rs. 200. I wrote that letter on behalf of "Ameer Khan (prisoner). I wrote about the "price of the sale of the books by Ameer "Khan's order. (At first witness says), what "do I know about the meaning of price of "books. (To Court. Do you know what that "means?). It means for *Jehad*. (Turns "to entry 2nd *Zilhij* in the same account "and reads it); This (M 1 A) is in my "handwriting. It is a receipt for the two "*hoondees* of the 2nd *Zilhij* entered in the "*khatta*. This (M 1) is in my handwriting, and this letter (M 1 A) was sent to "Khaja Abdoor Ruhman, the same man as "Khaja Myan Jan. Mihroolla is another "man. This letter was written on behalf of

“ Ameer Khan. I do not know Mihroolla.
“ The *hoondees* were sent to Ameer Khan
“ (prisoner). I saw these two *hoondees*
“ as well as the prisoner's *hoondee* which I
“ have mentioned. I know they were sent to
“ Azeemabad, because I wrote the receipts.
“ I wrote this receipt (M 1 A) under orders
“ from Ameer Khan. (Turning to Azeemabad
“ account and reading entry 2nd *Zilhij*);
“ This entry is in my hand writing and refers
“ to the two *hoondees* entered in the account
“ of Ameer Khan of Pubna. Those two *hoon-*
“ *dees* were sent to Zarawar Khan. (Turning
“ to Azeemabad account of 8th Rubbee-oll-
“ awul); This is Rs. 200 credited to the
“ Azeemabad (account). (Turning to Ameer
“ Khan of Pubna's account of 8th Rubbee-
“ ool-awul). Do not know who Ameerood-
“ deen and Maneeroodeen are. It looks as
“ if there had been an erasure. I cannot
“ recollect whether there was an erasure in my
“ time. This (L 1) is in my handwriting. It
“ is addressed to Abdoor Ruhman. I wrote it
“ by Ameer Khan's (prisoner's) order. I was
“ arrested in Mauzah Kanamee. I have been in
“ hiding for five months.” “And then in
“ cross-examination he also says,—“ This (L 1
“ reading it) is an answer to a letter saying
“ how *hoondees* should be sent to Azeemabad.
“ Before the writing of this letter there had
“ been no transactions between my master
“ and Abdoor Ruhman, nor *hoondees*, nor
“ *den len*, nor did any letters pass before
“ that time. I do not know who are the
“ Mahajuns of Hatkhola referred to in that
“ letter. I did not see the letter to which this
“ (L 1) is an answer as far as I can recollect.
“ I cannot recollect if I did.” Then he says.—
“ Ameer Khan never told me that Keemut-
“ e-kitab meant money for *Jehad*. He never
“ dealt in books. I am sure he never
“ did. He never sold books on commission.
“ No books were ever sent to him for sale.
“ I wrote in this letter what he told me. He
“ told me to write a receipt of the letter and
“ of the manner in which the *hoondees*
“ should be sent to Azeemabad. The letter
“ to which I wrote an answer may have been
“ with me. I cannot recollect after so many
“ years. (Confronted with Esan Khan), is
“ that letter in his handwriting? No, it is
“ in mine and not in his handwriting. He
“ was the *Sirdar Mohurir*. I have written
“ letters in the *Kotee* before that.” Then
“ further on he says,—“ Ameer Khan did not
“ dictate the letters to me. He used to tell
“ me in Hindee what to write. I used to
“ write about one *ghurree* or so after in his
“ presence (reads M 1 A). Ameer Khan told
“ me in Hindee what to write, and I wrote in
“ Persian. I never wrote but these three
“ letters for Ameer Khan.” and he says,—
“ These were the only transactions without
“ my knowledge between Cazee Myan Jan
“ and Ameer Khan. I do not know Bengalee
“ nor can I recollect who wrote the Bengalee
“ on the envelopes M 1 and M 1.”

This witness if believed shews that these three letters were written by him by direction of the accused Ameer Khan. His position, no doubt, is the position of a witness who requires some corroboration, and upon whose unsupported testimony it would not be safe to rely. But we have most material evidence in support of what the man says; and that is the evidence of Major Parsons. Major Parsons says, that he is District Superintendent of Police, Rajshaye. Then he speaks of having searched the house of Mahomed Suffee at Thaneshur, and found certain letters there. He then says,—“ I pro-
“ ceeded to Calcutta where I searched the
“ house of Ameer Khan (prisoner), in com-
“ pany with Mr. Reilly, Nobo Kisto Ghose,
“ and some Calcutta Police. I asked Ameer
“ Khan for an explanation of statements
“ made in some letters found in Cazee Myan
“ Jan's house at Comarcolly, supposed to have
“ been written by him in which allusion was
“ made to money having been forwarded to
“ Patna. He pointed to a Moonshee sitting
“ there, whose name I afterwards ascertained
“ to be Moshib Ali, and said, that Moonshee
“ had written the letters.” Now with regard to the identification of these three letters,—that is whether the letters, here spoken of, were the letters which have been used in evidence in this case, we have the statement of Major Parsons that he asked for an explanation of a statement made in the letters in which allusion was made to money having been forwarded to Patna, and the contents of the letters shew that Major Parsons was talking to Ameer Khan about these letters. I do not think there can be any question that he was referring and was understood to be referring to these three letters which were produced at the trial. He then goes on, Moshib Ali said that “ he
“ had written the letters, but that they were
“ written by orders of his master Ameer
“ Khan.” So that according to this, Moshib Ali understood perfectly well what letters were being spoken about, the letters namely which he has deposed to having written himself. Major Parsons proceeds, “ and the
“ Moonshee then shewed entries in an account
“ book which he said referred to the letters

"in question. Ameer Khan never denied "this statement and made no explanation. "We arrested Ameer Khan, (the arrest was "under my authority), and we took the book; "that the Moonshee had pointed out, also "the Moonshee and Ameer Khan, to the "Magistrate of Howrah who released Ameer "Khan on bail. The Magistrate attached "his signature to the entries in the book, and "also to certain letters alluding to these "entries that were found in Cazee Myan "Jan's house. Mr. Balfour was, I think, the "Magistrate of Howrah."

There can be no question that upon this occasion Major Parsons called the attention of the prisoner Ameer Khan to these letters as to which Mosahib Ali has deposed that he wrote them by direction of his master Ameer Khan, and that Ameer Khan understood then what these letters were and what the nature of them was. He was also distinctly informed that Mosahib Ali said that he wrote them by his direction,—that the letters were written by the orders of his master, and he did not deny that or attempt to make any explanation. A doubt has occurred to us in the course of the consideration that we have given to this case, although the point was not taken by the Counsel for the accused. The doubt to which I allude is as to whether the evidence of Major Parsons as to what Ameer Khan said and did when he searched the house can be said to be an admission or confession of guilt made to a Police officer (for Major Parsons was a Police officer) and as such inadmissible in evidence according to Section 148 of the Code of Criminal Procedure. But it does not appear to me that in what passed there was any admission or confession of guilt such as is contemplated by Section 148. Supposing, however, it to be doubtful whether what Ameer Khan actually said, could be used in evidence, I entertain no doubt that his conduct at that interview when he was distinctly informed of what these letters were, and when his servant Mosahib Ali said that he had got orders to write them, in not denying that statement and not attempting to offer any explanation of it, is admissible in evidence against him. I think Section 148 of the Code of Criminal Procedure cannot be carried to the extent of excluding such evidence as that.

The case then stands thus:—There is, against the prisoner Ameer Khan—not putting aside, but not placing entire reliance upon, the evidence of persons who may be regarded as accomplices,—the evidence of Daimoollah about the money being sent, the evidence of Ameer Khan of Pubna, and the important evidence of these letters, as to the contents of which, and as to their referring to money which was to be sent for purposes of the *Jehad*, I think there can be no doubt.

The letters do not appear to have been sent in the order of time in which they appear in the proceedings. The letter L1 is to this effect:—

"My dear Shaikh Saheb."

"After compliments and wishes for a "happy interview, which is the sole subject "of my heart, be it known to you that "thanks to God I am all right up to the "present time through God's favor, and I "pray to him every moment for your good "health. Your kind note containing your "happy news and asking about the transmission of a *hoondee* for Azeemabad to "Hatkhola came to hand by post; and I "learnt the contents thereof, my friend, whatever sum of money you wish to send to "Azeemabad, you can lodge at the Firm of "Ameer Khan Sahib in Nazirpore, Pubna, "and in lieu thereof, get a *hoondee* drawn "out in favor of Zarawar Khan and send it "in to Azeemabad, or you can send it to me "and I will forward it from here to Zarawar "Khan Saheb. If this cannot be done, get "a *hoondee* drawn out on the *Mahajuns* of "Hatkhola and send it to me. On the receipt "of the *hoondee* I shall realize the amount "and remit it to Zarawar Khan Saheb at "Azeemabad. Rest assured. Dated the 8th "Zikandie 1278, Thursday, from Calcutta."

The other letter M1A bears more closely on the evidence in the case. It is to this effect:—

"My dear Khan Saheb."

"After compliments and wishes for a "happy interview which is the chief object "of friends, I have to inform you that your "letter with two *hoondees* for Rs. 125, "written by Ameer Khan of Pubna on "account of the sale of books came to hand "by post, and I was thereby highly obliged. "My friend, I have sent the said amount to "Azeemabad through Zarawar Khan Sahib, "Rest assured by all means. I conclude with "best wishes." Then the other letter M1A is to this effect:—"After compli-"ments and wishes for a happy interview "which are more than I can speak and write, "I have to state, that thanks to God, the "news of this place is all right, and I always "pray to Him for your good health. Your "kind letter containing (your) happy news "with a *hoondee* for Rs. 200, on account of “the sale of books for transmission to Azeemabad, dated the 3rd Rubbee-ool-awol, came to hand by post under a registered cover, and I fully learned the contents. May you be ever so kind and live and in good health. As you have sent a *hoondee* I have given credit for it in the Azeemabad account—God willing. I shall, as desired by you, write about the remittance to Azeemabad. Rest assured by all means. Two days before I had the pleasure to receive from you a kind note, dated the 2nd Rubee-ool-awol. This I write for your information.

Now it was argued by the learned Counsel for Ameer Khan that a meaning, such as was put forward in the case for the prosecution, ought not to be attached to the expression “sale of books” used in these letters. If we take these letters in connection with the evidence of the witnesses, specially that of Ameer Khan of Pubna, it is clear that these remittances were not made on account of the sale of books but for some other purpose; and then it comes to this, that the expressions contained in these letters were evidently used for the purpose of concealment; and the letters themselves very strongly corroborate the evidence which the witnesses on the part of the prosecution give. I have not alluded to the other letters which were found in Myan Jan's house. The reason why I have not done so is that the handwriting of those letters appears to be proved only by accomplices, such as Abdool Guffur and Elahee Buksh; and their evidence not having been corroborated in this respect, I have not thought it safe to rely upon those letters. In regard to the three letters L 1, M 1 A, N 1 A, the evidence is of a very different nature, and upon that evidence I can come to no other conclusion than that the prisoner Ameer Khan was a party to this conspiracy, and did acts in furtherance of the objects of the conspiracy, and therefore I think that he has been properly found guilty by the Sessions Judge of Patna upon these two charges and that his conviction ought to be affirmed.

It is necessary next to consider the cases of the other persons who were convicted. The preliminary objections taken in the case of Ameer Khan, in so far as they apply to the case of these prisoners, may be considered as already disposed of, and the judgment in Ameer Khan's case on those objections, applies equally to their cases.

I proceed to consider first the case of Tobaruck Ali who has been convicted of waging war against the Queen at Umbeyla in 1863. The witness Noorr Shah Ali says—“I know Tobaruck Ali,” and he points him out. “I have seen him at Mulka more than eight years ago. He lived there at the *Musjid*, but I do not know whose *Musjid* it was. He lived with Abdoollah. After that I saw him at the Umbeyla fight with Moonshee Abdoollah. In the Umbeyla fight the *Mujahiddeens* and Abdoolla fought for about two or two and a half months with the English. Tobaruck Ali fought against the English.” Then, in cross-examination, questions were put to him apparrently with the object of showing how far he was a witness to whom credit ought to be given. He says,—“The authorities of Murdan gave notice, sent out word that if any one knew anything about this, he should come forward. The Chiefs of Mulka who received notice of this were favorably inclined towards Government. A Sirdar, Woosa Khan, sent one in. The information wanted related to this very business about the Wahabees. It was about one year ago, my Sirdar sent me to Mr. Macaulay at Murdan. I told him that I knew about Abdoolla and Tobaruck Ali. I did not return home.” If the evidence against Tobaruck Ali was only that of this man, it might not be sufficient, but he is not the only witness. There is also the witness Sunta. He says,—I know Abdoolla, I saw him at Umbeyla seven or eight years ago. I went to see the fight and *tamasha* with Government, called the Umbeyla fight. There were 4 or 5,000 men with him. They were all armed and Hindoostanees, and were fighting with Government.” He then says,—“I know Tobaruck Ali (pointing out the prisoner). I saw him at Goolnobaree. I saw him among Abdoola's army. Know these two men (pointing to two men in Court); their names are Hedayut Ali and Mahomed Akbar. I saw them at Goolnobaree with Abdoolla's following.” Then he is cross-examined by Mr. Ingram: “I did not tell the Magistrate that that man's (Mahomed Akbar's) name is Abdoor Ruhman. His name is Mahomed Akbar.” Then in cross-examination by Mr. Lingham, he says,—“I was a witness before the Magistrate. I went to the Meetapore one or two days before I saw Tobaruck Ali there. Narain Singh went with me and two Baboos. That man (Baboo Isree Pershad, pointing to him in Court) and another Bengalee, an Officer of Government, went also and two or three Sahebs. I saw

"Tobaruck Ali in the jail. I had not seen "him from the time I saw him at Goolna-"baree until I saw him in jail," and then he says: "Mr. Macaulay of Murdan sent "for me from my country and sent me to Mr. "Reilly and Mr. O'Kineally. I arrived here "in eight to ten days after I left Murdan. I "have since been supported by Government." It is difficult to see in what other way evidence of this character as to persons engaged in the fight could be obained except by the Government instituting enquiries as to what persons were capable of speaking to these facts and sending them down to give evidence. And when such persons were sent down, it is difficult to see in what other way they could be dealt with than that they should be kept by Government and subsistence afforded them by Government. Of course witnesses so obtained and supported by Government may be in some decree disposed to give evidence in favor of the party who sent for them, but it does not follow from this that their evidence is to be rejected, and it is the duty of the Court to consider to what extent it deserves credit.

Now we have the evidence of Jan Mahomed who is in a somewhat different position from the other witness. He says:—"I know Tobaruck Ali (points him out in "Court). I have seen him at Mulka before "the Kuttlegurh affair. He lived with Moul-"vee Abdoolla, Tyza Ali, Abdool Ku-"reem, Yacoob, Ishak, Moosa, his son, "Abdoolla's son Amunoolla. I saw Toba-"ruck Ali six months before the fight Kutt-"leghur. I saw him after the fight—one "month after—at Bunskota. He was there "living with Abdoolla. Three months "afterwards again saw him at Bunskota, "when he was there living. When I saw "Abdoolla at Bunskota, there were "2,3,400 men, Hindoostanees, armed." Then in cross-examination he is asked, "How did "you come to know Tobaruck Ali," and he says:—"I know him because he was about "(*nusdeek ranee wallah*) and all know "officers. What do you mean by *nusdeek ranee wallah*"? "I mean that he lived "near Moulvee Abdoolla. Tobaruck Ali was "a friend of mine and his. I did not see him "during the fight because he was an enemy." Then he is questioned apparently by Mobaruck Ali and he says,—"Tobaruck had then "only a small beard beginning to grow. "I saw Tobaruck Ali learning the use of "artillery from the Jemadar of the Maja-"hiddeens whose name I have forgotten."

Another witness, Narain Singh also speaks as to Tobaruck Ali. He says:—"—I saw Tobaruck Ali in Umbeyla with "Abdoolla (points him out in Court) at the "time of the fighting. I saw him afterwards "at Bunskota with Moulvee Abdoolla. I "know those men (naming them). Their "names are Mahomed Akbar and Datoollah "Shah (Hekayutoollah)."

There is another witness, Mahomed Shah, whose evidence it may be well to refer to. He says with respect to Tobaruck Ali, "I "know Kadir Buksh (points him out to be "prisoner Tobaruck Ali) I have seen him at "Delhi. He came to me to read some seven "years ago at Sadik Ali Khan's house where I "was living. He was then about twenty-two "years with a sprouting beard. He read the "*Sharamulla*, and was not then very well "educated, but he had a good disposition. I "said to him, you are of advanced age, and "you are only just commencing the *Shara-mulla*, how is this? He said, I have been "for a long time engaged with Moulvee "Abdoolla on *Jehad*, and have just returned "thence to read. He read with me for "about two years. He lived at Hossein "Buksh's Madrussa. I have seen him there. "I did not go often there, but whenever I "did, I saw him there. I have seen Ben-"gallees sitting with him in his room. He "went home. I advised him to stop and "finish his studies. He said he had impor-"tant business at home and that he would "return." Then he states something that Tobaruck Ali said about his father which I need not read as it would not be evidence against the father.

According to these witnesses therefore Tobaruck Ali was actually engaged in the waging of war. Four of them speak to their having seen him so engaged, and another speaks to a statement which Tobaruck Ali made to him which shews also that he was so engaged.

Upon this evidence it appears to me that Tobaruck Ali was properly convicted, and that the conviction against him also ought to be affirmed.

The next prisoner, whose case is to be considered, is Mobaruck Ali. Now the principal evidence against him is that of Oomed Ali who is an accomplice. I do not think I need read that, because if he is sufficiently corroborated, his evidence would establish the guilt of the prisoner Mobaruck Ali. The question to be considered is, whether there is in his case sufficient corroboration upon which we may safely act and sustain the conviction.

The alleged corroboration of Oomed Ali is to be found in the evidence of the witness Hurrish Chunder Mookerjee. He says that he “ knows Mobaruck Ali the prisoner. On “ 7th May 1868 he brought me a registered “ letter for Delhi addressed to Kazee Omed “ Ali; a receipt of its arrival came to the office. “ This with other papers has been sold as “ waste paper. On the 27th May 1868 he “ brought me a registered letter to the address “ of Moulvee Mahomed Ameen. A few days “ afterwards, no receipt of its arrival having “ come, Mobaruck Ali came himself and pre- “ sented a written petition to Poornoo Chun- “ der Banerjee, who was the Postmaster. I “ was then the Register Clerk. I saw him “ present this petition. Poornoo Chunder “ forwarded it to the Postmaster of Delhi. “ I don't know what order the Postmaster “ passed on it. Hurrukh Lall, a Moonshee in “ the office, was in the habit of reading and “ writing Urdu in the Office. He was pre- “ sent when the petition was filed. The peti- “ tion never returned from Delhi as far as I “ can recollect.” In cross-examination he says,—“ I could not read the paper which I “ call a petition. It was written in Persian. “ It was presented on the 28th November, “ 1868.” The witness had in the earlier part of his examination stated that “ a few days afterwards,” that is, a few days after the 27th May 1868, Mobaruck Ali presented a petition. This is not a correct statement, because the other evidence shews that it was presented on the 28th November which would be six months after the letter was sent, which was supposed to be the missing letter referred to in the petition. He then says,—“ I recollect “ the date, because enquiries were then being “ made, and books were then in existence.” It is remarkable, if enquiries were being made, and books were in existence at the time, that those books should not have been preserved and produced in evidence on the trial of the prisoner. The witness proceeds,—“ All the “ Post Office Establishment were present, “ Biddyanund, Rasbeharee Misser, Poornoo “ Chunder, myself, and Hurruck Lall. I re- “ collect the first letter, because of the dis- “ turbance on account of the second letter, “ they were both Persian letters. The “ addresses were read by the *Moonshee* and “ written by me in English. I only write “ the name and place, not the *Mohulla*. I “ recollect these facts in consequence of the “ enquiry made on account on this second “ letter, and also because afterwards an order “ was to enquire how many letters were “ written to Mahomedans at Delhi, and I “ picked them out. I have seen Mobaruck “ Ali since my childhood. He first of all “ used to live with Ahmedoollah. I have con- “ stantly seen him on the road selling Persian “ books. The enquiry regarding letters sent “ to Mahomedans at Delhi took place between “ May and November 1868 without any “ order from Government, but because we “ heard that there had been some disturbance “ discovered at Delhi. It was a private en- “ quiry, and not known to the police;” so that according to him, this petition was presented, there had been an enquiry about letters sent to Mahomedans at Delhi. How far that enquiry became known to the Mahomedans of Delhi does not appear: but there is the fact, according to this witness, that there was an enquiry going on before the presenting of this petition. Then he says:—“ The enquiry “ about the several registered letters took “ place after November. When he presented “ the petition, then the enquiry was made at “ his instance; but when Baboo Isree Pershad “ sent information from Delhi, the enquiry “ was made on account of Government, it was “ within 1868 after Mobaruck Ali's arrest. “ No one else except Isree Pershad ordered “ these enquiries. All the papers had not “ then been sold. I never received any “ notice from Government to keep all these “ papers. Isree Pershad himself came to me “ between ten days and one month after “ Mobaruck Ali presented his petition. He “ presented only one petition,”—shewing that this inconsistency as to dates did not arise from their being two petitions. He goes on,—“ Isree Pershad remained two or “ three hours in examining papers, and “ Poornoo Chunder gave him copies of all the “ papers.” Then to the Court he says:—“ The “ Postmaster General's orders are to keep “ papers and documents only for eighteen “ months and to sell those beyond that date.” It may be that there are general orders to keep papers and documents for eighteen months and to sell those beyond that date, but these enquiries had commenced long before the expiration of the eighteen months, and it is singular that a paper so material as this petition was not preserved, and that on the trial nothing was produced but an alleged copy of it. Hurrish Chunder says most distinctly that when Isree Pershad first went to the office and ordered the enquiry, all the papers were in existence and had not yet been sold.

The next witness upon this subject is Poornoo Chunder Bannerjee. He says:—“ I “ was formerly Postmaster of Bankipore. I “ cannot recollect in what year I gave Isree “ Pershad a copy.” The he is asked:—

"What did Isree Pershad ask you for"? "He asked me for a copy of the petition that Mobaruck Ali had put in. Hurrukh Lall wrote one by my order and I gave it. I recollect that Mobaruck Ali presented a petition regarding a registered letter, the receipt of which he had not learned of. I ordered Hurrukh Lall at once to send the original to the Postmaster of Delhi and keep a copy of it. I sent it on with a memorandum to the Postmaster of Delhi. Hurrukh Lall, whose duty it was to write all Persian papers, keeps the copy in his *dufter*. Hurrukh Lall wrote the order on the petition in my presence. The petition returned from the Postmaster of Delhi. I saw it" (this is the original petition he is speaking of). "It was then posted on to the Cheque Book. The Cheque Books are always destroyed after eighteen months," so that this petition, which is said to have come back and to have been posted on the Cheque Book, appears subsequently to have been destroyed. In these circumstances then he says to Mr. Ingram:—"I never read that, as I cannot read Persian or Urdu. I don't know Mobaruck Ali. I only know that a man presented a petition about a letter not having reached Delhi, and that that petition was signed by Mobaruck Ali." The witness therefore was not able to speak to the contents of the petition. No doubt, he says, that a petition was presented by a man which was signed by Mobaruck Ali, and which was about a letter which had not reached Delhi; but what the contents of the petition were, he is unable to say, because he could not read Persian or Urdu. He proceeds:—"I got Hurrukh Lall to read it and told him to go, and that he would hear of the result. Hurrukh Lall was close to me. Isree Pershad did not tell me to keep the original." I do not know Baboo Isree Pershad, nor what kind of an officer he may be; but it is singular that he did not take care that the original of such an important document should have been preserved. Then the witness Poornoo Chunder says:—"I cannot say how long afterwards it remained; it was in my office when Isree Baboo came to me. He did not ask me for the original, only for a copy. I remained here until fifteen, sixteen months ago when I took my pension."

Then comes the evidence of Hurrukh Lall who really is the only witness who speaks to the contents of this petition. And unless he can be depended upon, the supposed corroboration from any statements in this petition must fail. He says:—"I have been employed for seven years in the Bankipore Post Office. I am head peon, but my duties are to work in the head office in the Persian and despatch departments. If there are any Urdu papers to read or copy, I have to read and copy them. This (T 1) is in my handwriting. The original of this was presented on 28th November 1868. The Postmaster directed me to send the original with an English letter to Delhi. This (M) is in my handwriting. It is a copy which I wrote on the 28th November by order of Poornoo Chunder Bannerjee, Postmaster. I was present when it was presented. It is a true copy. The original after being copied was given to the Postmaster, Poornoo Chunder Bannerjee. The orders in the original were in my handwriting, and are copied on this (M)." On cross-examination he says:—"I do not know who filed the original." Some objection is then taken to the reception of this paper which is overruled.

It comes to this with regard to what the petition was, which is said to have been presented by Mobaruck Ali on the 28th November, that we have no other evidence than that of this witness, Hurrukh Lall; except that of Poornoo Chunder Banerjee, who says that there was a petition which related to some letter which had not been sent. But this evidence is open to the question, and an important question it is,—that if a petition like this was so important that it corroborated the evidence of the other witnesses, and was likely to connect Mobaruck Ali with this conspiracy at Patna, why was not the original petition preserved? It is most unsatisfactory that the Court should be called upon to act upon a copy of a petition, the original of which might have been preserved, but has not been preserved, especially when the alleged copy purports to have been made by such a man as this witness, Hurrukh Lall. Moreover, as my learned brother Macpherson reminds me, after the arrest of Mobaruck Ali, the original document was actually (according to the evidence) in the hands of Government which makes its non-production at the trial more extraordinary. Upon this part of the case there is also the evidence of the Postmaster of Bankipore, John Richard D' Abreu. He says:—"I am Postmaster of Bankipore. I received a summons to produce a document. A petition said to have been filed by Mobaruck to the late Postmaster. I searched among the records of my office, and could not find it. I searched among the file of correspondence, and then I found a copy of it. The records of the past eighteen months "are alone kept in my office; that is the order "of the department." He then says:—"I "brought that paper and gave it to the Magis-"trate when I gave my deposition in this "case." In cross-examination to Mr. Ingram, he says: "My correspondence book shews that the original went to Delhi." Then he says to the Court,—"I know that the origi-"nal went to Delhi from a memorandum in "the correspondence book. I could not find "any memorandum in my books of its return." The other evidence, however, shews that it was returned.

It appears to me that this evidence is of a most unsatisfactory character, and that it cannot be regarded as evidence corroborative of Oomed Ali, upon which we can safely rely so as to sustain the conviction of Mobaruck Ali. Oomed Ali was a witness of that character that it would not be safe to rely upon his uncorroborated evidence; and the evidence which is put forward in corroboration is most unsatisfactory, and I cannot come to the conclusion that it would be right to sustain this conviction. The evidence leaves such a serious doubt in my mind as to whether the conviction should be supported, that I think the conviction and sentence with regard to Mobaruck Ali must be reversed.

I proceed to the case of the prisoner Hajee Deen Mahomed, who has also been convicted of abetting and waging of war. The principal witness, indeed I think the only witness, who can be said really to affect him, is the witness Bundhoo Khan. Bundhoo Khan says.—"I know Peer Mahomed (points "him out), also Mobaruck Ali and Hajee "Deen Mahomed (points them out). I have "known Peer Mahomed for fifteen or sixteen "years, Mobaruck for five or six years. I "met him first at Peer Mahomed's house. "He used to go there for two years. I saw "him on four or five occasions. He went "to preach there 'fast and pray.' I have "heard him preach. He also preached 'Go "on pilgrimage, give *zikaat* and *fitra* and "*kaarbanee* for *jehad*. If you give them for "Majahiddeens, you will get salvation. If "any body goes to join in *jehad* and fights "and liyes, he will become a Ghazee, if he "dies, he will become a martyr.' Nothing "further. Peer Mahomed was in the house "when Mobaruck Ali used to preach in it. "They were related. He was Peer Maho-"med's daughter's husband's father. I have "not seen Mobaruck Ali collect *zikaat* and "*fitra*, but I have seen Peer Mahomed col-"lect at Dinapore." Then lower down he says;—"Peer Mahomed is the *maareid* "of Shah Mahomed Hossein, and so am I. "I have known Hajee Deen Mahomed "for eighteen years since I married his "daughter. He lived at Orderly Bazaar, Dina-"pore. He went off twelve, thirteen years "ago to the west. I was present when he left. "He started from the place near the *musjeed* "in Orderly Bazaar. He told me he was going "on *jehad*. I saw him again at Dinapore "more than three years ago at Peer Mahomed's "house. He remained there six days. On "the seventh day Peer Mahomed started him "off in the morning. He gave him Rs. 2,000 "in my presence, and Rs. 99 for road ex-"penses. The money was tied up in a bundle "and blanket, and put on an *ekka*. When "he was starting, Hajee Deen Mahomed said "it was *jehad* money. This was in Peer "Mahomed's presence. I know Abdoolla "Kuwaidee. Have known him for sixteen or "seventeen years. He used to live at Hajee-"pore and came over to Orderly Bazaar. Nine "or ten years ago I saw him starting for the "west. He started from Peer Mahomed's "house. More than four years ago I saw him "at Peer Mahomed's house at Dinapore. I "saw him twice at night; first at the bridge "at Muchiatolla. He was coming along from "the west. He was riding on a *tattoo*. He "stopped two days at Peer Mahomed's "house."

Now the first observation which arises upon the evidence of this man is, that he has spoken also with regard to the guilt of Peer Mahomed, and that the evidence which he gave as to Peer Mahomed has not been believed by the Sessions Judge. It is hard to see why his evidence in regard to Hajee Deen Mahomed should be deemed more trustworthy than his evidence with regard to Peer Mahomed. The case of Hajee Deen Mahomed thus really rests upon the uncorroborated testimony of a witness, whose evidence with regard to another prisoner has been disbelieved. Besides that Hajee Deen Mahomed has been acquitted by all the assessors, and convicted by the Judge alone, contrary to the opinion of the assessors. There is also, it is true, the evidence of Mehr Ali which might be supposed to affect him. But when you look at the evidence of Mehr Ali it amounts really to very little. What he says is this:—"Tobaruck Ali (that man "pointing to him in Court) brought the "order to Busseerooddeen. I saw him "come as I was under Busseerooddeen's "command. Tobaruck Ali twice brought "orders; the first order was for him to go to "Umbeyla; the second order was to go out “to fight that night. Hajee Budderooddeen “told me, ‘go and you will be supported,’ “and nothing else. When I got to Rawul “Pindee, I asked for Hajee Deen Mahomed's “*Musjid* (objected to). I was told to do so “by Yahiya Ali who said whatever expenses “were necessary I should get from Yahiya “Ali. When I got to Peshawur I enquired “for the *Musjid* of Mooftee Mahomed Hossein, what I learned from Hajee Deen “Mahomed. The Sylhet men went with “me. We fought because they said we “must fight with the Kafirs to obtain salvation.” This evidence as I have said seems to me to amount to very little; and witness is scarcely in the situation of a witness upon whose evidence any great reliance can be placed. He has been a very considerable time in the hands of the Police; and under such circumstances it may be supposed that he would be disposed to give evidence which he thought might be in favor of the prosecution. The evidence is too slight materially to affect this prisoner, and the case against him appears to me to fail. I think the assessors were right in the conclusion they came to, when they thought that he ought to be acquitted. The conviction of Hajee Deen Mahomed cannot be sustained and must be reversed.

There remains the case of Ameenooddeen. Now the evidence against Ameenooddeen is that of Oomed Ali; but he requires to be corroborated and the corroboration is to be found in the evidence of Jai Narain who says:—“I know the prisoner Ameenooddeen “(points him out). I have known him for “twenty or twenty-two years: first at Delhi “before the mutinies. He used to come “from Bengal with camels laden with goods, “indigo-seed, and cloth, along with seven or “eight or ten *Mujahiddeens*, and used to “alight at the printing press belonging to “Mirza Fukroo of which one Elahee Buksh “was superintendent. I left Delhi to establish a shop in Rawul Pindee in 1862—63, “but I returned again in 1867. I know “Abdoolla Kuwadee. I returned to my “own *Mohulla* in Delhi. I met him at “Delhi on that occasion. I met him towards evening a little beyond the *Jumma* “*Musjid*. I asked him where he lived, and “when he had arrived. He said yesterday; “and that he was living at the *Dureeba* “*Musjid*. I saw him again the next day. “I went to see him at the *Dureeba Musjid*. “When I got there, I found Moulvee Nusseer “Hossein sitting outside. I asked where “Abdoolla was, and he pointed inside. I “saw Abdoolla Kuwadee, and near him “were seated Ameenooddeen (prisoner), and “Khajee Oomed Ali, an old man, and a “young man whose names I do not know. I “saw Ameenooddeen take out gold mohurs, “place them in the hands of the young man “who counted them out and gave them to “the old man. Ameenooddeen told me to go “away, and so I went away.” And then Mahomed Shah, who says with respect to this prisoner,—“I know Ameenooddeen prisoner (points him out). I have known “him for upwards of six years. I first met “him at Moulvee Nusseer Hossein's, where I “was studying. He was constantly there, “so I knew him. I have met him at the “bazar and other places, and at his own shop. “Kazee Oomed Ali, Ameenooddeen, and “Kadir Buksh used to be constantly with “one another. I have seen them together “in the bazars in the *Jumma Musjid*, in “different shops, and at Moulvee Nusseer “Hossein's *Jumma Musjid*. I recollect going to Ameenooddeen's shop some four and “a half years ago. It was shortly after he “opened his shop. I met him there. He asked “me to sit down, but I said I was busy and “would come again. After some days I did “come. There was another person of Bengal “with him. I asked Ameenooddeen whence “this man had come. He said from Moulvee “Abdoolla Sirdar of the *Majahiddeens*. I “asked the circumstances of the army. He “told me of the non-apperance of Syud “Ahmed, and that when he did appear, there “would be fighting with the English in the “Hills, and that the English would be driven “back and defeated to their own country; “but the English army would be very numerous, and the *Majahiddeens* few, that the “English would surround them, that the “*Majahiddeens* would fall on their faces; “that there would then be a moment of “trance, and then, three men in green would “appear on horseback, and press each *Majahiddin* to his breast; that they would “be solaced and have courage in their hearts; “that they would fight again and would again “conquer the English; that the English “would re-assemble at Peshawur and be “again defeated; that they would assemble “all the princes and fight again at Attock, “and be finally defeated, and leave this “country for their own.”

As regards Jai Narain what he states in his evidence about Ameenooddeen having brought out the gold mohurs has been disbelieved by the Judge, and Ameenooddeen has been acquitted of that charge. I cannot see that Jai Narain can be relied upon as a witness in support of the witness Oomed Ali against Ameenooddeen. The other witness in corroboration of Oomed Ali is Mahomed Shah, who speaks about Ameenooddeen having made a statement to him of the objects of the conspiracy. But that is not the kind of evidence one would expect or require for the purpose of corroborating a witness like Oomed Ali; it is not such evidence as we can safely rely upon. When the evidence comes to be examined, and looking to the circumstances of the Judge having actually acquitted Ameenooddeen of the matter as to which Jai Narain speaks, we cannot, I think, rely upon the evidence of the witness sufficiently to sustain the conviction of Ameenooddeen. I think, his conviction must be reversed.

This disposes of all these appeals. The result will be that the convictions and sentences with regard to Ameer Khan and Tobaruck Ali will be affirmed, and the convictions and sentences in the cases of Mobaruck Ali, Hajee Deen Mahomed, and Ameenooddeen will be reversed, and the said prisoners Mobaruck Ali, Hajee Deen Mahomed, and Ameenooddeen will be released.

L. S. Jackson, J.—I am of the same opinion, in respect of each appellant and on all the points, as the Chief Justice, and I have nothing to add.

Macpherson, J.—I am of the same opinion.

The 20th February 1872.

Present:

The Hon'ble F. B. Kemp, and E. Jackson, *Judges.*

Using Forged Document—Section 471 *Penal Code.*

The Queen *versus* Bholay Pramanick, *Appellant.*

Committed by the Magistrate and tried by the Sessions Judge of Fureedpore on a charge of using forged document with guilty knowledge.

To support a conviction of the offence under Section 471 of the Penal Code, there must be a using of a document by a person who knows or has reason to believe that it is forged.

Kemp, J.—THE prisoner has been convicted under Section 471 of the Indian Penal Code.

To support a conviction of this offence, there must be a using of a document by a person who knows or has reason to believe that it is forged.

The prisoner cannot read or write; he admits he borrowed money from Mutioola, and executed a bond, but he urges that he paid 6 rupees to Kisto Rukeet, and received back from him what he, the prisoner, deemed to be the original bond given to Mutioola. It is this document which the prisoner filed in the Court of Small Causes in answer to Mutioola's suit.

It is a significant fact that the Stamp, upon which the bond which the prisoner received from Kisto Rukeet is engrossed, bears the endorsement of having been sold by Rukeet who is a stamp vendor. In the absence of any evidence of the prisoner's guilty knowledge, he must be acquitted. We may observe that the bonds in question do not form a part of the record sent to this Court. They ought to have been placed on the Sessions file.

The 21st February 1872.

Present:

The Hon'ble G. Loch and W. Ainslie, *Judges.*

False Evidence—Commitment—Charge—Precise Words.

Queen

versus

Boodhun Ahir, Appellant.

Committed by the Magistrate, and tried by the Sessions Judge of Shahabad, on a charge of false evidence.

A Magistrate, making a commitment for giving false evidence in respect of any offence enquired into under Chapter XII or XIV of the Code of Criminal Procedure, must set out the *precise words*, recorded as used by the accused, containing the statement which he undertakes to prove false, and not state the effect of those words.

Ainslie, J.—IT is the duty of a Magistrate making a commitment for giving false evidence in respect of any offence enquired into under Chapter XII or XIV of the Criminal Procedure Code to set out the precise words, recorded as used by the accused, containing the statement which he undertakes to prove false. If the record of the examination of the witness has been so carelessly drawn up that the phrases therein contained will not support a charge of giving false evidence, it is not open to the Magistrate to modify those phrases by saying that the witness gave evidence "to the following effect." The questions to be tried, on a charge under Section 193, are, whether the witness made a certain specific statement, whether that statement is false; and whether he knew or believed it to be false, or did not believe it to be true. Where the Criminal Procedure Code requires the whole statement to be taken down in the mode provided in Sections 195 to 199, the charge ought to be framed from the record, and the particular statement made must be proved to be false. The Sessions Court is not concerned with the effect of a statement on the mind of the Magistrate who may possibly have misunderstood it, but only with the question whether a particular statement was made and falsely made. In this case a charge has been prepared which contains a great deal more than the accused said. Explanations showing the intention of the speaker in using the words actually recorded, when the words themselves fail to disclose the intention, are matters to be adduced in evidence, and do not properly form part of the charge. The words of the accused are not given, but instead of them an elaborate paraphrase. In the present instance the paraphrase is doubtless accurate, and there does not appear to be any reason to suppose that the accused was in any way misled or left in doubt as to what the prosecution intended to establish against him, but it is better to quote the accused's own words in the charge sheet, and so avoid all danger of misleading him. This rule was most distinctly laid down in the case of the Queen *vs.* Soonder Mohooree, IX Weekly Reporter, Criminal Rulings, page 25, in the concluding paragraph of the reported judgment.

The evidence fully warrants the conviction, and we accordingly dismiss this appeal.

The 24th February 1872.

Present :

The Hon'ble G. Loch and W. Ainslie,
Judges.

False Evidence—Defect in charge—

The Queen

versus

Adhya Thakoor and others,
Appellants.

Committed by the Joint Magistrate and tried by the Sessions Judge of Tirhoot on a charge of giving false evidence.

When certain charges did not set out the exact statements made by witnesses which the Magistrate intended to prove false, but the defect was not such as to mislead the accused, the High Court declined to interfere under Section 426 of the Code of Criminal Procedure but warned the Magistrate to be careful for the future.

Ainslie, J.—The deposition called for in Court's order of the 6th Instant, have been sent up. The charges against Adhya Thakoor and Duryao are badly drawn up, as they do not set out the exact statements made by the witnesses which the Magistrate intended to prove false. The other charges are better drawn. The defect, however, has not been such as to mislead the accused, and therefore, under section 426 of the Criminal Procedure Code, this Court will not interfere, but the committing Magistrate should be more careful for the future.

The evidence leaves no doubt as to the guilt of the prisoners.

The appeal is dismissed.

The 2nd March 1872.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Jurisdiction—Code of Criminal Procedure s. 318—Ijmallee Property—Julkur situated in two Districts.

Miscellaneous Criminal Case No. 12 of 1872.

Goluck Chunder Roy and others, *Petitioners,*

versus

Raj Mohun Bose and others *Opposite Party.*

Baboo Doorga Mohun Doss for the Petitioners.

Mr. R. T. Allan and *Baboo Umbica Churn Bose* for the Opposite Party.

The decision of the Deputy Magistrate was quashed (1) because the property in dispute being *ijmallee*, he had no jurisdiction to try the dispute under Section 318 Code of Criminal Procedure, but ought to have proceeded in the manner laid down in Circular Order No. 10 dated 16th April 1868; and (2) because a portion of the disputed *julkur* being situated within the District of Backergunge, the Deputy Magistrate of Furreedpore had no jurisdiction with reference to that portion of the *julkur* which was admittedly not within the limits of his jurisdiction.

Kemp, J.—On the 27th of January last, this record was sent for and notice was issued on the opposite party. Both parties have to-day appeared and the pleaders have been heard on both sides.

We think that the decision of the Deputy Magistrate in this case must be reversed.

Two grounds are taken by Baboo Doorga Mohun Doss for the petitioner. First, that the property in dispute being *ijmalee* property, the Deputy Magistrate had no jurisdiction to try the dispute under Section 318, and he ought to have proceeded in the manner laid down in the Circular Order of this Court No. 10 dated 16th April 1868, and a decision of this Court reported in Vol. XVII, Weekly Reporter, page 9, Criminal Cases, has been referred to.

The second point taken is that, inasmuch as a large portion of the disputed *julkur* is situated within the District of Backergunge, the Deputy Magistrate of Furreedpore had no jurisdiction with reference to that portion of the *julkur* which is admittedly not within the limits of his jurisdiction. Section 318 is referred to, as also a decision of this Court to be found in Vol. XV, Weekly Reporter, page 85, Criminal Rulings.

We think it is clear from the proceedings of the Deputy Magistrate and still more abundantly clear from the documents filed in this case as also in a measure from the *Kyefeut* of the first party themselves, that the *julkur* in dispute is *ijmalee*, that is to say, that it does belong jointly to Pergunnah No. 17, of which the 2nd party are, according to the admission of the 1st party, joint *maliks*.

We therefore quash the decision of the Deputy Magistrate on both points—*1st*, that, this being an *ijmalee* property, he ought to have proceeded under the Circular Order and Ruling of this Court referred to above, and *2ndly*, because, under Section 318 of the Code of Criminal Procedure, he had no power to adjudicate on any question concerning lands beyond the limits of his jurisdiction.

The 2nd March 1872.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Act V of 1861 *s.* 29—*Police Officer (conviction of)—Violation of duty.*

Miscellaneous Criminal Case No. 25 of 1872.

Radhoo Singh, *Petitioner.*

Mr. M. L. Sandyal for the Petitioner.

Before a Police Officer can be convicted of an offence under Section 29 Act V of 1861, it must be found that he is guilty, not of mere neglect, but of deliberate and intentional violation of duty.

Markby, J.—The charge against the prisoner in this case is made under Section 29 Act V of 1861, and the question to be considered here is whether the prisoner has been properly convicted of the offence under that Section. That Section provides, "Every "Police Officer who shall be guilty of any "violation of duty or wilful breach or neglect "of any rule or regulation or lawful order "made by competent authority, &c., shall be "liable to a penalty not exceeding three "months' pay or to imprisonment."

Now I must say that I see no reason whatever to doubt the conclusion which has been arrived at by the Magistrate and the Sessions Judge, that the Police Officer behaved in a manner which was altogether improper; but the error which I think has been committed is where the Judge of the First Court says—"the defendant all but admits the charge." I think that the defence set up by the prisoner was, if true, an answer to the charge and one which, if true, ought to have prevailed. His defence was that he was engaged in investigating another case that is to say, he was engaged upon one of the duties of a Police Officer. He is charged with violating another of the duties of a Police Officer, *viz.*, his duty to prevent the commission of offences, and it is one thing to question the conduct of a Police Officer as a Police Officer in not leaving one case to interfere in another, and another thing to say that he is guilty of an offence under Section 29. Before he can be convicted of an offence under Section 29, it must be found that he is guilty of more than mere neglect; he must be guilty of a violation of his duty which must mean an intentional violation, and therefore it was necessary to enquire in this case whether or not the violation of duty was deliberate and intentional, or whether (as the defence is), however mistaken and erroneous it may have been, it was the result of his opinion that he ought not to quit the performance of one duty to perform another. Therefore I think that the defence set up by the defendant that he was acting to the best of his discretion has not been disposed of. In regard to the prisoner having gone to his dinner, I think that it cannot be relied upon in evidence, because it appears to have been done under the direction of his superior officer.

I think, therefore, that we are bound in this case to quash the conviction and order the prisoner's release.

Bayley, J.—I am of the same opinion. The particular facts of the case put it out of the purview of the offences mentioned in Section 29.

The 2nd March 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble Dwarkanath Mitter, *Judge.*

Breach of the Peace—Jurisdiction—Complaint—Evidence.

Miscellaneous Criminal Case No. 15 of 1872.

Brojendro Koomar Rai Chowdhry *alias* Dighoo Baboo (Petitioner).

Baboos Sreenath Doss and Doorga Mohun Doss for the Petitioner.

A Magistrate acts without jurisdiction in making an order binding a person to keep the peace, when there is no complaint before him of a breach of the peace being likely to be committed by such person and without taking any evidence in the matter.

THE petitioner, dissatisfied with a decision of the Deputy Magistrate of Backergunge dated the 18th November 1871, applied to this Court under Section 404 Act XXV of 1861 on the following amongst other grounds :—

1. That the order was based on no legal evidence whatever as to there being any probability of a breach of the peace in Ramnugger, nor was there any complaint whatever on that score.

2. That no summons was served on the petitioner to show cause under Section 288 Act XXV of 1861, and no evidence was recorded in the petitioner's presence as to the probability of any breach of the peace in Ramnugger.

Couch, C.J.—The order with regard to Dighoo Baboo seems to have been made without jurisdiction, because there was no complaint before the Deputy Magistrate with regard to a breach of the peace being likely to be committed by him, nor was there any evidence whatever taken. The Deputy Magistrate proceeded upon a supposition of his own. He thought it probable, from what he had seen in the other case, that a breach of the peace would occur ; but that was not sufficient to authorize him to make an order of that kind.

The order must be annulled.

The 6th March 1872.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Preliminary Enquiry—Irregularity—Jurisdiction—Charge—Plea of Not Guilty—Decision in 12 W. R., 49 (applicability of).

Reference to the High Court under Section 434 of the Code of Criminal Procedure by the Sessions Judge of Mymensingh.

Government,

versus

Moheeh Chunder Banerjee and others, *Petitioners.*

Baboo Nulleet Chunder Sein for the Petitioners.

The Court declined to set aside the preliminary proceedings before the Magistrate, because, though there might have been some irregularity in them, they had not been objected to by the parties notwithstanding that they had had full opportunity of doing so.

The decision in 12 W. R., 49, does not apply to a case where a regular charge was subsequently drawn up giving the prisoner full information of the offence which it was intended to prove, still less to an ordinary Sessions case, where the regularity of the preliminary proceeding is not in question under the plea of not guilty.

Markby, J.—IT seems to us that the explanation of the Magistrate, which of course must be taken as truly setting out the facts of the case, clearly shows that there was full explanation to the parties of the nature of the case which they were called upon to answer, and sufficient time for them to give in their answer, and enough opportunity to take any objection that they might think proper to take to the irregularities of the proceedings which they did not do. There was no objection by the defendants before the Magistrate that they were in any way injured by the mode in which the enquiry had been conducted ; therefore, although it is possible, upon a very close scrutiny of the proceedings, that there may have been some irregularities, there is nothing which would justify the Court exercising the discretion given us by Section 404 by setting aside those proceedings.

I therefore decline to interfere in the way that the Sessions Judge asks the Court to do.

I wish to observe that the case reported in 12 Weekly Reporter, 49, Markby and Kemp, JJ., and which has been now referred to, has been altogether misunderstood. That decision could not possibly have any application where a regular charge was subsequently drawn up giving the prisoner full information of the offence which it was intended to prove ; there a totally different set of considerations would arise. Still less could it apply (as appears to have been thought) to an ordinary Sessions case where the regularity of the preliminary proceedings is not in question under the plea of not guilty as was held in the case Regina *versus* Nobodeep.*

The main contention in the case in 12 W. R., was that the reference to the Deputy Magistrate was illegal and it was admitted that it was so, under the previous decisions of this Court, unless there was a complaint either to the superior Magistrate or before a Police Officer. It was to cure this objection that an attempt was made by the prosecution which attempt we considered to have failed, and it is with reference to this failure that the observations of the Court are made.

Bayley, J.—I concur in rejecting the application.

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* The 8th April 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble J. P. Norman and W. Markby, *Judges*

The Queen

versus

Nobodeep Chunder Goswamee and another.

Mr. Eglinton for the Crown.

Mr. Newmarch and *Mr. Woodroffe* for the Prisoners.

THIS case came on for argument on points reserved. The prisoners had been tried before Mr. Justice Markby at the Sessions in March 1868, and convicted of dishonestly retaining, forging, and uttering a Government promissory note, and were sentenced to two years' rigorous imprisonment.

The following were the judgments of the Court upon one of the points reserved:—

Peacock, C.J.—The prisoner in this case is charged with having committed an offence in Calcutta. The caption of the charge stated that he had been committed to trial before the High Court by W. H. Ryland, Esq., Deputy Magistrate and Justice of the Peace of and for the district of Serampore. At the close of the case for the prosecution, it was objected, on behalf of the prisoner Nobodeep: 1st, That no proper evidence had been given of any proceeding having been had by the High Court, duly directing the preliminary investigation to be made by the Magistrate at Serampore; and, 2ndly, that no proper evidence had been given of a direction to transfer the trial of the prisoner to this Court, and that accordingly the learned Judge who tried the case should have directed the prisoner to be acquitted. The prisoner had pleaded not guilty, and the question which arises upon this portion of the case is, whether the plea of not guilty of the offence stated in the charge raised any question as to the authority of the officer who preferred that charge.

There is no doubt that this Court had jurisdiction to try the prisoner for the offence committed, if a charge had been made against him by a person authorized to make that charge (reads Sections 3, 4, and 6 of Act XIII of 1865); and when this Court being a Court of superior jurisdiction put the prisoner on his trial upon that charge, it must in my opinion be assumed, until the contrary was shown, that the charge has been preferred by an officer competent to prefer it; and even if the charge had no caption at all, in my opinion when he was put upon trial by this Court, it must be assumed that this Court had jurisdiction to try him. The rule as to jurisdiction is that nothing shall be intended to be out of the jurisdiction of a superior Court, but that which specially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an inferior Court, but that which is so expressly alleged, *Peacock v. Bell and Kendall* (1 Wm. Saunders, 74 b).

Section 3 of Act XIII of 1865 does not require the officer making the charge to set forth his jurisdiction, but it merely requires the charge to state for what offence the person is so committed or held to trial; and I am of opinion that the charge would be presumed to be sufficient if the caption had merely stated that a charge had been duly preferred against him; and if that would have been sufficient, it would also have been sufficient if the Court had stated that the charge had been preferred against him, because when a superior Court put him on his trial upon a charge preferred against him, it would be presumed that it had been duly preferred. I by no means intend to say that the prisoner would have no remedy if the charge had not been duly preferred, but I am of opinion that, when the prisoner pleaded to the charge that he was not guilty of the offence stated therein, he raised no question as to whether the charge was duly preferred or not. It is stated in the caption that Mr. Ryland was a Deputy Magistrate and Justice of the Peace for Serampore, but I think that makes no difference with regard to the question now under consideration, which is merely whether proof ought to have been given as to whether Mr. Ryland had authority to send up the charge. If he had no authority to send up the charge, there were two courses open to the prisoner. He might have applied to the Court to quash the charge, bringing to the notice of the Court the facts upon which he contended that the officer had no jurisdiction to prefer it; or he might have pleaded to the jurisdiction of the Court, showing that Mr. Ryland had no jurisdiction to prefer it; or if it appeared on the face of the charge and the caption that Mr. Ryland had no jurisdiction to prefer it, he might possibly have demurred. It has been held that objections to the jurisdiction may be taken by demurrer if the objection appears upon the face of the indictment and caption, and that the want of jurisdiction may also be pleaded specially if the defect does not appear on the face of the indictment. But it has been held that, from the nature of the plea of want of jurisdiction, it must evidently be pleaded before the general issue, because, by pleading not guilty, the defendant admits the power of the Court to try him and refers his case to their decision. See Chitty's Criminal Law, 438, and cases there cited. The prisoner, therefore pleading not guilty in this case, admitted the jurisdiction of the Court and of the jury to try him for the offence, and it was no part of the issue which the jury were sworn to try upon the plea of not guilty, whether Mr. Ryland had jurisdiction or not.

I am therefore clearly of opinion that the ruling of the learned Judge was right in holding that, upon the issue which the jury had then to try, it was unnecessary to give any evidence with regard to Mr. Ryland's jurisdiction.

* * * * * *

It appears to me that there is no force in the objections, and that the judgment must stand. The prisoners will be remanded to jail to undergo the sentence which has been passed upon them.

Norman, J.—I concur.

Markby, J.—I agree substantially with the Chief Justice. I think all that is put in issue by the plea of not guilty on this charge, is what follows the word "charge," just as on an indictment presented by a Grand Jury all that is put in issue is what follows the word "present." I think it would lead to the greatest inconvenience if on every trial the correctness of the procedure by which the prisoner was brought before the Court was considered as challenged.

I therefore think I was right at the trial in refusing to leave to the jury any question as to whether the Magistrate at Serampore had been duly authorized to hold the preliminary enquiry.

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The 8th March 1872.

Present:

The Hon'ble H. V. Bayley and W. Markby,
Judges.

Examination of Complainant—Interference of High Court.

Reference to the High Court under Section 434 of the Code of Criminal Procedure by the Officiating Magistrate of Rungpore.

Kabil Nasyo Pyada

versus

Baharullah and others.

The not examining a complainant and not reducing his examination into writing is not such an irregularity as to require the interference of the High Court in a trivial case, unless it appears probable (of which there was no suggestion in the present case) that a fresh investigation would produce a different result.

Markby, J.—We do not think it necessary to direct the Joint Magistrate to re-open these proceedings, merely because there is not upon the record anything to show that the complainant was examined and his examination reduced into writing. That is an irregularity no doubt, but not such as requires us to interfere in such a trivial case, unless we think it probable that a fresh investigation would produce a different result, and of that there is no suggestion. The Magistrate does not appear to have been called upon to explain.

The 9th March 1872.

Present:

The Hon'ble H. V. Bayley and W. Markby,
Judges.

Code of Criminal Procedure, s. 62—Possession of Land—Breach of the Peace—Jurisdiction—High Court (Powers of)—Pleaders (Right of, to be heard.)

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of Mymensingh.

Sheikh Laloo

versus

Adam Sircar.

Government

versus

Surjakant Acharjia.

Dengoo Sheikh

versus

Adam Sircar and others.

Baboo Nullit Chunder Sein for Sheikh Laloo.

Baboo Greeja Sunkur Mujoomdar for Surjakant Acharjia.

The purchaser of an interest in land at a sale in execution of decree obtained an order for possession under Section 263 or 264 Act VIII of 1859, and a dispute arose between him and another person who had some interest in the land, as to what passed under the sale certificate. Without ascertaining the rights of the parties, the Magistrate made certain orders, the effect of which was to exclude the auction-purchaser for some time from exercising the right alleged to have passed to him under the purchase. HELD that the Magistrate ought to have made no order at all with reference to the property, leaving it to the parties to determine their rights in the Civil Court, and that he had ample power under the Section to do what was necessary to prevent a breach of the peace.

The High Court may interfere with and quash an order passed by a Magistrate under Section 62 Code of Criminal Procedure when the order is such that it was beyond the power and out of the jurisdiction of the Magistrate to make it.

Quære.—Whether pleaders have a right to be heard in such cases.

Markby, J.—I THINK this is one of the cases in which the Magistrate has mistaken the nature of the proceedings contemplated by Section 62. The nature of that Section is explained by the Chief Justice in the case referred to in Vol. XIV., W. R., p. 50, *viz.*, that it is intended to apply to cases in which there might be imminent risk of danger and where it is necessary to act speedily in order to prevent that danger. The case which the Magistrate had to deal with here is this. One of the parties being purchaser of an interest in land at a sale in execution of decree had got an order for possession either under Section 263 or 264 Act VIII of 1859. There was a dispute between him and another person who had some interest in the land as to what passed under the sale certificate, and we must assume that the Magistrate's apprehension was well grounded that one of the parties at any rate was prepared to use force in carrying out his view of his rights. Under these circumstances, the Magistrate, without in any way ascertaining the rights of the parties, made three orders which in effect excluded the auction-purchaser for a considerable time from any exercise whatever of the right which he alleged to have passed to him under the purchase. That is not, in my opinion, the sort of order contemplated by Section 62, which only provides that the Magistrate may direct "any person to abstain "from a *certain* act or to take *certain* order "with *certain* property *in his possession or* "*under his management.*"

The proper course for the Magistrate to have adopted in this case was to have made no order at all with reference to the property, leaving it to the parties in the Civil Court to determine what their rights were, and he had ample power to do all that was necessary to prevent the breach of the peace apprehended under that Section of the Procedure Code which is provided for that purpose.

It is contended, however, that we have no power to interfere because it has been held that the order under Section 62 is not a judicial proceeding. No doubt that would have been so, if the Magistrate had confined himself to that sort of order which Section 62 empowers him to make; but he has gone beyond that power and has entirely excluded a man from the enjoyment of his property without any enquiry whatever as to what the nature of his rights is. That being clearly out of the Magistrate's jurisdiction, we have undoubtedly power to quash his order. It is not necessary for us to go into the other questions raised by the Sessions Judge.

We may add that in this case we only heard the pleaders under reservation of the question as to whether or no pleaders in a case of this kind have a right to be heard. As far as our experience goes, the practice of pleaders appearing in such a case is entirely a novel one, and seems only to have grown up within the last two years, and without observation. We have not been able to discover any direct sanction of the Court to such a practice, and it seems to us to require consideration whether it ought to continue.

Bayley, J.—I concur.

The 9th March 1872.

Present:

The Hon'ble H. V. Bayley and W. Markby,
Judges.

Penal Code s. 174—Non-attendance before Court—Evidence.

Miscellaneous Criminal Case No. 21 of 1872.

Shib Pershad Chuckerbutty, *Petitioner.*

Baboos Doorga Mohun Doss and Ishur Chunder Chuckerbutty for the Petitioner.

Before convicting a person under Section 174 of the Penal Code, it is necessary to prove that he had notice to appear at a certain time and place, and that he did not do so.

Markby, J.—I THINK the order of the Deputy Magistrate in this case also must be quashed. As a general rule it is not usual to fine a defendant for non-appearance before the Court in addition to estreating his recognizance; but as a matter of law we cannot say that the Court might not adopt such a course, if it sees good reasons for so doing. But by the plain words of Section 174 under which the petitioner has been convicted, it was clearly necessary to prove that he had notice to appear at a certain time and at a certain place, and that he did not do so. The evidence has been read out to us and all that appears from it is that the petitioner bound himself under the recognizance to appear when called upon. There is nothing whatever to show that he was called upon to appear at all, still less that he was called upon to appear at a certain time and place. Under these circumstances, therefore, there is no evidence to support the charge, which consists in the petitioner intentionally omitting to attend at the place where and at the time when he was legally bound to attend in obedience to a summons of Court. We, therefore, quash the order of the Deputy Magistrate.

Bayley, J.—I am of the same opinion.

The 9th March 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Code of Criminal Procedure s. 319—Lease of Property attached.

Reference to the High Court under High Court's Circular No. 17, dated the 17th June 1868, by the Officiating Magistrate of Dacca.

Greesh Chunder Doss, lessee, *Applicant.*

A Magistrate may lease land attached under Section 319 Code of Criminal Procedure.

Abstract of doubtful point.

WHETHER there is any provision in the law by which a Magistrate is entitled to lease a *mehal* attached under Section 319 Criminal Procedure Code?

What is to be done with land attached under Section 319?

Opinion of Officer making reference.

I am under the impression that land so attached may be let out.

Mr. Maclean considered this wrong and upset a farm made. The land in question was a *chur* without ryots, the value of which arose from its "*bonkor*."

Remarks by the Sessions Judge.

Mr. Officiating Magistrate Maclean's procedure might perhaps be correct in the case of inhabited villages, but in the present matter I think he was wrong. The value of the *chur* consisted in the crop of grass growing spontaneously on it; if this were not leased to some party, it would be carried of by the jungle cutters, of whose identity there could be no trace found afterwards; and whoever might be successful in the Civil Court would have additional difficulty in proving mesne profits, and the loser would have to pay without having collected a rupee.

Judgment of the High Court.

Kemp, J.—We concur in the view taken by the Sessions Judge. We direct that the lessee be restored to possession under the lease granted to him by Mr. Lyall.

The 28th November 1871.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, G. Loch, L. S. Jackson, F. A. Glover, Dwarkanath Mitter, and W. Ainslie, *Judges.*

Registration Act (XX of 1865) ss. 93 and 95—Jurisdiction—Prosecution by Magistrate as Sub-Registrar.

Miscellaneous Criminal Case No. 89 of 1871.

The Government of Bengal, *Petitioner,*

versus

Heera Lall Dass and others, *Opposite Party.*

The Legal Remembrancer (Mr. Bell) for the Petitioner.

Mr. G. Gregory for the Opposite Party.

The proceedings of a Magistrate who tries prisoners charged with having committed offences under Sections 93 & 95 of the Registration Act XX of 1866, are not illegal and without jurisdiction or otherwise bad, merely because the prosecution was (with the sanction of the Registrar to whom he was subordinate) instituted against the accused by the same Magistrate in his official capacity of Sub-Registrar.

On the 15th September 1871, *this case was referred to a Full Bench by Macpherson and Glover, JJ., with the following remarks:—*

Macpherson, J.—This case* has been sent for by the Court, under Section 404 of the Criminal Procedure Code, upon the application of the Government.

The prisoners were convicted under the Registration Act, 1866, by the Assistant-Magistrate of Mudbhunnee in the district of Tirhoot. One was convicted of false personation under Section 93; the other two of abetting false personation under Section 94.

It appears that the Sub-Registrar of Mudbhunnee is also Assistant Magistrate (with powers of a Subordinate Magistrate of the first class). It having come to his knowledge, in his official capacity as Registering Officer, that an offence under the Registration Act had been committed, the Sub-Registrar, with the sanction of the Registrar to whom he is subordinate, instituted a prosecution. Subsequently, as Assistant Magistrate, he tried the accused, and convicted them,—their own admissions being the chief evidence against them.

On appeal the Judge (considering that Section 426 cured all the other irregularities) quashed the conviction and proceedings on the ground that in trying the case the Assistant Magistrate acted without jurisdiction, because he had himself, in his capacity of Sub-Registrar, instituted the prosecution. The Judge in so deciding stated that he followed the rule laid down by a Division Bench of this Court in the case of *Bharut Chunder*, XIV Weekly Reporter, p. 74, Criminal.

On the 8th of July a rule was granted calling upon Heeralall, Bachwa Dhanuk, and Moti Lall to show cause why the order of the Sessions Judge should not be quashed; and they have now appeared to show cause through Mr. Gregory, their Counsel.

On behalf of the prosecution, it is contended that the Assistant Magistrate had jurisdiction to try the prisoners, and that this Court, as a Court of Revision, ought to set aside the order of the Judge, and to declare that the conviction was right; and we are asked to order the prisoners to be apprehended and sent to prison, so that the sentences passed upon them respectively may be carried out.

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*The record of the case was, under Section 404 of the Criminal Procedure Code, called for by Mitter and Ainslie, JJ., by order of the 8th of July last.

Section 95 of Act XX of 1866, says—"A prosecution for any offence under this Act coming to the knowledge of a Registering Officer in his official capacity may be instituted by * * * * [with the sanction of the Registrar to whom he is subordinate] the Sub-Registrar in whose * * sub-district * * * the offence has been committed. All prosecutions under this Act shall be instituted before a person exercising the powers of a Magistrate or a Sub-Magistrate of the first class."

Section 21 of the Code of Criminal Procedure gives the Criminal Courts of the several grades (according to their several powers) jurisdiction in respect of offences punishable under the Indian Penal Code or under any special or local law (except offences which are by any such law made punishable by some other authority therein specially mentioned), and declares that in the investigation and trial of offences they shall be guided by the provisions of the Procedure Code.

Thus, under Section 95, the Sub-Registrar may institute a prosecution before a person exercising the powers of a Magistrate or Sub-Magistrate of the first class; and, under Section 21 of the Procedure Code, such last-mentioned officer has (subject of course to the provisions of the law as to the local limits within which he may exercise his powers) jurisdiction in respect of the offence charged.

There is nothing in Section 95 to indicate that the Magistrate, before whom a prosecution is instituted, must be a person different from the person who is Sub-Registrar.

But it is said that a man cannot be Judge in a case in which he has an interest [XIV, W. R., 74, Criml.]

It is hard to see what interest a Sub-Registrar or Registrar can ordinarily have in a prosecution instituted by him under the Registration Act. The word *interest*, when used with the reference to the question whether a Judge is or is not disqualified from trying a case, commonly means either pecuniary interest in the result, or an interest by reason of personal relationship; and the mere existence of circumstances from which a suspicion of favor, or a possibility of bias, may arise, does not produce the same disqualifying effect as a pecuniary interest. (The *Queen* v. *Rand*, L. R., 1 Q. B., 230: *Reg.* v. *Dean of Rochester*, 20 L. J., Q. B., 467). In the case before us it is not suggested that the Assistant Magistrate could have had any pecuniary or personal interest in the prosecution. There is no ground for any suspicion of favor or disfavor on his part. The offence charged was in no sense an offence against him or affecting him personally. He was not injured or attempted to be injured in his capacity of Sub-Registrar or otherwise, either directly or indirectly, by any of the prisoners. So that in instituting the prosecution, the Sub-Registrar,—and in trying the prisoners, the Assistant Magistrate,—had no interest of any kind in the matter one way or other.

It is next argued that the mere fact of his having as Sub-Registrar instituted or initiated the prosecution disqualified the Assistant Magistrate from dealing with the case as Judge. But the case of *Wildes* v. *Russell* (L. R., 1 C. P., 723) is an authority to the contrary. There it appeared that the Justices for the County of Kent had made an order which Mr. Wildes, the Clerk of the Peace for the County, refused to carry out. The Justices referred the matter to a Committee of their members. The Committee came to the conclusion that Wildes had been guilty of a misdemeanour in his office of Clerk of the Peace, and recommended a prosecution of him by the County Treasurer. The Treasurer accordingly brought the matter before the Justices at Quarter Sessions, and they adjudged that Wildes had been guilty of misbehaviour in his office and removed him therefrom. The question was raised whether the Court, which took upon itself to discharge Wildes from his office, was a Court competent to dispose of the matter, or whether their proceeding was illegal and void, either in respect of their acting as Judges in their own cause, or of their being Judges and also parties interested; it being alleged that there was an interest as prosecutor in those Justices who directed the Treasurer to prosecute the inquiry. The case came before the Court of Common Pleas. In delivering judgment, Mr. Justice Willes, after showing that the Justices had no pecuniary interest in the matter, continued,—"As to the other point that they were both prosecutors and Judges, I cannot bring myself to feel any doubt. As well might it be said that a Judge who sees an offence committed before him, and directs a bill to be sent up to the Grand Jury, ought to withdraw from the Bench when the charge comes to be tried. I cannot regard the Justices who, so to speak, took notice of the alleged contumacy, and complained of it and suggested a prosecution, as parties to the proceedings."

Byles, J., was of the same opinion. He observed that in making the order in question, the Justices "could have no interest, unless it may be said that they have been interested in getting rid of an obnoxious person. That, however, is an interest which such a tribunal must always have. The Statute, which gives them jurisdiction to remove the officer, confers upon them that interest."

Montague Smith, J., says—"Then it is said the Justices were both parties and Judges in the matter. But the maxim, 'Nemo sibi esse judex vel suis jus dicere debet,' cannot have any reference to a state of things like this, ***where the relation is by statute and the Judges have a duty imposed upon them to investigate and decide.*** Suppose the Clerk of the Peace were wilfully to falsify a record of the Court, is it to be said that they have not power to bring him before themselves and investigate such a charge? It would plainly be their duty to do so, and the same principle must apply to any other offence."

In the case of the *Queen* v. *Mookta Sing* (XIII W. R., 60, Criml.), a Sessions Judge before whom a witness gave evidence which turned out to be false, made a complaint against him before the Magistrate, and was examined as a witness by the Magistrate. The Sessions Judge afterwards tried the case himself with Assessors, and in the course of the trial before himself was sworn and gave his evidence as a witness. On appeal the conviction was upheld. In giving judgment, *Norman, J.*, says—"No doubt it is extremely inconvenient that a Judge sitting without a Jury should try a case in which he himself is the complainant and principal witness. I should have no doubt that if he has any personal or pecuniary interest in the subject of the charge, he is disqualified from trying it. But if that is not the case, if the Judge in making the complaint has merely acted in discharge of his duty as a public officer, I think we must say that he is not incompetent to try the case."

Under Section 68 of the Criminal Procedure Code, a Magistrate may, without any complaint being made to him, take cognizance of any offence which may come to his knowledge, and may issue a summons, &c., in the same way as if a complaint had been made. It is the daily practice for every Magistrate in India to act under this Section; and it has never been suggested, so far as I am aware, that a Magistrate had not jurisdiction to try a case, merely because, acting under the direction of the law, he had in his official capacity initiated the proceedings.

Again, Section 172 of the Criminal Procedure Code expressly authorises a Court of Session, when any one of certain offences specified are committed before it or under its own cognizance, to charge a person for such offence, and to commit and try such person upon its own charge. Such an authority never could have been given by the Legislature, if the mere fact of having himself in his official capacity initiated the proceedings had been deemed a disqualification for him afterwards sitting as Judge. This Section is relied on for the prisoners as showing that the Legislature found it necessary specially to authorise the Sessions Judge to hold the trial in such a case. Probably the special object of the Section was merely to prevent the necessity of having to send such cases before a Magistrate at all. But whatever may have been the cause which moved the Legislature to pass Section 172, it clearly admits the principle that the having initiated the prosecution is not necessarily a reason why a Judge should be deemed disqualified from presiding at the trial of the accused.

The case of *Bharut Chunder* in XIV, W. R., p. 74, Criminal, is the only reported case in which the precise point raised before us has been expressly decided. The judgment of the Court is very short:—"We think that on the principle that no one should be a Judge in any case in which he is himself interested, as also on the principles laid down in a decision of a Division Bench of this Court to be found in XIII, W. R., p. 66, Criminal, the Magistrate ought not to have tried this case."

The learned Judges rely, *firstly*, on the principle that no one should be a Judge in a case in which he is himself interested; and *secondly*, on the decision in *the Queen* v. *Chunder Sekur Roy*, XIII, W. R., p. 66, Criminal. In the case now before us, the Judge was not, as I have already shown, himself interested in the result. And as regards the case of *Chunder Sekur Roy*, I am of opinion that it in no way determines, or even bears, upon the question which we have to decide.

In addition to that case, (which overrules a previous decision reported in VIII, W. R., p. 61, Criminal), another case has been relied on, which is reported in XII, W. R., p. 18, Criminal. But these cases do not deal with any questions arising under the Registration Act, but with questions which have been raised on various Sections of the 11th Chapter of the Criminal Procedure Code. These Sections are peculiar in their language, and no argument founded on them, or on the decisions of the Courts upon them, can in any way indicate the decision at which we ought to arrive with reference to the provisions of the Registration Act which are wholly different. It may be that, under Section 171 of the Procedure Code, a Judge cannot try a case in which the prosecution has been initiated by himself, although upon this point I abstain from expressing or indicating any opinion one way or other. But the fact that the law has been laid down in a certain manner with reference to the special words used in a particular Section is no reason why the law should be declared to be the same under another Section in another Act, the language used in which is wholly different.

We have been asked to refer the matter for the decision of a Full Bench. Under the circumstances, it seems to me to be scarcely necessary to do so; but as Mr. Justice Glover is of opinion that the reference should be made, I concur with him in making it.

The Judge has already disposed of the appeal upon its merits. He quashed the proceedings on the ground that the Assistant Magistrate acted without jurisdiction, but was of opinion that, with reference to the provisions of Section 426 of the Criminal Procedure Code, there was no other reason for interfering with the conviction. Following the rule laid down in the case of *Gora Chand Gope* (V, W. R., p. 45), I think that (if the Full Bench shall uphold the view which I take of the jurisdiction of the Assistant Magistrate) the order of the Judge should be set aside, and he should be directed to cause the prisoner to be arrested and committed to prison that the sentences passed on them may be carried out.

The question referred for the decision of a Full Bench is, are the proceedings of *A. B.*, a Magistrate who tries prisoners charged with having committed offences under Sections 93 and 94 of Act XX of 1866, illegal and without jurisdiction or otherwise bad, merely because the prosecution was (with the sanction of the Registrar to whom he was subordinate) instituted against the accused by the same *A. B.* in his official capacity of Sub-Registrar?

The judgments of the Full Bench were delivered as follows:—

The Chief Justice.—The question which is referred to us is whether the proceedings of a Magistrate who tries prisoners charged with having committed offences under Sections 93 and 95 of Act XX of 1866, are illegal and without jurisdiction or otherwise bad, merely because the prosecution was (with the sanction of the Registrar to whom he was subordinate) instituted against the accused by the same Magistrate in his official capacity of Sub-Registrar.

Section 95 Act XX of 1866 provides that "a prosecution for any offence under this "Act, coming to the knowledge of a Registering Officer in his official capacity, may be "instituted by the Registrar General, the "Branch Registrar General, the Registrar, or," which is this case, "(with the sanction of "the Registrar to whom he is subordinate) the "Sub-Registrar in whose Territory, District, or "Sub-District, as the case may be, the offence "has been committed," and that "all prosecutions under this Act shall be instituted "before a person exercising the powers of a "Magistrate or Subordinate Magistrate of the "first class."

I think that the Legislature, when this Section was passed, did not contemplate the Sub-Registrar being also the Magistrate, and himself exercising the powers of a Magistrate and trying the case; and certainly where it can be done, it would, to my mind, be better that some other person than the Sub-Registrar should try the case. But I agree with the referring Judges in thinking that the words of the Section do not indicate that he must be another person. The words of the Section are not sufficient to prohibit him from doing it; and therefore the other question arises, whether there is any general rule of law with regard to the Judge being interested which would apply, and which would prevent the Sub-Registrar being the Magistrate who tried the case.

Now the interest which disqualifies a Judge is not merely a pecuniary interest; that would be too limited a way of describing such an interest; but in describing it we ought rather to use the language of Mr. Justice Norman in the case in 13 W. R., 60, Criminal Rulings, that is to say a personal or a pecuniary interest. A Magistrate could not try a person for an assault upon himself; and without defining precisely what amounts to personal interest, it appears to me that there must be either a personal or pecuniary interest in order to disqualify a Judge or Magistrate from exercising the general jurisdiction which is conferred upon him. It is not a question of want of jurisdiction, so much as of a disability arising from interest to exercise his jurisdiction in the particular case.

In this case, I think, the Sub-Registrar has not such an interest in the matter as disqualifies him from trying the case; and I may observe with reference to some of the arguments that have been used as to the Sub-Registrar having made up his mind, and that the accused would have no chance of a fair trial, that the sanction of the superior officer, the Registrar, is required before the prosecution can be instituted, and certainly I do not consider that the prosecution will not be instituted unless the Sub-Registrar has made up his mind as to the guilt of the party. It is his duty, when he comes to know that an offence has been committed, to cause a prosecution to be instituted, by which I understand that there is *primâ facie* evidence of an offence having been committed, that there is that which renders it proper that there should be an enquiry, and the Registrar accordingly gives his sanction to it; and certainly, I cannot suppose that, because an officer in his position sanctions the institution of a prosecution, his mind is made up as to the guilt of the party and that he is not willing to consider the evidence which may be produced before him when he comes to try the case. In this case, there appears to be no such interest as would prevent the case from going before the Magistrate as the trying authority; but as I have already said it would be better, where it can be avoided, that it should not be done, and it may very well be that the Court in its discretion would in similar cases direct the transfer of the case in order that it should be tried by some other officer.

Section 172 of the Code of Criminal Procedure does not in my opinion afford any argument in favor of the proposition that the Sub-Registrar could not try the case. I understand Section 172 to be this, that whereas the Court of Sessions would not have authority before the passing of the Code to frame a charge or commit for trial in respect of offences committed under the preceding Sections, a special power is given to it in this particular instance to do so. That is a sufficient explanation of Section 172, and the Section does not afford any ground for the contention of Mr. Gregory that, because there is a special provision of that kind, by the general law, a Judge instituting proceedings against a person cannot also try him.

I think, that the question that has been put to us by the Division Court must be answered in the negative, that it is not illegal or without jurisdiction or otherwise bad for the Magistrate to try a person in the case supposed.

Then there is another question which it may be well to consider, namely, what order should be made upon this answer being given to the question referred. I rather think that had better be disposed of by the learned Judges who referred the question as they can deal with that matter better than we can having had all the facts of the case before them.

Loch, J.—I concur.

L. S. Jackson, J.—I am of the same opinion. I admit that I have not been free from doubt. It seems to me on reading the terms of Section 95 Act XX of 1866 that the Legislature had in contemplation first the person by whom proceedings of this kind might be instituted, and then a Magistrate of a specified grade before whom such charges must be instituted, and that the Legislature in passing that Section did not contemplate the union of those two capacities in the same person. I admit, however, that the Legislature has not in this instance used words sufficiently clear to exclude the union of those two persons. In the case of *Chunder Sekhur Roy*, we had to deal with the wording of a different Section (171) where the words used were more emphatic. There the law speaks of *sending* a particular person in custody and charged with having committed a certain offence before a specified Magistrate. If the same words had been found in Section 95 Act XX of 1866, I would probably have held the same opinion in this case as I did in the other case.

Glover, J.—I concur in the answer proposed to be given to the question referred by the Division Bench.

Mitter, J.—I concur in the proposed answer to the reference.

Ainslie, J.—I concur.

The 18th March 1872.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Commitment—Criminal Breach of Trust—Forgery.

Reference to the High Court under Section 484 of the Code of Criminal Procedure by the Sessions Judge of East Burdwan.

Queen

versus

Mooktaram Chatterjee.

The accused was charged with two others with criminal breach of trust. Evidence was taken in support of the charge of embezzlement; but considering that there was no evidence to convict him under Section 408 of the Penal Code, the Assistant Magistrate charged him under Section 208. Five days afterwards he was charged with forgery and called upon to plead to that charge, but no separate grounds of committal were drawn up. The HIGH COURT agreed with the Sessions Judge that the commitment in its present state was incomplete and should be quashed.

Reference.—THE case of the Queen *versus* Mooktaram as sent up, to the Court of Session consists of a charge drawn up on the 9th January and Mooktaram's examination on that charge. There are no grounds of commitment, and I have to fall back upon the record of the Bengal Coal Co, Prosecutor and Lukhinarain Mookhopadhya, T. Moodie, and Mooktaram Chatterjee, defendants, charge criminal breach of trust. This record is very confusing and apparently full of irregularities, and I cannot trace the Assistant Magistrate's proceedings. Evidence seems to have been taken in support of the charge of embezzlement on the 4th and 5th January. On the 5th the Assistant Magistrate charges Mooktaram (the prisoner before me) under Section 250, as he considers that there is no evidence to convict him under Section 408. He then puts him in the witness box and subjects him to a long and severe examination. Four days after, *i.e.*, on the 9th January, Mooktaram is, it seems, charged with forgery and called upon to plead to that charge.

When the Assistant Magistrate's judgment was written does not appear as it bears no date. At the end of that judgment which is very lengthy and the greater part of which is exculpatory of one of the defendants, Moodie, I find these words "against Mooktaram the evidence is clear ($\frac{1}{4}$ 18, $\frac{8}{4}$ 10 etc.) and he admits his handwriting. The charge is fully established." This I suppose I am intended to accept as "grounds of committal." The Counsel for the prisoner objects to my proceeding with the trial on the record as sent up, and I think his objections are perfectly fair. If the Assistant Magistrate thought that Mooktaram should be committed, he should have prepared a fresh record, taken the evidence regarding the receipt afresh, called upon the accused to answer the charge, and offer evidence if he wished; separate grounds of committal should then have been drawn up and there should have been no need to refer to Lukhinarain's case at all.

Mooktaram was, it seems, illegally arrested by the Police without a warrant. There is on the record a bit of paper, dated 26th December, which is an order by a Sub-Inspector to arrest Mooktaram under Sections 467 and 109, this is utterly illegal. The Police cannot arrest on a charge under Section 467 without a warrant. This is followed by an order of the District Superintendent of Police of the 26th December, directing the Sub-Inspector to arrest Mooktaram, on what charge the order does not state; bail is also ordered to be taken although the offence is not bailable.

All these irregularities are seized upon by the prisoner's Counsel, and he contends that his client should be let go at once. I have no power to give such an order. I consider that the case should not be allowed to go to a Jury in its present form, and I am inclined to think that no Jury would convict upon the evidence at the latter part of page 10 ("10 $\frac{8}{4}$" ?) and the middle of page 18 ("$\frac{1}{4}$ 18" ?) I may add that Lukhinarain whom the Assistant Magistrate convicted of criminal breach of trust, was on appeal released by me, the evidence being in my opinion insufficient to justify the conviction.

To avoid delay as the prisoner is in *hajut*, I send the case up without calling for an explanation from the Assistant Magistrate, which does not seem to be necessary in the case of a commitment to the Court of Session.

Judgment of the High Court.

Glover, J.—We have read the proceedings in this case and agree with the Sessions Judge that the commitment in its present state is incomplete and should be quashed. With regard to the illegalities noticed by the Sessions Judge, they would not prevent a fresh commitment should the Assistant Magistrate see fit to make one, and this Court has no power to direct that such commitment shall not be made. Before making it, however, the Assistant Magistrate will no doubt consider the remarks of the Sessions Judge on the trial in appeal of Queen *versus* Luckhee Narain Mookerjee.

The 23rd March 1872.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Misdirection—Right of Private Defence—Section 100 *Penal Code, cls.* 1, 2, *and* 6.

Committed by the Magistrate and tried by the Additional Sessions Judge of Hooghly, on a charge of Culpable Homicide.

The Queen

versus

Mookhtaram Mundle,
Appellant.

Baboos Ashootosh Dhur and *Kumlakant Sein* for Appellant.

HELD that it was no misdirection on the part of the Judge in not calling the attention of the Jury to Clauses 1 and 2 of Section 100 of the Penal Code, when he particularly called their attention to Clause 6 of that Section.

Kemp, J.—AFTER hearing the pleader for the prisoner Mookhtaram Mundle, we do not think that there is any such misdirection to the Jury as in any way prejudiced the prisoner. The Judge called the attention of the Jury to the different pleas raised by the prisoner ; namely, *first,* that he was not armed with the weapon at all ; *secondly,* that the blow was an accidental one ; and *thirdly,* that the blow if given at all, was given in the exercise of the right of private defence. On the first head the Judge informed the Jury, that there was evidence that the prisoner was armed with this weapon, which, if they believed it, sufficiently established that fact. On the second head he also called their attention to the evidence in the case which, if believed, substantiated the fact that the blow was not an accidental one ; and on this question whether the blow was accidental or not, we may well refer to the evidence of the doctor. The wound, he says, was a deep one, five or six inches in length, the breast bone and five of the ribs on the right side were completely cut through, a portion of the right lung protruded through the wound, and the heart was cut in two. This was evidently not an accidental blow. Then comes the third head of the defence, namely, that the blow was struck in the exercise of the right of private defence. The Judge called the attention of the Jury to Sections 96 and 97 Clause 1, to Section 99 Clause 4, and to Section 100 Clause 6. He at the same time also asked the Jury, whether they believed that Mookhtaram's party were only three in number, and that they were attacked by some twenty five men on the other side, or whether it was not more probable on the evidence that Mookhtaram's party were in larger force than they represented themselves to be, and were prepared and armed to meet and to resist Anundo's party. The objection which the pleader for the prisoner takes to the Judge's charge to the Jury being defective is that he did not call their attention to Clauses 1 and 2 of Section 100 of the Penal Code and that he ought to have asked the Jury, whether they considered that the prisoner Mookhtaram had not reasonable cause to apprehend death in consequence of the assault made upon him by Anundo's party. Now the right of private defence is extended by Section 100 of the Indian Penal Code under certain restrictions ; these restrictions are laid down in Section 99 of the Code. There is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities. This is laid down in Clause 3 Section 99. Now there is evidence in this case which the Judge refers to in his charge to the Jury, to the effect that Mookhtaram was not prevented or was not unable to have recourse to the public authorities for protection, and therefore that it was on this account that the Judge more particularly called the attention of the Jury to Clause 6 Section 100, and told them to find on the evidence whether they were of opinion that the assault on Mookhtaram, if any, on the part of Anundo's party was under such circumstances as to reasonably cause Mookhtaram to apprehend that he would not be able to have recourse to the public authorities for his protection, and the Jury evidently, from their unanimous verdict, believed that this was not a case in which Anundo's party were wholly the aggressors, but that Mookhtaram's party were armed and prepared to fight, and that the prisoner Mookhtaram had with that intention armed himself with a dangerous weapon with which he killed Gungaram. We see no reason to interfere with the conviction of the prisoner, and the sentence passed upon him by the Court is not too severe, considering the character of the wound inflicted by him on Gungaram Paramanick and its fatal result.

The 23rd March 1872.

Present :

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Prosecution for Perjury—Authority of High Court.

Miscellaneous Criminal Case No. 62 of 1872.

Sheebpershad Chuckerbutty and others, *Petitioners.*

Baboo Isshur Chunder Chuckerbutty for the Petitioners.

It would be very undesirable for the High Court, except under very peculiar circumstances, to entertain in the first instance an application to authorise a prosecution for perjury.

Markby, J.—ALTHOUGH Section 169 of the Code of Criminal Procedure empowers either this Court or the Subordinate Court before which the case was heard to authorise the prosecution for perjury, we think that it would be undesirable for this Court to entertain such an application in the first instance. We do not say this Court has no power to do so, but we have full discretion in the matter; and we think that, except under very peculiar circumstances, the application ought to be made in the first instance at any rate to the Subordinate Court. We, therefore, refuse the application.

The 3rd April 1872.

Present :

The Hon'ble W. Markby and W. Ainslie, *Judges.*

Criminal Prosecutions by Civil Suitors.

The Queen

versus

Acheet Lall, *Appellant.*

Committed by the Magistrate and tried by the Sessions Judge of Tirhoot, on a charge of making a false statement before a Sub-Registrar.

As a general rule, one of two parties to an impending suit ought not to put the Criminal Law in motion as against the other in matters connected with the suit; or if he does so, the hearing of the Criminal case ought to be postponed until the suit is concluded. But although that is a good ground for questioning the propriety of a prosecution, it is not a ground for questioning the legality of a conviction.

Markby, J.—WE do not think that we should be justified in setting aside this conviction, though we are not altogether satisfied with the proceedings if we have understood the facts rightly.

We understand that there was and is still a dispute between the factory and the ryots; that the parties had been and were again likely to be in litigation in the Civil Court on matters arising out of that dispute, and that the defendant in this case was one of the ryots engaged in the dispute. Now it is, we think, a good general rule that one of two parties to an impending suit ought not to put the criminal law in motion as against the other, in matters connected with the subject of that suit; and if that is done, then as a general rule the hearing of the criminal case ought to be postponed till the suit is concluded. That is the usual practice, and it appears to us to be founded in good sense; for it is clear that the procedure of a Criminal Court might otherwise be easily used for purposes of oppression. But though this consideration leads us to question the propriety of the prosecution, it is not a ground for questioning the legality of the conviction; and as the conviction is supported by the evidence, the appeal must be dismissed.

The 5th April 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and W. Ainslie, *Judge.*

Right of private defence—Wanton firing of guns.

The Queen

versus

Hussainuddy and others, *Appellants.*

Committed by the Magistrate and tried by the Officiating Additional Sessions Judge of Backergunge, on a charge of rioting &c.

Baboo Kashi Kantha Sein for the Appellants.

The firing of a gun at persons at a distance of twenty-five yards, without a reasonable apprehension of danger, and without any necessity for so doing, is not justifiable by the right of private defence.

Couch, C. J.—IN the case of injuring another in self defence, there must be two things; there must be no more harm inflicted than is necessary for the purpose of defence, and there must be a reasonable apprehension of danger to the body from the attempt or threat to commit some offence; and the right does not commence until there is that reasonable apprehension. In this case, it is clear that the gun was fired from, as most of the witnesses said, five and twenty yards. At that time, there could not be a reasonable apprehension of danger to Tumizooddeen, nor was it necessary for him to fire the gun and to injure these people in the manner he did for the purpose of defence. There is no justification for his doing that. Apparently, it was a wanton use of the gun to fire at these people at this distance. I think the conviction was quite right, and I see no reason to mitigate the sentence.

The 6th April 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and W. Ainslie, *Judge.*

Criminal Intimidation, Insult, and Annoyance—Possession (actual, not constructive.)

Reference to the High Court under Section 434 *of the Code of Criminal Procedure by the Officiating Magistrate of* 24 *Pergunnahs.*

Ishur Chunder Kurmokar, *Complainant,*

versus

Seetul Das Mitter, *Opposite Party.*

Baboo Keshub Chunder Roy for the Complainant.

An intention to intimidate, insult, or annoy any person in possession of a house, does not mean to insult or annoy any person in constructive but in actual possession of the premises.

Couch, C. J.—IN this case the Criminal Law has been improperly resorted to, as it too frequently is in disputes of this kind. There was not here an intention to commit an offence, nor was there an intention to intimidate, insult, or annoy any person who was in possession of the house. That does not mean to insult or annoy any person in constructive possession; it obviously means to intimidate, insult, or annoy any person actually in possession of the premises. Here the intention, so far as appears, was to assert either a real or a fancied right to the property. The man might have been mistaken with regard to his rights, but that was the intention with which he appears to have entered the house. The conviction must be quashed.

The 9th April 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and W. Ainslie, *Judge.*

Criminal Appeals—Jurisdiction (of Single Judge of High Court).

The Queen

versus

Chundro Joogi, *Appellant.*

Committed by the Magistrate, and tried by the Sessions Judge of Jessore, on a charge of attempt at murder.

Baboo Bhoyrub Chunder Banerjee for the appellant.

Criminal appeals to the High Court may be disposed of by single Judges. No second petition of appeal can be allowed to be considered after a first one has been rejected by a single Judge.

Couch, C.J.—IN this case the prisoner presented a petition of appeal to this Court from a conviction by the Sessions Judge, which was disposed of on the 27th of January by Mr. Justice Glover sitting alone. The learned Judge rejected the petition. The petitioner has now by his pleader presented another petition, which was filed on the 15th of February, within the time allowed by law; and therefore the question arises, whether the first petition was properly disposed of. If it was, the Court will not allow the matter to be re-opened.

Now the 13th Section of the 24th & 25th Vic. cap. 104 for constituting the High Court enacted that the exercise of the Original and Appellate Jurisdiction vested in the Court, by one or more Judges, or by Division Courts constituted by two or more Judges, was to be provided for by rules of the Court. I have not found that any formal rules under this Section were passed until the 1st of January 1865; but the practice of disposing of some business by one Judge, and of other by a Division Court, existed from the time of the constitution of the High Court, which on the Appellate Side for the most part adopted the practice of the Sudder Court. But on the 1st of January 1865 a rule was made by which it was declared that all rules which at the time of the abolition of the Sudder Court were in force in that Court were to extend, so far as they were applicable, and as nearly as might be, to all proceedings of Appellate Jurisdiction in the High Court, not being cases of appeal from the Ordinary Original Civil Jurisdiction of the Court, except so far as such rules were contrary to the said 24th & 25th Vic. cap. 104, or to the Letters Patent, or as the same might have been or should thereafter be altered or modified by the Court. Those words are very important—the rules of the Sudder Court were to be in force except so far as the same might have been altered or modified by the Court before that time. Now it appears that there was a rule of the Sudder Court of the 27th of April 1854, which required that all criminal cases, whether appeals or referred cases, should be tried before a Bench of at least two Judges. But on the 14th of June 1854 a modification of that rule was made, and it was then provided that—"If, by accident or "indisposition, one of the Judges forming "a double Bench for the trial of Nizamut "cases is prevented from attending the "Court, it shall be competent to his "colleague, sitting alone, to take up and "dispose of any appeal or referred criminal "trials, in which the opinion of the Sessions "Judge agrees with the *futwas* of the "Law Officer, or the verdict of the jury or "assessors who tried the case, reserving for "the consideration of his colleague any case "in which he may entertain doubt, or may "be inclined to differ from the Sessions "Court."

In the rules made on the 1st of January 1865, which were continued in force by a rule made on the 2nd of January 1866 after the issuing of the Letters Patent now in force, there is another rule (No. 30) which says that—"Appeals on the Criminal side of the "Appellate branch of the Court, which are "in the first instance heard before one Judge, "may, if he think fit, be referred to such "Division Court." And the previous rule (29) is that—"A Division Court for the "hearing of criminal appeals may consist of "two or more Judges." This rule (30) shows that either in the time of the Sudder Court, or of the High Court, a practice had existed of criminal appeals being in the first instance heard before one Judge. The language of the rule clearly shows this. It recognizes it as a practice which was then in existence, and provides that the Judge may, if he think fit, refer the appeal to the Division Court. Therefore, whatever might have been the rule of the Sudder Court, it had before the passing of the rules of the 1st of January 1865 been altered or modified, so as to allow of criminal appeals being heard in the first instance before one Judge. Even if that were not so, this rule (30) might be considered as impliedly allowing appeals so to be heard, although it does not in terms say that they shall be. By providing that the Judge *may* refer appeals to a Division Bench, it impliedly authorizes him to hear them in the first instance.

There is really then a rule of this Court made under the authority conferred upon it by the 13th Section of the Act constituting the Court, allowing a single Judge in the first instance to hear criminal appeals; and the papers which we have got showing what took place in the matter when it came before Sir Barnes Peacock, confirms the view of what was the practice of the High Court at the time the rules of 1865 were made.

There is a minute of Sir Barnes Peacock, dated the 8th of February 1869, in which, speaking of what the practice had been, he says:—"As criminal appeals were formerly "heard and determined by one Judge of the "Sudder Court, except in cases in which the "order had to be signed by two Judges "under Section 420 of the Code of Criminal "Procedure, I have thought it right to ap-"point each of the Judges of the 3rd and "5th Benches, sitting alone to hear and deter-"mine criminal appeals."

The appointment of four of the Judges to sit singly to hear criminal cases was made by an order of the same date. That appears to have been objected to as being an exercise of a power which did not belong to the Chief Justice under the Act of Parliament. The power of the Chief Justice was not to make a rule that criminal appeals should be tried by a single Judge; but that if there was a rule of the Court to that effect, he was to determine what Judges should sit to hear them. And his attention having been called to that, Sir Barnes Peacock, in a minute dated the 12th of February 1869, says:—"I find that there was a rule of the "late Sudder Court under which all appeals "in criminal cases and cases for revision "were required to be heard before two "Judges. I do not find that that rule was "ever revoked.

"Under these circumstances I doubt whe-"ther the rule of this Court which provides "that all such business as was formerly "heard and determined by one Judge of "the Sudder Court may be heard and deter-"mined by one Judge of the High Court, "authorizes the appointment of one Judge "to hear criminal appeals or revisions." And he revoked the order which he had made on the 8th of February.

Now it is to be observed that the learned Chief Justice appears not to have had present to his mind the rule (30) at all. He does not refer to it, and he assumes that the matter was governed by the rule of the Sudder Court which required that criminal appeals should be heard before two Judges. And that rule never having been revoked, he considered that every criminal appeal must be heard by two Judges. But there was the circumstance which appears in his own minute, that it had been the practice in the Sudder Court for one Judge to hear criminal appeals; and there was the rule (30) showing that the High Court had adopted that practice. I think that Sir Barnes Peacock, if he had had his attention called to rule (30) and the undoubted practice for one Judge to hear criminal appeals, would not have considered that a single Judge sitting alone had no power to try criminal appeals. He had exceeded the power of the Chief Justice in making[revoking?]the rule that single Judges should sit alone to hear criminal appeals. But these papers do not show that the rules of the Court did not and have not allowed criminal appeals to be disposed of by single Judges. And it appears that from November 1870, if not from the constitution of the Court, single Judges have constantly heard appeals in criminal cases and disposed of them, as was done by Mr. Justice Glover in this case. I think the learned Judge had power to reject the former petition, and therefore we cannot allow the second petition to be considered.

Ainslie, J.—I entirely concur.

The 9th April 1872.

Present :

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and W. Ainslie, *Judge.*

Maintenance (of Illegitimate Child)—Code of Criminal Procedure s. 316—*Jurisdiction—Decision of Civil Court.*

Miscellaneous Criminal Case No. 41 of 1872.

John Meiselback, *Petitioner.*

Baboo Romanath Bose for the Petitioner.

A decision of the Civil Court, refusing to enforce a contract or agreement against a man for the maintenance of a woman, cannot conclude either the woman from applying, or a Magistrate from making an order, under Section 316 of the Code of Criminal Procedure, for the maintenance of their illegitimate daughter.

Couch, C.J.—The proceeding in the Civil Court was of a different nature: it was founded on an alleged contract, and the decision of the Civil Court, even if it had not proceeded, as it appears to have done, on the Law of Limitation, would not have concluded the woman from applying under Section 316 of the Criminal Procedure Code for the maintenance of the illegitimate daughter. All that the Civil Court had to determine was, whether there was a contract or agreement on the part of the petitioner which could be enforced against him for the maintenance of the woman. The only question in this case is whether the matter was so put before the Magistrate that he had jurisdiction to make the order under Section 316 for the maintenance of the illegitimate daughter. Now it appears that what the woman did was to lay before the Magistrate the facts that she had cohabited with the petitioner, and that there was a daughter of whom she alleged the petitioner to be the father, and she asked that a sum might be paid to her for maintenance. She stated in her petition that both she and the daughter were starving and required maintenance, and she asked for a sum to be paid to her for maintenance. The Magistrate had power to make an order for the maintenance of the daughter. The question whether the evidence before the Magistrate was sufficient to enable him to make that order was a matter for him—not for us to consider under Section 404.

The petition must be rejected.

The 10th April 1872.

Present :

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and W. Ainslie, *Judge.*

Evidence—Admissions by Prisoner's Vakeel.

The Queen

versus

Kasim Mundle, *Appellant.*

Committed by the Magistrate, and tried by the Sessions Judge of Jessore, on a charge of causing hurt.

Admissions made by a prisoner's vakeel cannot be used against the prisoner.

Ainslie, J.—This is a very clear case, and we must reject the appeal. We observe that the Sessions Judge has referred to an admission made by the prisoner's vakeel. Such admissions cannot be used against an accused person, and the Judge should be careful not to rely on them in future.

The 13th April 1872.

Present :

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble W. Ainslie, *Judge.*

Misappropriation of Postage Stamps—Criminal Breach of Trust—Indian Post Office Act, 1866 *s.* 49—*Penal Code—Code of Criminal Procedure s.* 426.

In the matter of

Nobin Chunder Dutt, *Petitioner.*

Mr. M. M. Ghose for Petitioner.

The accused being entrusted to put a proper amount of stamps on a letter and return such as might not be required, did not return them but misappropriated stamps to the value of two annas, and was convicted and punished under Section 49 of the Indian Post Office Act XIV of 1866 instead of under the Penal Code for Criminal breach of trust. As the accused had not been sentenced to a larger amount of punishment than could have been awarded for Criminal Breach of Trust nor shown to have been prejudiced by the error of convicting him under the Post Office Act, the High Court could not, under Section 426 Code of Criminal Procedure, reverse or alter the sentence, pointing out at the same time that this was one of those cases in which it was a mistake to look at the smallness of the amount misappropriated, rather than to the gravity of the offence.

Couch, C. J.—In this case, upon the facts as found in the Lower Courts, we think that the conviction under Section 49 was wrong. The offence which had been committed was not an offence under this Section: it was really a Criminal Breach of Trust, the accused being entrusted to put upon the letter the proper amount of stamps and to return such as might not be required. We must take it as found that he did not return them, and that he misappropriated stamps of the value of two annas. Then Section 426 of the Code of Criminal Procedure applies. It says 'that a Court of Revision shall not reverse or alter the sentence of a Court of competent jurisdiction on account of an error or defect in the proceedings on trial unless the accused person has been sentenced to a larger amount of punishment than could be awarded for the offence of which in the judgment of the Court the accused person ought upon the evidence to have been found guilty, or unless in the judgment of the Court the accused person shall have been prejudiced by such error or defect.'

Here the accused person has not been sentenced to a larger amount of punishment than could have been awarded for Criminal Breach of Trust, nor can he be said to have been prejudiced by the error of convicting him under the India Post Office Act: he has probably received a smaller punishment than he would have received if he had been tried under the Penal Code.

Then we are asked to mitigate the sentence. We think we should not be justified in doing that. The man occupies a position of responsibility, and the act was one which calls for grave reprehension. We cannot tell what might be the consequences of visiting an act of this kind with a slight punishment. These are cases where it is a mistake to look at the small amount which may be misappropriated in the particular case: we must look at what is the general effect of allowing an act of that kind to go without receiving a really adequate punishment, such a punishment as would deter others from committing an act of this description, for which there is probably very considerable facility.

We do not think we should be justified in altering the sentence which has been passed by the Magistrate who tried the case.

The 15th April 1872.

Present :

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and W. Ainslie, *Judge.*

Dacoity—Possession of Property acquired by Dacoity—Evidence.

Committed by the Deputy Magistrate and tried by the Sessions Judge of Mymensingh, on a charge of Dacoity.

The Queen

versus

Kamal Fukeer and others, *Appellants.*

Mr. M. M. Ghose for two of the Appellants.

Merely being seen getting on board a boat with four persons who have on their own admissions been convicted of belonging to a gang of dacoits, is not sufficient evidence against those so seen.

To make an admission of guilty knowledge of the means by which money supposed to have been acquired by dacoity was obtained, evidence under Section 150 of the Code of Criminal Procedure, it must be shown that the admission was antecedent to the discovery of the money.

Ainslie, J.—The eight persons named in the margin convicted by the Sessions Judge of Mymensingh, under Sections 395 and 400 and 412 of the Indian Penal Code, and sentenced (excepting Sadhoo, who is sentenced to imprisonment for seven years) to transportation for life, have appealed.

Kamal Fukeer,
Modhoo,
Haran Chutki,
Kala Chand,
Kadir,
Biroo,
Koodrutoollah, and
Sadhoo.

The two last were represented by Mr. Ghose, the first six have not appeared by a pleader. These persons (except Sadhoo) were tried on two separate charges of dacoity, and in each trial they were also charged with belonging to a gang of persons associated for the purpose of committing dacoity. The charge in each case referred to the same period of time, so that in fact the prisoners have been twice tried and convicted on the charge of belonging to the same gang of dacoits.

As regards the first six prisoners, there is no ground for interference with the sentence passed by the Sessions Judge under Section 400 in the case first tried, namely that which related to the plunder of Wuzeer Mahomed's boat. Their admissions to the Magistrate clearly establish their guilt.

But as regards the last two prisoners, we find no sufficient evidence. There is some evidence that, on a day at the end of Srabun, Koodrut was seen to get on board a boat with four of the persons who have been convicted of belonging to a gang of dacoits, on their own admission ; but there is no further evidence of his proceedings, nor does the record of the Sessions Court show how or where he was apprehended.

As to Sadhoo, it is true he gave up Rs. 300 in cash, which is supposed to be property acquired by dacoity, and it is said that he admitted guilty knowledge of the means by which the money had been obtained ; but to make this admission evidence under Section 150 Criminal Procedure Code, it must be shown that it was antecedent to the discovery of the money, and whatever may be the actual fact, the record wholly fails to show this. From the way in which the evidence has been recorded, we are bound to read it as showing that the admission was subsequent to the discovery, and therefore to exclude it. There is no other evidence against this prisoner. The conviction and sentence in respect of the prisoners Koodrutoollah and Sadhoo are set aside. The appeal of the other prisoners is dismissed.

The 15th April 1872.

Present :

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble W. Ainslie, *Judge*.

Cross-examination (of Witnesses both before and after Preparation of Charge)—Criminal Procedure Code s 252.

In the matter of

Thakoor Dyal Sen, *Petitioner.*

Mr. G. C. Paul for Petitioner.

A Magistrate cannot refuse to allow witnesses whom he allowed to be cross-examined by the accused previous to the preparation of a charge, to be recalled and cross-examined after the accused has been put upon his defence under s. 252 of the Code of Criminal Procedure, treating them as witnesses for the prosecution.

Couch, C. J.—The direction in Section 252 of the Code of Criminal Procedure is express that, if the accused person has any defence to make to the charge, he shall be called upon to enter upon the same and to produce his witnesses, if in attendance, and shall be allowed to recall and cross-examine the witnesses for the prosecution.

It does not clearly appear whether it was intended by the Code that there should be, previous to the preparation of the charge, a full cross-examination by the accused or by his pleader : it would rather seem, notwithstanding Section 249 which must be read with the other Sections, that that was not contemplated, and that the Magistrate should in the first instance examine the witnesses, with a view to seeing whether there was a *primâ facie* case against the accused person, and then that he should prepare the charge.

Now we do not say that, if an accused person or his pleader went into a full cross-examination before the preparation of the charge, and were told that, if he did that, he might be waiving his right to a further cross-examination after the charge had been prepared, he would not be precluded from the subsequent cross-examination. It is possible that, if put to it, he might be obliged to elect between the two, and not to have the inconvenient proceeding of the whole of the cross-examination being again repeated.

But here that does not seem to have been done. The Magistrate appears to have allowed a cross-examination before the charge was prepared ; but when the accused was put upon his defence, it might be very important that some further questions should be put to the witnesses for the prosecution, in order to elicit facts which might constitute a defence for him. We think that the Magistrate had no power to say that this should not be done, and that the cross-examination which had been already had should be the only cross-examination in the case. If the privilege of cross-examination had been abused, and questions which had been put before and appeared to have been answered (the witnesses understanding the questions) were repeated, the

Magistrate might have stopped that, and confined the cross-examination to its proper limits. We think it was not competent to him to refuse to allow the witnesses to be recalled and cross-examined after the accused had been put upon his defence.

Also, the subsequent Section would entitle the accused person to call the witnesses as his own. Of course, he would be in a different position then, and would not be allowed to cross-examine them and treat them as witnesses for the prosecution. What he really required, and what he was entitled to, was to have them recalled and to cross-examine them, treating them as witnesses for the prosecution.

We think there has been an error in the procedure which may have prejudiced the accused, and therefore that the conviction and confirmation of it must be set aside, and the case must be ordered to be re-tried by the Magistrate.

The 17th April 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble W. Ainslie, *Judge.*

Abetment—Mischief by Fire—Admission—Penal Code ss. 114 *and* 149.

The Queen

versus

Peer Mahomed, *Appellant.*

Committed by the Magistrate, and tried by the Sessions Judge of Tipperah, on a charge of mischief by fire.

Section 114, and not Section 149, was held to apply to a case where, upon a charge of mischief by fire, the prisoner admitted that he was an abettor, and that he was present at the time the offence was committed.

Ainslie, J.—The Judge has treated the admission by the prisoner himself as giving a more reliable account of what occurred than the evidence of the witnesses.

The prisoner's admission was to the effect that he was an abettor, and that he was present at the time the offence was committed. Section 114 of the Penal Code, and not Section 149, was the proper Section to apply to the case.

There are no grounds for interfering with the sentence. The appeal is dismissed.

The 18th April 1872.

Present:

The Hon'ble F. A. Glover and W. Ainslie, *Judges.*

Revision by High Court—Code of Criminal Procedure s. 426—Error or Defect in Proceeding before Magistrate.

In the matter of Azeemoddy and others, *Petitioners.*

Baboo Bama Churn Banerjee for Petitioners.

Section 426 of the Code of Criminal Procedure allows no revision by the High Court in cases where, in the judgment of the Appellate Court, an accused person has not been prejudiced by an error or defect in the proceeding before the Magistrate (*e. g.*, as in this case, by the alteration of the charge and the omission of the Magistrate to record a separate defence).

Glover, J.—The point taken in this application is that the petitioners who were charged with petty theft of grass were, although released from that charge, convicted by the Joint Magistrate of being members of an unlawful assembly and punished therefor without any fresh defence being taken from them. The Judge on appeal confirmed the sentence.

It was for the Appellate Court to decide whether or not the accused were in any way prejudiced by the alteration of the charge by the Joint Magistrate and by his omission to record a separate defence; and the Judge did decide the question adversely to the accused. He has recorded his opinion that they were in no way prejudiced by the omission of the Magistrate, and this was a judgment of fact.

Section 426 of the Code of Criminal Procedure allows no revision by this Court in cases where, in the judgment of the Appellate Court, an accused person has not been prejudiced by such an error or defect as is now stated to have taken place in the proceeding before the Magistrate. And as the Judge says distinctly that he does not think the petitioners have been prejudiced, the matter, as it appears to me, is taken out of our hands, and we have no power to interfere.

The application must be rejected.

The 20th April 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble W. Ainslie, *Judge.*

Land Disputes—Jurisdiction of Magistrate—Accretions—Evidence—Attachment of Property—Possession—Title—Recording a Proceeding—Code of Criminal Procedure ss. 30, 318, *&* 319.

In the matter of

Emambandee Begum, *Petitioner,*

versus

Tek Bahadoor and another, *Opposite Party.*

Mr. C Gregory for Petitioner.

Mr. R. T. Allan for Opposite Party.

A Magistrate has jurisdiction, under Section 318 Code of Criminal Procedure, to prevent breaches of the peace in places where the rivers have dried up. The jurisdiction that was once there under Section 30, is not taken away by reason of the land having appeared and the water disappeared.

It is not competent to a party who, when there is no clear evidence of actual possession, puts in certain documents which would be evidence of title and invites the Magistrate to consider them as bearing upon the fact of possession, to object afterwards that the Magistrate has gone into the question of title.

When a Magistrate is not satisfied that either of the contending parties was in actual possession, his proper course is to attach the property, and not give either party what might be supposed to be the advantage of a finding on his part that there was possession.

Where a Magistrate made an order under Section 318 without previously recording a proceeding, his order was annulled, and the case sent back to him that he may proceed under the Section.

Couch, C.J.—In this case we are asked to set aside the order of the Magistrate of Chuprah on two grounds, the first being that he had no jurisdiction over the subject-matter.

Now it is incumbent upon the party who makes the application to show that there is a want of jurisdiction before we should make that order. Section 318 under which the proceedings took place, gives power to the Magistrate, if he is satisfied that there is likely to be a breach of the peace, to record a proceeding stating the grounds of his being so satisfied, and to determine the fact of actual possession. We think that, as the provisions in the Code of Criminal Procedure are intended to give the Magistrate power to prevent a breach of the peace, we ought to hold that, if he would have jurisdiction to enquire into the offence of the breach of the peace, he would have jurisdiction under this Section. If a breach of the peace was likely to be committed on the land which was the subject of the dispute into which he would have power to enquire, he might take this proceeding in order to prevent it.

Then it appears that formerly the land in question was part of the bed of the Ganges, and at that time, by Section 30 of the Criminal Procedure Code, this Magistrate had jurisdiction over the spot where the land now is. There is no authority that we are aware of, nor do we see any reason for holding that because the place which was formerly water is now land, and the private rights of parties are regulated by the law of accretion, the Magistrate of Chuprah has lost the jurisdiction which he formerly had.

Questions of difficulty may arise with respect to the jurisdiction, but we cannot come to a conclusion that there is no jurisdiction over those places where the rivers have dried up, and that the jurisdiction which was once there, is taken away by the circumstance of the land having appeared and the water disappeared. The petitioner has failed to show that the Magistrate of Chuprah had not jurisdiction to make this order, and therefore we cannot set it aside on that ground.

It was then objected that the order is bad because the Magistrate has gone into the question of title, and has not confined himself to the fact of actual possession. It seems that this land has only been culturable for the last two or three years, and therefore there could have been, under any circumstances, but little actual possession. And the course taken by the present petitioner apparently shows that, because he appears, by the finding of the Magistrate, to have relied upon documents which would be evidence of title. Apparently the circumstance being such that there could be no clear evidence of actual possession, the petitioner sought to eke out that by putting in this evidence of title, and now it is objected that the Magistrate who expressed his opinion upon that evidence and said that it was not sufficient to prove the possession, has acted improperly, and that his order ought to be set aside.

We think it is not competent to the petitioner to take such an objection as that now. As the petitioner invited the Magistrate to consider this evidence as bearing upon the fact of possession, the Magistrate has considered it and rejected it. The Magistrate does not determine the title: he does not profess to determine the claims to a right of possession. His language might perhaps have been more precise, and no doubt it would have been if he could have anticipated that such an objection would have been made: but what he has done is that, after considering such evidence as was offered by the parties, he has come to the conclusion that he could not say that either of them was in possession. And most likely neither party could be said to be in possession, and that any acts which were apparently acts of possession could not be considered as proving it. Then being unable to satisfy himself as to either of these persons being in possession of the land in dispute, he has done what he had power to do under Section 319—he has taken what was the best and the proper course, he has attached the property, and not given to either of the contending parties what might be supposed to be the advantage of a finding on his part that there was possession. When we come to look at his order, we think there is no ground for saying that he exceeded the power he had under Section 318. He has made an order in fact under Section 319, not being satisfied that either of these parties was in possession, and such an order is good in law, and ought not to be set aside by this Court. The petition must be rejected with costs which we assess at two gold mohurs.

In the other case (No. 46) the Magistrate has in reality made an order under Section 318 without taking the proceeding which he ought to take before making such an order. That order, therefore, must be annulled, and the matter must be sent back to the Magistrate that he may proceed under the Section. The petitioner is entitled to the costs of this application, the pleader's fees being fixed at two gold mohurs.

The 22nd April 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble W. Ainslie, *Judge.*

Code of Criminal Procedure s. 282—Breach of the Peace (by one Person)—Recognizances (from another).

Reference under Section 434 *Act XXV of* 1861, *by the Judge of West Burdwan.*

In the case of

Ram Coomar Banerjee, *Plaintiff,*

versus

Rajah Gopal Singh Deb, *Defendant.*

It is illegal and contrary to the provisions of Section 282 Code of Criminal Procedure, to take recognizances from one person, in order to prevent another from committing a breach of the peace.

Case.—The Deputy Magistrate records that a tank belonging to defendant was sold in execution. The inhabitants of Bishenpóre, who are attached to defendant, interfered to induce the purchaser (plaintiff) to give up the tank to defendant. He refused, and consequently the people of Bishenpore have made a set at him (plaintiff). The defendant would certainly not commit a breach of the peace himself; but in order to prevent his over-zealous friends at Bishenpore from committing such breach, recognizances must be taken from the Rajah (Gopal Singh Deb), who now prays to this Court for interference with this order of the Deputy Magistrate, as based on mere hearsay grounds, inasmuch as the Deputy Magistrate acknowledges that he (the Rajah) could not commit a breach of the peace.

The proceeding of the Deputy Magistrate carries with it its own condemnation. For it is certainly illegal and contrary to the provisions of Section 282 to take recognizances from one person, in order to prevent another from committing a breach of the peace.

As the Deputy Magistrate's proceeding contains his reasons, I see no reason for calling for further explanation.

The papers of the case are herewith forwarded to the Hon'ble Court under Section 434. The sentence appears to me contrary to the law, and should be set aside.

The order of the High Court was passed as follows by

Ainslie, J.—The order of the Deputy Magistrate dated 24th February 1872, calling upon Rajah Gopal Singh to enter into his own recognisance in the sum of five hundred rupees to keep the peace for the term of one year is set aside, as recommended by the Sessions Judge.

The 22nd April 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* and the Hon'ble W. Ainslie, *Judge.*

False Evidence—Code of Criminal Procedure s. 169.

Committed by the Deputy Commissioner, and tried by the Judicial Commissioner of Assam.

Bapooram Aham

versus

Gunga Ram Kacharee, Appellant.

Baboo Kashee Kant Sen for Appellant.

Where the Judicial Commissioner of Assam, sitting as Sessions Judge, certified, in his capacity of Judge of the Chief Civil Court in Assam, that a charge of false evidence was entertained with the sanction of the District Court of Assam to which the Court of the Moonsiff of Debrooghur before or against which the offence was committed was subordinate, HELD that the sanction required by s. 169 Code of Criminal Procedure had been given.

Couch, C.J.—We have at last arrived at the fact which ought to have been stated to us long ago, namely that, when the charge under Section 465 was amended to a charge under Section 193, the Judicial Commissioner, who was sitting as Sessions Judge, certified, in his capacity of Judge of the Chief Civil Court in Assam, that the charge was entertained with the sanction of the District Court of Assam to which the Court of the Moonsiff of Debrooghur was subordinate. All that Section 169 of the Code of Criminal Procedure requires is that there shall be the sanction of the Civil or Criminal Court before or against which the offence was committed, or of some other Court to which such Court is subordinate, and there was that sanction here.

If we are to speculate at all as to what was the object of the Legislature, it seems to have been that there should be some check on prosecutions of this kind. The proper course is to look at the language of the Section, and not to introduce other words into it.

The application must be rejected.

The 27th April 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and W. Ainslie, *Judge*.

Improper Adjournment of Enquiry by Magistrate—Power of High Court—Code of Criminal Procedure ss. 224 and 404—Charter Act s. 15—Warrant of Arrest (Cessation of.)

Miscellaneous Criminal Case No. 43 of 1872.

Muthoora Nath Chuckerbutty and others (Defendants) *Petitioners*,

versus

Heera Lall Doss (Prosecutor) *Opposite Party*.

Mr. Woodroffe for the Petitioners.

Mr. Fergusson for the Opposite Party.

Baboo Jugadanund Mookerjee for the Government.

Although an improper adjournment of an enquiry by a Magistrate was scarcely an error in the decision upon a point of law or involved any question of law justifying the interference of the High Court under s. 404 Code of Criminal Procedure, the Court under s. 15 of the Charter Act set aside the order of the Magistrate adjourning the enquiry when, according to s. 224, there was not the absence of a witness or other reasonable cause rendering it necessary or advisable to adjourn the enquiry; the power conferred by s. 224 being one which can only be exercised in cases which come really within the terms of that Section.

The force of a warrant of arrest is at an end when the prisoner is brought before the Magistrate.

Couch, C.J.—The petition in this case stated that the petitioners were aggrieved by an order of the Magistrate of Maldah, dated the 26th of February 1872, postponing the case in which they were defendants, and also by the other orders of previous dates to the same effect. Upon that petition an order was issued by Mr. Justice Bayley and Mr. Justice Markby that the prosecutor Heera Lall Doss, should show cause why the orders of the Magistrate of Maldah, dated respectively the 3rd of January and 15th of February and 26th of February 1872, should not be quashed upon the grounds stated in the petition.

It appears from the statement made to us by Mr. Woodroffe, who appeared in support of the petition, that, as long ago as the 19th of April 1871, a petition was presented to the Magistrate of Maldah, and the examination of the applicant in that case was taken on the 21st of April, that a further petition was presented on the 27th of April, and another on the 10th of June; and, on the 5th of July, upon the deposition of the Court Inspector being taken, it was ordered that a warrant should be issued, and the 3rd of January was fixed for the hearing of the case. Then the adjournments, which are complained of took place.

Now Mr. Woodroffe complained of the issuing of the warrant, and alleged that there was no evidence to justify its being issued. I think that we ought not to make any order now with respect to that. In the first place, the petition did not ask to have the warrant dealt with at all, nor did the order which was issued upon the petition direct cause to be shown with respect to the warrant. The warrant has long ago fulfilled all that it was required for, and it would be useless now to set it aside. Indeed, in the judgment of Mr. Justice Phear, upon which Mr. Woodroffe strongly relied, it is stated that the force of a warrant of arrest is at an end when the prisoner is brought before the Magistrate. So also with respect to the two orders of remand, dated the 3rd of January and the

15th of February, they have come to an end; the petitioners have appeared in pursuance of them, and a further remand has been made; and the real question is, whether the remand which was made on the 26th of February by which the case was postponed until the 12th of March, and the petitioners were put under recognizances to appear on that day, ought to be allowed to stand.

The power under which the order was made is contained in Section 224 of the Code of Criminal Procedure, which provides that "if, from the absence of a witness or "from any other reasonable cause, it shall "become necessary or advisable to defer the "examination or further examination of a "witness, it shall be lawful for the Magis"trate, by a written order, from time to time, "to adjourn the enquiry and to remand the "accused person for such time as shall be "deemed reasonable, not exceeding fifteen "days."

Mr. Woodroffe relied very strongly, as it appeared to me, on a passage of the judgment of Mr. Justice Phear, which is reported in XIII Weekly Reporter, page 27, in which the learned Judge said that a Magistrate cannot lawfully commit to prison, or remand a prisoner who is before him without sufficient grounds, and in the complete absence of evidence there can be no grounds. It appeared to me at the time that Mr. Justice Phear was there contemplating a case where there was no evidence at all, and that his language must be read with reference to such a case. On looking at the judgment that seems to be so, because in a subsequent paragraph he says:—"After "the 2nd of November, the case changed. "At that time evidence was produced before "the Magistrate on which he could rightly, "in the exercise of his judicial discretion, "hold that the persons charged ought to be "committed to prison, either to await trial "or for safe custody, during the adjournment "of the enquiry." And when we refer to the statement of what took place in the case from time to time, it appears that on the 2nd of November a witness was partly examined. It is said, "that on the 2nd of "November, after the first portion of the "evidence of the said Nobin Roy was re"corded, Mr. Munro directed that the wit"nesses who had then been sent by the "Police should be kept in custody in Mr. "Munro's house." It would therefore seem that Mr. Justice Phear was of opinion that, if a witness had been even partly examined, the Magistrate would have power to remand; and the judgment does not support what it was quoted for by Mr. Woodroffe.

We have, however, to consider what is the power which is conferred upon the Magistrate by Section 224. It is said that, if from the absence of a witness or from any other reasonable cause it shall become necessary or advisable to defer the examination of witnesses, it shall be lawful for the Magistrate to adjourn the enquiry. It appears to me, looking at the language of this Section, that if there not a proper cause, a cause such as is described, a Magistrate has not power to adjourn the enquiry, it is not lawful for him to do it. A Magistrate is not at liberty, arbitrarily, or for any reason which he may think sufficient to adjourn the enquiry, it is only to be in the cases mentioned; and although an improper adjournment of the enquiry by a Magistrate, an adjournment on a ground which could not be said to show that it was either necessary or advisable to do so, might scarcely be said to be an error in the decision upon a point of law or to involve any question of law, and Section 404 of the Code of Criminal Procedure might possibly not enable this Court to interfere, we have, by the 15th Section of the Act under which the Court is established, a power of superintendence which enables us to deal with such a case. I think it enables us, where a Magistrate has adjourned an enquiry when it was not lawful for him to do so under Section 224, to set aside the order. Here, there was not the absence of a witness or other reasonable cause which made it necessary or advisable to adjourn the enquiry. The witness whose absence appears to have been given as a reason for the adjournment was the Inspector who made the report. Assuming that, if called, he would have deposed to all the facts stated in that report, it appears that all that he could have proved would have been that the will was produced to him and was afterwards returned; and, that evidence being taken, there really would have been no evidence to justify the detention of the parties upon a charge of forgery of the will; it would really have been just the same as if there had been no evidence whatever against them.

The case appears (and it seems to me it was admitted by the Government Pleader and also by Mr. Fergusson who appeared for the prosecutor) to have been postponed in a manner which could hardly, even by them, be justified. There was not any evidence taken which could be made the foundation of a charge; and the Magistrate appears to have been influenced in the course which he took by the expectation that, after some time and by dint of enquiry, some evidence might be obtained. But a Magistrate is not justified in keeping parties under recognizances in the way in which he did on this occasion, possibly, from soon after the 5th of July, when the warrant was issued, but certainly, from the 3rd of January the day first fixed for the hearing, until the 12th of March, with this charge hanging over them, and remanding them from time to time in an illegal manner, the two previous remands having exceeded fifteen days. This is a case I think, in which the Court may well exercise its power of superintendence, and set aside the last order of remand; and it seems to me desirable that Magistrates should understand that the power conferred by Section 224 is a power which is only to be exercised in cases which come really within the terms of that Section. It is not a power conferred upon them to be exercised in an arbitrary manner and not according to rule, but a power which they ought to be careful in exercising.

Therefore, the order which we shall make is that the last order of remand, that of the 26th February, will be annulled, the consequence of which will be that the petitioners will not be liable to appear in accordance with the recognizances which they give. If evidence is afterwards discovered which would justify the charge of forgery being brought against them, the Magistrate is not precluded, by the order which we now make, from taking proceedings again.

The 27th April 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble W. Ainslie, *Judge.*

Penal Code s. 188 *(Charge under)—Written Order—Cleaning Privy—Code of Criminal Procedure ss.* 62 *and* 308.

Reference to the High Court under Section 434 *of the Code of Criminal Procedure, by the Officiating Sessions Judge of Hooghly, dated the* 15*th April* 1872.

Pitambur Day, *Petitioner.*

An order in writing under Section 62 of the Code of Criminal Procedure is necessary to sustain a charge under Section 188 of the Penal Code.

Quære.—Whether a Magistrate has not power to proceed under the former Section instead of under Section 308, against a party for disobeying an order issued by him directing the party to clean a privy pronounced to be a nuisance.

Case.—The Assistant Magistrate of Serampore has sentenced Baboo Pitambur Day to pay a fine of 40 rupees, or in default to suffer imprisonment for 10 days under Section 188 Penal Code, for disobeying an order lawfully promulgated by him directing the Baboo to clean a privy pronounced to be a nuisance. The proceedings taken do not clearly show under what law the Assistant Magistrate proceeded, but I learn from recent proceedings also under Section 188, in consequence of the continued disobedience of the Baboo, that the Assistant Magistrate acted under Section 62 Code of Criminal Procedure. Two grounds have been pleaded before me for the reversal of the Assistant Magistrate's order because it is illegal.

First, that Section 62 requires that the order should be a *written* order directing a person to abstain, &c; whereas no such order is to be found on the record, nor does it appear that any was given and regularly served on the person concerned. The only orders that I can find are to the Inspector of Police to enquire into and report on the state of the privy, and an order dated 28th February on the report, apparently a memo. of a verbal order given to the Baboo or rather his agent to the effect that "the Baboo has been given time until Monday next to clear the privy, on which date Mr. Cavanagh (the Inspector) will inspect again and report."

The next objection is that the Assistant Magistrate should not have proceeded under Section 62 but under Section 308 of the Code of Criminal Procedure, in support of which the judgment of the High Court in the case of Huree Mohun Malo, X Weekly Reporter, 58, is quoted.

I am of opinion that on both of these grounds the order of the Assistant Magistrate for wilful disobedience of which the sentence of fine was passed is illegal, and that, as there was "no order promulgated by a public servant lawfully empowered to promulgate such order" (Section 188 Penal Code), the conviction under that Section was illegal. I have not submitted the explanation of the Assistant Magistrate as Mr. Plowden has left Serampore.

The order of the High Court was delivered as follows by—

Couch, C.J.—The conviction and sentence in this case must be annulled on the ground that there was no order in writing under Section 62 of the Code of Criminal Procedure, and consequently the charge under Section 188 of the Penal Code cannot be sustained.

Upon the other objection which was taken we give no opinion. We are not prepared to say that this was not a case in which the Magistrate had not power, if he thought fit, to proceed under Section 62.

The conviction and sentence will be annulled, and the fine, if paid, will be returned.

The 2nd May 1872.

Present :

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Code of Criminal Procedure s. 404 (Exercise of Powers given by)—Bonâ fide Exercise of Discretion—Municipal Offence (keeping Piggery in filthy state.)

Miscellaneous Criminal Case No. 67 of 1872.
Aman Chinaman, *Petitioner.*

Baboo Romanath Bose for the Petitioner.

The extraordinary power given by Section 404 Code of Criminal Procedure was declined to be exercised to quash proceedings held under a *bonâ fide* exercise of discretion in a case where a fine was imposed for keeping a piggery in a filthy state.

Bayley, J.—In this case we are called upon to set aside an order of the Municipal Commissioner imposing a fine of 6 rupees upon the petitioner under Section 68 Act III of 1864 B. C., for keeping his piggery on the 30th January, 1st February, and 2nd February, in a filthy state. This Section says that, on a conviction under it, a fine may be inflicted. All the facts here found support the conviction. In this instance the case was postponed for a local investigation by the sitting Commissioner, and the investigation terminated with the result that the piggery was in a filthy state, and therefore the fine was inflicted. We are called upon by the applicant to exercise the extraordinary power given to us under Section 404, which I must say is seldom done, except in cases of jurisdiction or obvious and patent injustice, *i. e.* to quash the proceedings held here under a *bonâ fide* exercise of discretion, and after proper enquiries, and after the party who had to exercise the discretion, had satisfied himself on the subject. We see no reason to quash the proceedings, and we reject the application.

The 6th May 1872.

Present :

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Charge to Jury—Using forged Documents—Alterations or Blots—Witnesses (Naming of, by Prisoners).

Committed by the Magistrate and tried by the Sessions Judge of East Burdwan on a charge of dishonestly using as genuine a forged document.

Queen

versus

Kissoree Mohun Dutt and others, *Appellants.*

Baboo Aukhil Chunder Sein for Appellants.

A Judge has every right to draw the attention of the Jury to anything which appears to be a palpable alteration or blot on the face of a document alleged to be forged.

Prisoners should name their witnesses at the commitment.

The offence of altering one part of a document executed in two parts for the mutual security of both the parties concerned, deserves to be severely punished.

Bayley, J.—We see no reason whatever to interfere with the conviction by the Judge and the Jury or the sentence passed by the Judge.

Three objections have been taken to the judgment of the Lower Court as erroneous in law.

Firstly.—That the Judge was wrong in charging the Jury to the effect that they would see in the *dakhilla* that certain part has been tampered with and so prejudging the case. We think that the Judge had every right to draw the attention of the Jury to anything which appeared to be a palpable alteration or blot on the face of the document. By so doing, he certainly did not prejudge the case, for he distinctly states that they were to look into and consider all the facts in the case and then say whether the prisoners were guilty or not of forgery.

The *second* objection taken is that the witnesses named in a certain list have neither been summoned nor examined.

Now the rule of law is that the prisoners should name their witnesses at the commitment; and from what they did in this case there is nothing to show that the Judge refused to summon any witness whom the prisoners named. On the contrary the Judge's own statement shows that no evidence was offered before him.

The *last* plea is that the punishment is too severe and ought to be mitigated.

Now, the very document, the subject-matter of this case, is a document for the mutual security of both the parties concerned, *viz.*, a cheque and a counterpart. If, on the face of this, a party alters one part, leaving to the other party, who has only the counterpart, to disprove the fact, the security becomes one-sided. The amount may be small; but as a matter of principle the relation between the landlord and the tenant ought to be one of strict good faith, and any attempt to disturb that ought to be severely punished. No other arguments have been pressed before us. We, therefore, reject this appeal.

The 8th May 1872.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Land Disputes—Code of Criminal Procedure, Section 318.

Reference to the High Court under Section 434 *of the Code of Criminal Procedure by the Officiating Sessions Judge of Nuddea.*

Government

versus

Sreeputtee Roy and another.

A Magistrate cannot, under s. 318, Code of Criminal Procedure, decide as to the respective claims or rights to actual possession, nor act upon former decisions to prove previous title or possession. All that he has to do is to find which party is in actual possession.

Bayley, J.—THE Magistrate could not decide as to the respective claims or rights to actual possession. He has only under Section 318 to find which party is in actual possession. Nor could he legally act upon former decisions to prove previous title or possession. All he had to decide under Section 318 was who was in actual possession.

We concur with the Judge and set aside the Magistrate's order. We do not think it necessary to remand this case for a fresh decision.

The 8th May 1872.

Present:

The Hon'ble Dwarkanath Mitter and W. Ainslie, *Judges.*

Hurt—Rioting—Evidence (Duty of Appellate Court to test)—Extra-judicial Directions.

Case No. 54 of 1872.

(Miscellaneous Criminal.)

Goomanee and others, *Petitioners.*

Baboo Doorga Mohun Dass for the Petitioners.

An accused person cannot be punished, first on a charge for rioting, and afterwards on a charge for hurt, when the latter is included in the former.

Per Mitter, J.—An Appellate Court is bound precisely in the same way as the Court of first instance to test evidence extrinsically as well as intrinsically.

Per Ainslie, J.—A Magistrate as an Executive Officer is not bound to attend to a Judge's extra-judicial observation not warranted by law.

Mitter, J.—AFTER a careful perusal of all the papers of this case, the conclusion I have arrived at is that the decision of the Judge confirming that of the Deputy Magistrate is substantially correct.

It is true that the Judge is not strictly right when, with reference to certain arguments based upon the probabilities of the case, he says that "as an Appellate Court he has to look *at the evidence as it stands,*" and that it would be "a departure from the duty of an Appellate Court if he rejected the evidence which the Deputy Magistrate with full knowledge of the defects pointed out against it, accepted, *unless that* evidence is *intrinsically* bad." Such a view of the functions of an Appellate Court is in my opinion erroneous in law. No doubt an Appellate Court is bound to presume the decision of the Court of original jurisdiction to be correct until the contrary is shown, and it is equally beyond all doubt that an Appellate Court is bound to give every reasonable weight to the conclusion which the original Court has arrived at upon a question depending upon evidence. But the Appellate Court is also bound, precisely in the same way as the Court of first instance, to test the evidence *extrinsically* as well as *intrinsically.* In determining the value of oral evidence, it is not enough for the Appellate Court to say, as the Judge says in this case, "I find no fault with the evidence *per se,* and it *must* be allowed to prevail;" but that Court is bound, in my opinion, also to enquire, as thoroughly as the Court of first instance, whether the probabilities arising from all the surrounding circumstances of the case are such as to justify a reasonable mind in coming to the conclusion that the evidence is worthy of credit. This precaution is nowhere more necessary than in this country. It is true that there is no presumption of perjury against oral testimony, but it has, I believe, been sufficiently confirmed by a long course of experience that nothing can be more dangerous than to act upon such testimony without testing its credibility both ***intrinsically*** and ***extrinsically***. But be this as it may, I don't think that the petitioners have been really prejudiced by the above error in the Judge's decision. That there was a riot of a very serious character appears to be admitted on all sides, and the only question to be determined is whether the petitioners were parties to it. After a careful consideration of all the direct and circumstantial evidence on the record, I feel no doubt whatever that this question has been properly answered by both the Lower Courts. The petitioners were all named from the very beginning, and it seems to be quite clear that they would have been brought to justice much earlier but for the grossly improper conduct of the Head Constable who conducted the first local enquiry. The petitioner Goomanee was upon his own shewing clearly implicated in the affray, and I think there is sufficient explanation upon the record to account for the non-appearance of the witnesses for the prosecution at an earlier stage of the proceedings. Many of them have distinctly sworn that they fled away from the scene of occurrence immediately after the riot, and I see no reason to distrust this statement.

There is one part of the Judge's judgment, however, which requires to be amended. He says that the petitioners ought to be again tried upon the charge of hurt, and although he has not passed any separate order to that effect, there is enough in his judgment to show that he intended to direct the Deputy Magistrate to institute fresh proceedings upon that charge. This direction is clearly wrong. The charge of hurt was included in that of rioting, and the petitioners cannot be twice punished for the same offence. I would, therefore, set aside this direction, and with that modification reject the present application.

Ainslie, J.—I am of opinion that this is one of the very numerous cases wrongfully brought before this Court under Section 404 of the Code of Criminal Procedure in which no material point of law arises.

The points taken by the petitioner are three: 1st, that there has been an error in law in the mode in which the Sessions Judge has dealt with the case; 2nd, that he has fallen into a mistake of fact in respect of the evidence on the record; and, 3rd, that he has directed a second prosecution which cannot be legally sustained. The second ground was abandoned after the Court pointed out that the name of the accused Chetoo was to be found in the earliest papers of the case, ***viz.***, the Police Reports, and that the objection was itself founded on a mistake of fact. As to the first, I conceive that the Judge never did say and never meant to say that he was not to satisfy his own mind of the guilt of the appellants before him from the evidence on the record. The judgment might advantageously have been more concise, but the sum of it, as it appears to me, is simply this—that there is a mass of direct evidence sufficient, if believed, to support the conviction, that on the one side are certain probabilities which had been exhaustively argued for the appellants, and on the other, the fact that the Magistrate who had accepted the evidence had been particularly cautious in his mode of dealing with it, and that his judgment is therefore deserving of more than the usual weight to be attached to the judgment of the officer who has the advantage of personally examining the witnesses. Balancing one against the other, the Sessions Judge came to the conclusion that he ought to accept the evidence for the prosecution as credible. Although he may have used expressions which are inaccurate, I cannot see how this Court is authorized to revise his judgment on the question of the credibility of the evidence.

As to the 3rd point, I would observe that it was a mistake certainly, and one which, as the case has come before us, we can remedy, but that it is not a point on which I should be prepared to admit an application under Section 404.

The Judge's extra-judicial observation is warranted by no law, and the Magistrate as an executive officer would probably not feel himself bound to attend to it.

I concur in the order passed by my learned colleague.

RULES AND ORDERS OF THE HIGH COURT.

Calling Attention to Rules relative to the Use of Bi-color and Adhesive Stamps as denoting Fees chargeable under the Court Fees' Act.

CIVIL CIRCULAR MEMO. No. 1.

Dated Calcutta, the 10th January 1872.

(Civil Side.)

Present:

The Hon'ble Louis S. Jackson, *Judge.*

AT the instance of the Government of India in the Financial Department, the attention of District Judges and of all Judicial Officers is called to the requirements of the Notification of the Government of India, Financial Department, No. 1865 of the 15th March 1870, published at pages 87 and 88 of the *Calcutta Gazette* of the 3rd January 1872, prescribing the rules by which the use of bi-color stamps and adhesive stamps (as denoting fees chargeable under the Court Fees' Act) shall be governed.

District Judges to entertain Establishments for Additional Moonsiffs.

CIVIL CIRCULAR MEMO. No. 2.

Dated Calcutta, the 24th January 1872.

(Civil Side.)

Present:

The Hon'ble Louis S. Jackson, *Judge.*

COPY of the following letter forwarded for the information and guidance of all District Judges subordinate to the High Court:—

No. 6663.

From A. Mackenzie, Esq., Junior Secretary to the Government of Bengal, to the Registrar of the High Court, dated Fort William, the 28th December 1871.

SIR,—With reference to your letter No. 3953, dated 18th instant, and previous correspondence on the subject, I am directed to say that, concurring in the views expressed by the Hon'ble Judges of the High Court, the Lieutenant-Governor is pleased to lay down as a general rule that, when the entertainment of an Additional Moonsiff is sanctioned, the District Judge will be at liberty, without reference to Government, to entertain for him an establishment on the same scale as that of other Moonsiffs, it being understood that the District Judges will always study economy, and reduce the establishment according to their discretion, if advisable, in particular instances.

District Judges responsible for due Supervision of the Accounts of the Moonsiffs' Offices.

CIVIL CIRCULAR ORDER No. 1.

To District Judges of Lower and Extra Regulation Provinces, dated Calcutta, the 6th January 1872.

(Civil Side.)

Present:

The Hon'ble Sir R. Couch, *Kt., Chief Justice,*
The Hon'ble G. Loch, Louis S. Jackson, A. G. Macpherson, and E. Jackson, *Judges.*

SEVERAL cases of gross neglect in the supervision of the accounts of Moonsiffs' offices having been brought to the notice of the High Court, District Judges are informed, that the Court expect them to see that the Moonsiffs subordinate to them keep and scrutinize their accounts in a thoroughly careful manner. The District Judge will be held responsible where neglect of the kind referred to has passed unnoticed.

Prepayment of Official Covers by Service Postage Stamps.

CIVIL CIRCULAR ORDER No. 2.

To all Civil and Criminal Authorities in Lower Bengal and Non-Regulation Provinces, dated Calcutta, the 10th January 1872.

(Civil Side.)

Present:

The Hon'ble Louis S. Jackson, *Judge.*

THE Court, having frequently had to pay postage on covers that are not prepaid by service postage stamps, calls attention to the order of the Governor-General in Council, No. 4032, dated 30th September 1871, published at page 1855 of the *Calcutta Gazette* for 18th October 1871, and requests that strict attention may be paid thereto.

Fresh Plaint not to be required when new Trial granted by Small Cause Courts under Section 21 Act XI of 1865.

CIVIL CIRCULAR ORDER No. 3.

Copy of the following letter forwarded to all Judges of Courts of Small Causes for their information and guidance, in continuation of Circular Order No. 32, dated 19th December 1865:—

From the Registrar of the High Court of Judicature at Fort William in Bengal, to the Officiating Judge of the Small Cause Courts, Sealdah and Howrah, dated Calcutta, the 26th January 1872.

(Civil Side.)

Present:

The Hon'ble Sir R. Couch, *Kt., Chief Justice,*
The Hon'ble G. Loch, Louis S. Jackson,
A. G. Macpherson, and E. Jackson, *Judges.*

No. 861, dated 17th November 1871.
No. 884, dated 30th December 1871.

In reply to your letters as per margin, I am directed to inform you that, when a new trial has been granted by a Judge of a Court of Small Causes, under Section 21 Act XI of 1865, the filing of a fresh plaint should not be required.

Zillah Judge's Sanction not necessary to Subordinate Civil Courts issuing a Commission of Inquiry under Act VIII of 1859 *s.* 180.

CIVIL CIRCULAR ORDER No. 4.

To all Civil Authorities, Lower Provinces, dated Calcutta, the 15th February 1872.

(Civil Side.)

Present:

The Hon'ble Sir R. Couch, *Kt., Chief Justice,* and the Hon'ble G. Loch, Louis S. Jackson, A. G. Macpherson, and E. Jackson, *Judges.*

It has come to the knowledge of the Court that it is the practice in some districts for Moonsiffs to report, for the sanction of the Judge, orders passed by them, directing local inquiries, and to await such sanction before the inquiry is begun. The Court desires to point out that no such practice is enjoined by Circular Order No. 25, dated 25th August 1870. On the contrary, it is therein distinctly stated that the responsibility of ordering an inquiry under Section 180 of the Code of Civil Procedure, rests entirely with the Court before which the suit is pending.

2. The intention of Rule II of the above Circular which requires Subordinate Civil Courts issuing a commission of inquiry to submit a copy of the same to the Zillah Judge, was to afford the Zillah Judge an opportunity of satisfying himself that the general directions given in Rule I had been properly attended to, and not as in any way necessitating the Judge's sanction to the local or other inquiry before it could be commenced.

Meaning of 6th Column in para. 12 of Circular Order No. 32, dated 8th November 1870 *explained.*

CIVIL CIRCULAR ORDER No. 5.

To All District Judges and Judicial Commissioners, dated Calcutta, the 6th February 1872.

(Civil Side.)

Present:

The Hon'ble Sir R. Couch, *Kt., Chief Justice,* and the Hon'ble G. Loch, and Louis S. Jackson, *Judges.*

Doubts having arisen as to the intention of the words "6th Column" in paragraph 12 of Circular Order No. 32 dated the 8th November 1870, the Court is pleased to declare that the column intended is the 6th of the narrow columns of Statement B. 10, namely, the column superscribed "Decrees partially executed."

2. It was intended that that column should contain the cases in which execution was not complete; but was also not pending. It was meant to include both those in which there had been partial execution, and those in which no execution had resulted, though the proceedings had come to an end for the time being.

Rules for the Admission of Special Appeals.

In the High Court of Judicature at Fort William in Bengal, Appellate Jurisdiction, dated the 27th January 1872.

Present:

The Hon'ble Sir R. Couch, *Kt.*, *Chief Justice*, the Hon'ble G. Loch, H. V. Bayley, F. B. Kemp, L. S. Jackson, J. B. Phear, A. G. Macpherson, E. Jackson, W. Markby, F. A. Glover, Dwarkanath Mitter, and W. Ainslie, *Judges*.

UPON reading a reference from the Deputy Registrar pointing out certain irregularities in the presentation of applications for the admission of Special Appeals, and in amendment of the Rules relating to the admission of such applications, dated the 19th December 1870 and the 28th March 1871,—

IT IS RESOLVED:

That from and after this date, applications for the admission of Special Appeals, if duly presented to the Deputy Registrar within the time prescribed by law, shall be retained by him.

That the Deputy Registrar shall cause such applications to be entered in the lists of the several Division Courts, according to the Districts from which the applications are brought.

That such lists shall be furnished to the several Division Courts on every Monday morning, with a view to the hearing of the applications on the day appointed by each such Court for the hearing of motions.

That the pleaders presenting such applications shall be in attendance before the Courts where, and on the day when, they are called on for hearing.

That such applications may be admitted by a single Judge, but none such shall be rejected otherwise than by a Division Court.

AND IT IS ORDERED:

That copies of this Resolution be printed and posted up in the Bar Libraries and at the main entrance of the Court-house, for general information.

Amendment of Notice circulated with Civil Circular Memo. No. 2 of 1870.

CIVIL CIRCULAR MEMO. No. 4.

Dated Calcutta, the 16th February 1872.

(Civil Side.)

IN the Notice circulated with Circular Memorandum No. 2, dated 21st February 1870, after the words, "*viz.*, Rs. 2 for each person to be served,"

READ—

"plus Rs. 2 on account of the Sheriff's European Officer, or 6 annas on account of his Native Officer, according as the service is made by one or the other.

Instructions relative to the Issue of Commissions under Act VIII of 1859 *s.* 175, *for the Examination of Witnesses.*

CIVIL CIRCULAR ORDER No. 7.

To All Civil Authorities, Lower and Non-Regulation Provinces, dated Calcutta, the 20th February 1872.

(Civil Side.)

Present:

The Hon'ble Sir R. Couch, *Kt.*, *Chief Justice*, the Hon'ble G. Loch, Louis S. Jackson, A. G. Macpherson, and E. Jackson, *Judges*.

THE following instructions are laid down for observance by all Civil Courts subordinate to the High Court, when issuing Commissions, under Section 175 of the Code of Civil Procedure (VIII of 1859), for the examination of witnesses resident beyond the jurisdiction of the Court issuing the commission, and not within the local jurisdiction of the High Court on its Original Side.

2. Such Commissions ought not generally to be directed to the District Courts, the terms of the law requiring that it be issued ordinarily to the Court within whose jurisdiction the witness may reside, "and which can most conveniently execute the same." This language clearly points to the Courts of first instance with narrow local limits, so that, on the one hand, the labor of examination may be divided, and may not accumulate on the District Court, and, on the other, that the witness may attend the nearest Court.

3. The Commission should, therefore, in ordinary cases, and especially those issuing from Moonsiffs' Courts, be addressed to the Moonsiff within whose jurisdiction the witness resides, by whom, for the above reasons, the evidence can usually be taken more conveniently than by the Subordinate Judge.

Enquiry as to the Appointment of Clerks of the Small Cause Courts and their Duties.

CIVIL CIRCULAR MEMO. No. 5.

To All Judges of Courts of Small Causes in the Mofussil, dated Calcutta, the 16th March 1872.

(Civil Side)

Present:

The Hon'ble Sir R. Couch, *Kt.*, *Chief Justice*, and Hon'ble G. Loch, Louis S. Jackson, A. G. Macpherson, and F. A. Glover, *Judges*.

THE Court desires to be informed whether the Court of Small Causes at__________ has a "Clerk of the Court" appointed under

Section 44, Act XI of 1865; and, if not, whether the Head Clerk otherwise appointed in such Court exercises any of the powers specified in Section 45 of that Act.

Mode of conveying Information to Prisoners in Jail as to the Result of their Appeals.

CRIMINAL CIRCULAR ORDER, No. 2.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Sessions Judges, Lower and Extra Regulation Provinces, dated Calcutta, the 18*th March* 1872.

(Criminal Side.)

Present:

The Hon'ble Sir R. Couch, *Kt., Chief Justice,* and the Hon'ble G. Loch, L. S. Jackson, A. G. Macpherson, and F. A. Glover, *Judges.*

The High Court has been pleased, on the proposal of the Judge of Jessore, to sanction, and now circulates for general adoption, the form appended hereto as a convenient mode of conveying information to prisoners in jail as to the result of their appeals. A copy will be sent to the Superintendent of Stationery, with a view to a sufficient supply being provided.

2. It must however be borne in mind that parties are entitled, under Section 440 Act VIII of 1869, to copies of the final sentence or order, with the reasons for passing or making the same, of Appellate Courts, as well as of the Criminal Courts of first instance.

List of Criminal Appeals heard by the Sessions Judge of *on* 18 .

Name of Prisoner.	Against whose Order the Appeal is preferred.	Order passed in Appeal.	Remarks.

MEMO.

Forwarded to the officer in charge of the Jail for communication to the Appellants.

COURT OF SESSIONS, }
The 18 . } *Sessions Judge.*

Rule relative to the Disposal of Criminal Appeals, References, Cases for Revision, and Motions.

The 23rd March 1872.

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice,* Hon'ble G. Loch, H. V. Bayley, F. B. Kemp, Louis S. Jackson, J. B. Phear, A. G. Macpherson, W. Markby, F. A. Glover, Dwarkanath Mitter, and W. Ainslie, *Judges.*

Upon a re-consideration of the Rule of this Court, dated the 26th January 1870, introducing the system of placing for hearing and determination Criminal appeals and references, and cases for revision under the Code of Criminal Procedure, and motions in Criminal matters, before the several Division Courts, according to the groups of districts, and fixing Saturdays for the sittings of the several Courts for such work, and in supersession of the said Rule,

It is RESOLVED:

1. That, from and after the 1st April 1872, all Criminal appeals and references, and cases for revision under the Code of Criminal Procedure, and motions in Criminal matters, shall be taken up daily by one of the Division Courts.

2. That one of the several Division Courts shall sit exclusively for the disposal of such Criminal work, by rotation month by month; the *first* Division Court, sitting, as a commencement under this Resolution, during the month of April; the *second*, during the next month; and so on.

3. That the Division Bench hearing Criminal cases for the time being, shall nevertheless take the miscellaneous appeals, and also all motions and applications for the admission of special appeal belonging to its own group; but that regular and special appeals shall not be heard by such Bench, unless specially ordered.

AND IT IS ORDERED—

That copies of this Resolution be printed and posted up in the Bar Libraries, and at the main entrance of the Court-house, for general information.

Relative to the use of the Vernacular Language in the Local Courts.

CIVIL AND CRIMINAL CIRCULAR ORDER No. 8.

To all Civil and Criminal Authorities, Lower Provinces, dated Calcutta, the 6th March 1872.

HIGH COURT.

(Civil and Criminal Side.)

Present:

The Hon'ble Sir R. Couch, *Kt., Chief Justice*, and the Hon'ble G. Loch, L. S. Jackson, and E. Jackson, *Judges of the Court.*

A COPY of the minute recorded by His Honor the Lieutenant-Governor, under date the 4th December 1871, (relative to the use of the vernacular language in police offices) having been communicated to the High Court, the Court are pleased to call the attention of Civil and Criminal Judges and Magistrate of all grades to the Circular Order No. 16, dated 3rd June 1864.

2. The Court consider it essential, in order to the inferior tribunals attaining their full measure of usefulness, that the language of those tribunals should be that of the great bulk of the people within their jurisdictions, and that the belief and practice to the contrary should be steadily discouraged.

3 Pleaders and mooktears who practise in the local Courts should be enjoined to abstain from the employment of foreign terms for which the vernacular possesses equivalents in daily use, and to draft petitions and other documents in such language as their clients can readily comprehend.

4. The proceedings of the Courts, with the exception of those technical words which are of necessary occurrence, should be composed in a style such as would be adopted by persons of good education resident in the district.

5. A special caution is necessary as to the recording of oral testimony. It is too common a practice with mohurrirs and other persons employed on this duty, instead of taking down the actual words of the witness (as nearly as a simple adherence to grammar will permit), to render, as it were, what he has said, into language which the writer considers elegant or appropriate, that is to say, into the Court jargon. In this way not only is the witness, if an ignorant person, perplexed when his supposed statement is afterwards read over to him, but from one witness being made to speak exactly like another, all characteristics of distinct testimony are lost, and the evidence, when afterwards referred to, loses much of its effect.

6. The Court are quite aware that that which they now require is not to be easily done, but will require patient and vigilant attention on the part of Judges of all grades. The acquired habits and traditions of years are not to be readily subverted; and the best chance of success will probably be found to lie in enlisting the aid of ministerial officers and pleaders of the higher classes and of the greatest intelligence.

By Order of the High Court,

(Sd.) F. B. PEACOCK,

Registrar.

Rules regarding receipt and payment of money by Courts Subordinate to the High Court.

CIVIL CIRCULAR ORDER No. 9.

All Civil Authorities, Lower Provinces, dated Calcutta, the 8th March 1872.

HIGH COURT, &c.,

(Civil Side)

Present:

The Hon'ble Sir R. Couch, *Kt., Chief Justice*, and the Hon'ble G. Loch, Louis S. Jackson, A. G. Macpherson, F. A. Glover, *Judges.*

THE following general Rules made by the High Court of Judicature at Fort William in Bengal, in the exercise of the powers vested in it by Section 15 of the Charter Act 24 and 25 Victoria, Cap. CIV, and with the sanction of the Governor General of India in Council, in respect of the receipt and payment of money deposits, are now promulgated for observance by all Subordinate Courts in the Lower Provinces.

By order of the High Court,

(Signed) F. B. PEACOCK,

Registrar.

Rules for the guidance of all Courts Subordinate to the High Court in the receipt and payment of money.

1. Judges, Magistrates, Moonsiffs, and Small Cause Court Judges do not submit accounts to the Accountant General. They should, as far as possible, in their cash transactions with the public, merely authorize the receipt and payment of money at the Government Treasury. Where inconvenience would result from this rule, money may be received and receipt granted by such officers. Money thus received may be paid out on the day of receipt to the person entitled to receive it; but all sums, remaining on hand when the Court or Office is closed for the day, must be remitted to the Treasury the same day (or, if that is not possible, on the following morning) and must not, under any circumstances, be retained for disbursement. The only money which may be retained by the above officers is that drawn from the Treasury as a permanent advance. Whenever a Judicial officer repays deposits out of sums received by him in the day, and not paid into the Treasury, he shall, in his daily accounts, debit the full amount repaid, and send the receipted payment orders in verification of the balance of receipts not remitted in cash.

2. The following records must be kept by the above officers:—

1. Cash Book.
2. Register of Challans issued.
3. „ of payment orders issued.
4. „ of deposit receipts.
5. „ of deposit repayments.
6. „ of fines and forfeitures.
7. „ of Ameen's fees Fund.
8. „ of Sheriff's fees (Local Funds).
9. „ of Registration fees.
10. „ of Stamp fines and penalties.
11. „ of Intestate property.
12. Miscellaneous Register.

3. The Cash Book (form 3) will exhibit all sums received from and paid to the public in actual cash. It will also show, in a separate column, cash received from the Treasury as a permanent advance or in reimbursement of sums expended from a permanent advance. All remittances to the Treasury, will also appear in it. It will be closed and balanced each day, and signed daily by the presiding officer after careful examination.

Receipts.

4. When a person desires to pay money into any Court or when money is paid in by any officer of the Court, he shall be furnished with a chalan in duplicate, prepared by the proper officer, and signed by the Serishtadar of the Court. The form of biglot chalan annexed (No. 1) is to be used.* The particulars prescribed in the form must be carefully filled in. The Chalan must be entered and numbered in the Register of Chalans issued, (form No. 4) in a consecutive series of numbers.

5. The following are the Heads of Account in the Treasury Book for which separate chalans should be prepared.

1. Judicial deposits.
2. Fines and forfeitures.
3. Ameen's fees.
4. Sheriff's fees (Local Funds).
5. Registration fees.
6. Stamp fines and penalties.
7. Property of Intestate.
8. Miscellaneous receipts (not deposits), *i. e.* proceeds of sale of torn records, old furniture, examination fees, &c.

6. On presentation of the chalan at the Treasury and on receipt of the money, a form of acknowledgment prepared by the payer shall, if demanded, be signed by the officer in charge or by the Accountant (according to rule).

7. When this course would entail inconvenience to the person tendering money, the Court may receive it direct and grant a receipt for the same. The entry in the Cash Book should be initialed by the Judge at the time the receipt is granted.

8. At the close of business of each day, or on the following morning, chalans so received shall be sent to the Treasury with the balance of cash and Pass Book in form No. 15 (modified). The chalans for money received into Court and repaid during the day will be excluded.

The Treasury officer will check the entries in the Pass Book with the chalans and orders for payment, and return the book receipted.

Payments.

9. Payments of money must be made on vouchers in form No. 2, which will be delivered to claimants by the Judge or other officer with the particulars in the form duly filled in. The order for payment must be entered

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* The forms are with some modifications those now in use. The Accountant General will issue them.

and numbered prior to issue in the Register of payment orders issued (form No. 6).

10. If the cash in hand suffices, the Court may at once pay the money on the responsibility of the presiding officer, and in such cases will forward, at the end of the day to the Treasury, payment orders for the amount duly receipted by the payees. In all other cases, the payment must be made to the payee at the Treasury.

Pass Book.

11. The total of chalans of the day for money received by the Court, minus the total of orders for payment cashed at the Court, will represent the balance of cash to be remitted to the Treasury.

Register of Chalans issued.

12. This Register must be kept in form No. 4. All chalans authorizing the payment of money into the Government Treasury by individuals or officers of Court, or with which money is received in Court and forwarded to the Treasury by the presiding officer, must be entered in the Register and numbered in annual consecutive series, such details, being added in the column of particulars against each amount as may be necessary for identifying it and writing up there from the several Registers.

13. At the close of business of each day, the Treasury Officer, whether Sudder or Sub-divisional, will prepare a list in form No. 5 of all the chalans of each Court or Office that have been presented at the Treasury in the course of the day. In the case of the Sudder Treasury, the list will include all chalans received from Sub-divisional Treasuries on that day, but these will not be checked or the particulars brought on the District Registers till the end of the month. On receipt of this list by the officer concerned, the particulars of the chalans shown in it should be compared with the details recorded in the Register of chalans and the date of actual credit, as certified by the Treasury officer, should be entered in the column prescribed for that purpose. Where the money has been repaid on the day of receipt, the entry in this column will be left blank, a note to that effect being made in the column of remarks at the time of repayment.

Register of deposits.

14. The Office Register of deposit receipts, form No. 7, should next be written up in prescribed detail from the particulars recorded in the Register of chalans. In this Register there will thus only be shown the amount of the chalans of deposits which are reported in the Treasury officer's list to have been actually presented at the Treasury.

15. All items of deposit in this Register must be numbered in an annual consecutive series of numbers commencing on 1st April and continuing to 31st March of each official year. Every entry in the Register must be initialed by the presiding officer of the Court or Office after comparison with the Treasury officer's list and the Register of chalans; only the first eight columns should be filled in at first, the other columns being intended for the record of subsequent repayments.

Extract Register of deposits.

16. On the 27th or last open day of the Treasury, an Extract Register of deposits (form No. 9) will be forwarded to the Judge or other District officer by the Moonsiff or other subordinate officer, which will contain those items only, which were deposited during the month, and remained unpaid on the above date. These items only will be brought upon the District Registers for the month and numbered in continuation of the district series; the district numbers being noted for reference on the Extract Registers of the Subordinate Officer. At the foot of this Extract Register, deposits received and repaid during the month by the Subordinate Officer will be shown in a lump sum without details.

17. At the end of each month, an Extract Register of deposits must be prepared by the Judge or other District Officer in the same form (No. 9) and forwarded to the Treasury Officer for submission, with his cash account to the Accountant General. This Extract Register will contain those items only which were deposited during the month, and remained unpaid on the last day of the month. At the foot of this Register, deposits received and repaid during the month will be shown in a lump sum without details. This Extract Register should be despatched punctually at the end of the month.

18. At the same time a plus and minus memo: showing the total amount of deposits received and repaid during the month, with the balances on the first and last day of the month, should be prepared and entered at

foot of the Extract Register of deposit receipts in the following form:—

	Rs.	A.	P.
Balance of last month.	0	0	0
Deposits as above...	0	0	0
„ received and repaid during the month (in lump)	0	0	0
	0	0	0
„ repaid	0	0	0
Balance...	0	0	0

Other Registers and Extract Registers.

19. The rules laid down in paragraphs 14, 15, 16, and 17 should also be observed in the case of the other Registers referred to in paragraph 12. The monthly Extract Register of fines realised and paid into the Treasury should be in form No. 13. Fines are under no circumstances to be held in deposit, but should be paid into the Treasury to credit of Government. Refunds of fines will be made by the Treasury officer on production of an order prepared in form No. 14, and passed for payment by the presiding officer of the Court. Remission of the fines should be noted in the Register of fines.

Register of payment orders.

20. All orders for the payment of money must be entered prior to issue in a Register (form No. 6) and numbered in an annual consecutive series of numbers; such details being recorded as are necessary for writing up the several Registers.

21. In authorising the payment of any sum, the local officer is required to satisfy himself in the first instance of the validity of the claim, and, in the case of deposits, to ascertain from his Register of deposits, whether the balance at credit of the particular deposits is sufficient to meet the repayment, and that there has been no order for the attachment of the money. If the claim is good, he should issue an order for the payment of the amount either from the local Treasury or from his Court, as prescribed above, and, in case of deposits, if the balance is sufficient, at once record the order of refund, in anticipation of the actual payment, against the particular number in the Register of deposits, attesting the entry with his initials. Should the payment be ordered to be made from Court on the day of receipt of the money, the Judge or other officer should, at the time of issue, enter the date of payment in the proper column, noting the fact in the column of remarks.

22. As in the case of chalans, the officer in charge of the Treasury, whether Sudder or Sub-divisional, will enter in the daily advice list (form No. 5, to be forwarded to each Court or office) all the orders of payment of such Court or office that have been cashed at the Treasury in the course of the day, and forward the same to the officer concerned. In the case of a Sudder Treasury, this list will include all orders of payment received from Sub-divisional Treasuries on that day.

23. On receipt of the list by the officer concerned, it should be carefully compared, item by item, with the Register of payment orders, and the date of actual discharge should be noted in the Register in the proper column, against every number included in the list. The Register of deposit repayments and other office Registers, should be written up from this list.

Register of deposit repayments.

24. This Register (form No. 12) should contain the details of all deposits actually disbursed from the Treasury, and should be written up daily from the Treasury officer's list of payments after check with the Register of orders of payment. Deposits of previous months repaid at Sub-divisional Treasuries should be recorded in the Judge's Register of deposits as well as in the Register of deposit repayments. Deposits of the current month repaid during the month at Sub-divisional Treasuries should not be recorded by the Judge in either Register, but should be shown in lump in his Extract Register of deposit repayments.

Extract Register of deposit repayments.

25. On the 10th and 27th (or last open day of the Treasury) an extract Register of deposit repayments (form No. 12) will be forwarded to the Judge or other District officer by the Moonsiff or other Subordinate officer, which will contain the repayments of previous month's deposits only. At the foot of this Extract Register, payments of deposits of the current month will be shown in a lump sum without details.

26. A bi-monthly extract from his Register of deposit repayments should be forwarded in the same form by the Judge or District officer to the Treasury officer, for submission with his lists of payments to the Accountant General on the 10th and last day of each month respectively. The first extract should show the repayments made from the Treasury (both Sudder and

Sub-divisional) between the 1st and 10th; and the second, those made between the 11th and the last day of the month. All repayments of the current month's deposits, whether made at the Sudder or Sub-divisional Treasury should be shown in a lump sum without details. These extracts should be despatched punctually on the above dates.

27. Small Cause Court Judges, Moonsiffs, and other officers who hold their Court at places other than the Sudder Station or the head quarters of a Sub-division, will be guided by the above rules, making periodical, instead of daily, remittances to the nearest Treasury, whether Sudder or Sub-divisional. Every such remittance should be accompanied by the chalans and payment orders, together with the Pass Book in form No. 15, (modified) full particulars being entered therein for the guidance of the Treasury officer, who will return the Pass Book receipted.

The maximum cash in the hands of Small Cause Court Judges should never exceed Rupees 500, or of Moonsiffs Rupees 500.

28. On the last day of each official year, all deposits of more than htree years' standing should be written off in the Register of Deposit Receipts, in which a note should be made against the numbers to the effect that they have been credited to Government, and are thus no longer available for refund, under the orders of the local officer. The same course should be followed in regard to deposits or unpaid balances of deposits not exceeding one rupee in amount, which have been unclaimed for more than twelve months.—A list should be prepared in form No. 10 of amounts thus written off, and forwarded to the Accountant-General.

29. When the refund of a deposit thus written off is required, by a depositor, the local officer should forward an application to the Accountant-General in form No. 11, a separate form being used for each application. The Accountant-General's letter of authority when received should be noted against the items in the Register of Deposit Receipts, to obviate a second application, and then passed for payment at the Treasury, as prescribed in the form. No other record need be kept of these refunds.

30. At the close of the first month of the next official year, the amount of unclaimed deposits written off the Registers should be deducted from the balance of deposits in the plus and minus memo.

31. During the absence on tour of Sub-divisonal officers and the consequent closing of their Treasuries, Moonsiffs must be guided by the rules for officers at stations where there are no Treasuries, making remittances of surplus cash, if necessary, to the District Treasury. They should take advantage of the periodical returns of sub-divisional officers to head quarters, to reduce the cash balances in their hands as much as possible, having due regard to their probable requirements.

Small Cause Court References (Calcutta).

Rules relating to References to the High Court from the Small Cause Court of Calcutta.

HIGH COURT.

Present :

The Hon'ble Sir R. Couch, *Kt., Chief Justice,* and the Hon'ble H. V. Bayley, F. B. Kemp, L. S. Jackson, A. G. Macpherson, W. Markby, F. A. Glover, Dwarkanath Mitter, and W. Ainslie, *Judges.*

IT is ordered that the rules of the 5th of June 1850 as "to the transmission and hearing and return of cases sent from the Court of Small Causes to the Supreme Court, for the opinion of the Judges of the latter Court," be and the same are hereby repealed. And in lieu thereof it is ordered that the following rules be passed, as the rules to be observed as to the transmission and hearing and return of cases, sent from the Calcutta Court of Small Causes to the High Court, for the opinion of the Judges of the latter Court, and as to the fees to be charged in such cases, to take effect from the 12th day of April 1872.

1. The case shall be signed by a Judge of the Court of Small Causes, and shall be forwarded to the Registrar of the High Court on the Original Side.

2. The case shall be numbered, and the number of the case and the names of the parties shall be entered in a book to be kept for that purpose in the Registrar's Office.

3. The Registrar, as soon as a case is received, shall obtain from the Chief Justice an appointment of a day for the hearing of the case which shall not be sooner than four days from the day of its receipt, and he shall, as soon as he has obtained the appointment,

notify the day fixed for the hearing of the case to the Attorneys of the parties, if they are represented by Attorneys, or to the Clerk of the Court of Small Causes, for communication to the parties, if they are unrepresented by Attorneys.

4. A Bench, consisting of not less than two Judges, shall be appointed for the hearing of the case.

5. The order made in the case together with a copy of the judgment shall be transmitted by the Registrar to the Judges of the Court of Small Causes, the date and substance of the order being first entered in the register book.

6. If Counsel be employed, one Counsel only shall be heard on each side, and a fee to one Counsel only on each side will be allowed, not exceeding sixty-eight rupees in cases within the limit of five hundred rupees, or eighty-five rupees in cases above the limit of five hundred rupees, unless, in cases of the latter class, the Court shall, on account of the difficulty or importance of any such case, think fit to sanction the employment of a second Counsel, in which case a fee will be allowed to him not exceeding sixty-eight rupees. No consultation fee or any fee other than that above mentioned shall be allowed in cases not exceeding five hundred rupees. This will also apply to cases exceeding five hundred rupees, unless otherwise ordered by the Court.

7. When an Attorney is employed, he shall receive for all his work and labor in the matter, and in lieu of all fees, one fee of thirty-two rupees in cases not exceeding five hundred rupees, and of sixty-four rupees in cases exceeding five hundred rupees.

Enquiry as to the number of days the Judges were occupied in January in conducting the Examination of Pleaders and Mooktears.

CIVIL CIRCULAR MEMO. No. 6.

To all District Judges and Judicial Commissioners except Rungpore, Sylhet, and Bancoorah, dated Calcutta, the 22nd March 1872.

HIGH COURT.

(Civil Side.)

Present:

The Hon'ble Louis S. Jackson, *Judge.*

THE Court requests to be informed, as early as possible, of the number of days in which the Judges of all grades were occupied in January last in conducting the examination of Pleaders and Mooktears.

Instructions relative to the distribution, between Government and the parties to Suits, of the charge for Postage incurred in certain cases.

CIVIL CIRCULAR ORDER No. 10.

All Civil Courts, Lower and Extra Regulation Provinces, dated Calcutta, the 28th March 1872.

HIGH COURT.

(Civil Side).

Present:

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble G. Loch, Louis S. Jackson, A. G. Macpherson, and F. A. Glover, *Judges.*

AT the request of the Lieutenant-Governor of Bengal, the following instructions are issued for the guidance of all Judicial Officers subject to the control of the High Court, in respect to the distribution, between Government and the parties to suits, of the postage charge incurred in certain cases.

2. When records are called for by Civil Courts at the instance of parties, the party applying should pay the charge for postage; but when the Court calls for them of its own motion, then the postage should be in the first instance paid by the State, but the Court may in its discretion make such postage a part of the costs and order the losing or other party to pay. Such records do not in the first-mentioned case stand in the position of the records alluded to in the letter from the Government of India in the Financial Department, No. 3118, dated 21st November 1870,* ruling that "the charge for transmitting records through the post from one Court to another should be borne by the State."

* Vide Circular Order No. 1, dated the 4th January 1871. †

3. When copies of notifications of sales, &c., are sent by Courts in the interior for the purpose of being affixed in the Office of the Collector and in the Court of the Judge, and when the replies thereto are sent by the general post, the postage should be paid by

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† 15 W. R., Civil Circulars, p. 1.

the party applying for sale and chargeable as costs of execution.

4. In like manner when Civil Courts in the interior of the district, upon applications of decree-holders, ask for attachment of the judgment-debtors' interests in decrees or documents deposited in other Courts, the postage for the despatch of the requisition, and for the return of the reply, should be borne by the party applying.

5. As regards notices to respondents in appeal cases, the postage should be paid by Government; there being in contemplation one uniform rate of *talubana* fee, and the transmission by post for part of the distance being an economy to the Government.

6. When Courts in the interior make requisitions upon the District Court at the Sudder Station for the payment of money in deposit, to decree-holders or other persons, the postage for such requisitions should be paid by the parties on whose behalf they are made.

What declaration required to be made by a District Judge on his assumption of Office.

CIVIL AND CRIMINAL CIRCULAR ORDER No. 11.

To all District Judges and Judicial Commissioners, dated Calcutta, the 28th March 1872.

HIGH COURT.

(Civil and Criminal.)

Present:

The Hon'ble Sir R. Couch, *Kt., Chief Justice*, and the Hon'ble G. Loch, Louis S. Jackson, and F. A. Glover, *Judges*.

SEVERAL instances having recently occurred of mistake, on the part of Civil and Sessions Judges, in respect to the declaration required from them previous to their assumption of office, the Court desires to point out that, under the law as it at present stands, the only form of solemn declaration required to be made and subscribed by a District Judge is that prescribed in Section 18 of the Bengal Civil Courts Act (VI of 1871). No further oath or declaration is warranted by law in respect of the office of District Judge, and no oath at all is now required to be taken by Judges of the Court of Session.

2.—Where the District Judge's predecessor in office leaves the station before the Judge's arrival, such declaration must be made before the Magistrate of the District, but not before a Joint Magistrate or other officer in charge, who has no authority to receive and attest such declaration "for the Magistrate."

Quarterly Returns of Receipts and Disbursements, on account of Civil Court Ameens and other Commissioners appointed under Act VIII of 1859, *ss.* 180 *and* 181.

CIVIL CIRCULAR ORDER No. 12.

To all District Judges and Judicial Commissioners, dated Calcutta, the 8th April 1872.

HIGH COURT.

(Civil Side.)

Present:

The Hon'ble Sir R. Couch, *Kt., Chief Justice*, and the Hon'ble G. Loch, Louis S. Jackson, A. G. Macpherson, F. A. Glover, *Judges*.

THE Court request that quarterly returns may be made by each District Judge and Judicial Commissioner of the receipts and disbursements on account of Civil Court Ameens and other Commissioners appointed under Sections 180 and 181, Act VIII of 1859, in connection with his own Court and the Courts Subordinate thereto. The returns should include all money received and credited and all payments made on account of Ameen's fees or remuneration of Commissioners whether appointed under Act XII of 1856, or temporarily employed, but should not include boat hire or other travelling expenses,* which are payable to the officer direct.

* *Vide* C. O. No. 118, dated 12th March 1858.
Vide C. O. No. 84, dated 10th October 1860.
Vide C. O. No. 4, dated 20th January 1864.

2.—The returns should be made in the form appended and should begin with the

1st April 1872, the commencement of the ensuing Financial year. The first return will therefore be due on or before the 15th July next.

3.—At the foot of the statement and after the total of the expenditure on account of *salaries*, an addition should be made of 10 per cent. on account of *pensions*, as expressly desired by the Government of India.

4.—The Court will expect these returns to be carefully prepared and promptly submitted. A similar monthly return will be furnished by the Accountant-General, with which the local returns now prescribed will be checked.

Statement showing Receipts and Disbursements on account of the Employment of Ameens in the District of during the month of 18 .

NAME OF COURT.	Receipts on account of employment of Ameens permanently entertained.	Disbursements on account of employment of Ameens permanently entertained.	Receipts on account of Ameens temporarily employed.	Disbursements on account of Ameens temporarily employed.	Amount received as fees paid for the employment of Moonsiffs as Commissioners.	Ameens permanently employed, 1st and 2nd Grade.	REMARKS.

[*N. B.*—Civil Circular Order No. 18 has not yet been published.]

Amended Rule VIII regarding Pleaders' Fees in Miscellaneous Proceedings, &c.

CIVIL CIRCULAR ORDER NO. 14.

To all Civil Judges, dated Calcutta the 9th April 1872.

HIGH COURT.

(Civil Side.)

Present :

The Hon'ble Sir R. Couch, *Kt.*, *Chief Justice*, and the Hon'ble G. Loch, H. V. Bayley, F. B. Kemp, Louis S. Jackson, J. B. Phear, A. G. Macpherson, F. A. Glover, D. N. Mitter, and W. Ainslie, *Judges*.

RULE 8 of the Rules* made by the High Court under Section 37 of Act XX of 1865, and notified by Circular Order No. 22, dated 13th June 1866, is hereby rescinded, and the following Rule is circulated for general observance :—

Amended Rule VIII.

"The amount in respect of the fee of an adversary's pleader when allowed in any miscellaneous proceeding or for any other matter than that of appearing, acting, or pleading in a suit prior to decree, shall be fixed by the Court according to the following scale, *viz.*:—

A fee not exceeding Rs. 80 in the Court of a Judge or Subordinate Judge.

A fee not exceeding Rs. 16 in the Court of a Moonsiff in suits of amount or value exceeding Rs. 300.

A fee not exceeding Rs. 4 in the Court of a Moonsiff in suits of amount or value not exceeding Rs. 300.

Circular Order No. 28, dated 20th July 1866, is also rescinded."

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* 5 W. R. Rules of Practice, p. 15.

Calling for opinion on suggestions of Judge of Bhaugulpore, relative to the transmission of Moonsiffs' and Subordinate Judges' records at out-stations to the Appellate Courts.

CIVIL CIRCULAR MEMO. No. 7.

To all District Judges (and Subordinate Judges,) dated Calcutta, the 9th April 1872.

HIGH COURT.

(Civil Side.)

Present:

The Hon'ble Sir R. Couch, *Kt., Chief Justice,* and the Hon'ble G. Loch, Louis S. Jackson, A. G. Macpherson, and F. A. Glover, *Judges.*

IN connection with Circular Memo. No. 5 of the 11th September 1871,* calling for a report as to the period within, and the intervals at, which it will be practicable to require the transmission of Moonsiffs' and Subordinate Judges' records at out-stations to the several Appellate Courts, the following suggestions made by the Judge of Bhaugulpore on the subject are circulated, with a request that the High Court may be favored, as early as possible, with the opinion of District Judges thereon :—

"Every party appointing a pleader or "filing an appeal or for other purposes can "obtain, on payment of a sum of Rs. 5 "only in appeals from orders of Subordinate "Judges, and Rs. 2 in appeals in rent suits, "&c., from orders of Moonsiffs, copies of all "the papers in this Court comprising the "record of the case, by putting in an appli-"cation on a slip of plain paper. The copies "are prepared by English and Vernacular "copyists appointed under Circular Order "No. 18 of the 23rd June 1870†."

"This rule is largely availed of by the "parties, and the pleaders are in every "instance supplied with a complete vernacu-"lar brief of all the papers of the case, and "the party is saved all the bother and trouble "of constant attendance on his pleader. I "have found the rule work so well that I can "confidently recommend its adoption in the "lower Courts with slight modifications. "Probably in a very short time the people "will become aware of the facility thus "afforded them, and largely avail themselves "of it. The introduction of the rule will "do away with the necessity of having the "records earlier at the Judges' Court. For "instance, a party cast at the lower Court, "on putting in an application for a brief for "his case, can obtain unauthenticated copies "of its record in a short space of time at "the Court, and can come with only an "authenticated copy of his decree to the "Appellate Court. The copies of records "being supplied to pleaders, the rule in "Circular Order No. 17 of 23rd May‡ could "virtually be thus carried out. This will "obviate the necessity of an earlier transmis-"sion of records. The records of the case "are on an average so unvoluminous, that "Rs. 2 for a copy of brief in each case "will be ample, and men will be found to "grant these copies on an average of two "days' time, their remuneration being debited "to the accumulation of the fees, which will "not be very small."

Charges and Travelling Expenses of Moonsiffs employed as Commissioners under Act VIII of 1859, *ss.* 180 *and* 181.

CIVIL CIRCULAR ORDER, NO. 15.

To all Civil Authorities, dated Calcutta, the 18th April 1872.

HIGH COURT.

(Civil Side.)

Present:

The Hon'ble Sir R. Couch, *Kt., Chief Justice,* and the Hon'ble G. Loch, Louis S. Jackson, A. G. Macpherson, and F. A. Glover, *Judges.*

THE Court are pleased to direct that whenever Moonsiffs are employed as Commissioners under Sections 180 and 181 of the Code of Civil Procedure, the parties to the suit shall be charged at the rate of 10 Rs. for each day the investigation lasts. All sums so received are to be credited to Government and shown in column 6 of the statement appended to Circular Order No. 12, dated 8th April 1872. Moonsiffs so employed will also be entitled to their travelling expenses either by land or water, which must be calculated and paid in the manner prescribed in paragraph 8 of Circular Order No. 80, of 10th October 1863.

2. It is not to be understood that the Court contemplate the frequent employment of Moonsiffs as Commissioners or otherwise than under the special orders of the District

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* 16 W. R., Civil Circulars, p. 9.

† 14 W. R., Civil Circulars, p. 2.

‡ 16 W. R., Civil Circulars, p. 1.

Judge; such work will, as heretofore, be usually performed by Ameens. Occasions may, however, sometimes arise when by reason of the amount of work already in the hands of the Ameens of a District, or the importance of a particular investigation, the employment of a Moonsiff in this way may be thought desirable by the District Judge, and it is to meet such cases that the present Circular Order is issued.

Returns called for of all Pleaders and Mookhtears enrolled, under the High Court's Rules of 2nd May 1866, *before the* 1*st April* 1872.

CIVIL CIRCULAR MEMO. No. 8.

To all District Judges and Judicial Commissioners of Assam and Chota Nagpore, dated Calcutta, the 23rd April 1872.

HIGH COURT.

(Civil Side.)

Present:

The Hon'ble Louis S. Jackson, *Judge.*

DISTRICT Judges and officers holding the like powers are requested to furnish this office with complete lists, in the form hereto appended, of all the Pleaders and Mookhtears enrolled, under the High Court's Rules of 2nd May 1866,* before the 1st April 1872, with the date of enrolment of each, and the other particulars for which the form provides.

2. It will be seen that one form only is considered necessary; but there must be three distinct returns in the same form, *viz.*, one for Pleaders of the senior grade, another for Pleaders of the junior grade, and a third for Mookhtears. The headings of the form, it is believed, explain themselves sufficiently, with the exception of heading to column 5, "Nature of qualification and date of original admission," which should be understood as providing for the following information. In the case of Pleaders, it should show whether they were admitted after examination, or, as possessed of a Law degree, under the general operation of the Rules of 2nd May 1866, or as old Pleaders, under the special proviso in Rule 5. Similarly, in the case of Mookhtears, it should indicate whether they were admitted after examination under the general rules applicable to such practitioners, or under the specific permission in Rule 39. The *date of original admission* will, of course, be the date on which the Pleaders and Mookhtears of the exceptional classes just described were admitted to practise *before* Act XX of 1865 came into operation.

3. Blank printed forms of each description, and uniform in size and shape, are sent with this Circular, for the purpose of being filled up and returned as carefully and as speedily as possible, with a view to being bound up and preserved as an original and permanent record of the High Court.

Name.	Father's Name.	Age.	Place of Residence.	Nature of Qualification and date of original Admission.	Date of Admission and Enrolment.	Date of District Judge's Certificate.	Date of latest Renewal.	Remarks.

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* 5 W. R., Rules of Practice, p. 9.

Addition of a column "Total Value of Suits" in the Judicial Statement for Small Cause Courts.

CIVIL CIRCULAR ORDER No. 16.

To Judges of Small Cause Courts, dated Calcutta, the 25th April 1872.

HIGH COURT.

(Civil Side.)

Present:

The Hon'ble Louis S. Jackson, *Judge.*

IN continuation of Circular Order No. 5, dated 25th February 1871, the following instructions communicated to a Judge of a Small Cause Court are forwarded for the information and guidance of Judges of Small Cause Courts.

No. 814.

From F. B. Peacock, Esq., Registrar of the High Court of Judicature at Fort William in Bengal, to the Judge of Small Cause Court, Patna, dated Calcutta, the 22nd March 1872.

HIGH COURT.

(Civil Side.)

Present:

The Hon'ble Louis S. Jackson, *Judge.*

HAVING laid before the Court your letter No. 11 of the 23rd ultimo, soliciting to be informed whether a column "total value of suits," as in the Consolidated Statement No. 7 B. for the District Courts, prescribed by Circular Order No. 82, dated 8th November 1870, should not be added to the Judicial Statement No. 7 for the Small Cause Courts, prescribed by Circular Order No. 5, dated 25th February 1871, I am directed to observe as follows :—

2. The Small Cause Court Statement No. 7 was ordered by Circular Order No. 5, dated 25th February 1871, so as to enable the Small Cause Court Judges to furnish the District Judge with the necessary materials (as to their Courts) for constructing the general statement No. 7. Column 7 of the latter was certainly intended to show the total value of suits of each denomination in the District; and to enable the District Judge to arrive at such general total, each Court should furnish its own total, and the Small Cause Court Statement No. 7 should therefore have such a column. The Superintendent of Stationery will be so instructed, in order that the necessary addition may be made to this Form when the present stock is exhausted. In the meantime the column of remarks may be sub-divided, the first half being headed "total value of suits."

Summonses issued under Act VIII of 1859, *ss.* 59 *and* 158, *to be directed, not to the Judge, but to the Moonsiff.*

CIVIL CIRCULAR ORDER No. 17.

To all Civil Authorities, Lower and Non-Regulation Provinces, dated Calcutta, the 14*th May* 1872.

HIGH COURT.

(Civil Side.)

Present:

The Hon'ble Sir R. Couch, *Kt., Chief Justice,* and the Hon'ble L. S. Jackson, W. Markby, F. A. Glover, and W. Ainslie, *Judges.*

THE rule laid down in Circular Order No. 7, dated the 20th February last,* in respect to the issue of commissions under Section 175 of Act VIII of 1859, is hereby extended to summonses issuing under Sections 59 and 158 of the same Code which shall ordinarily be directed not to the Judge of the district where it has to be served, but to the Court "by which it can be most conveniently served," *i. e.*, to the Moonsiff within whose jurisdiction the defendant or the witness (as the case may be) resides.

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* *Ante*, p. 8.

Scale of fees to be deducted and credited to Government from proceeds of sales in execution of decrees.

CIVIL CIRCULAR ORDER No. 18.

To all Civil Courts, dated Calcutta, the 16th May 1872.

HIGH COURT.

(Civil Side.)

Present:

The Hon'ble Sir R. Couch, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, W. Markby, F. A. Glover, and W. Ainslie, *Judges.*

IN modification of the rule in para. 1 of Circular Order No. 26, dated 5th September 1871, the Court are pleased to direct that the deduction to be made and credited from the proceeds of all property sold in execution, shall be according to the following scale:—

When the amount of proceeds does not exceed 1,000 rupees.	One per cent.
When the amount exceeds 1,000 rupees but does not exceed 10,000 rupees.	On 1,000 rupees as above, and on the surplus up to 10,000 rupees, half per cent.
When the amount exceeds 10,000 Rupees.	On 10,000 rupees as above, and on the surplus a quarter per cent.

Provided that the amount of fee shall never be less than 5 rupees upon immovable property.

BRIEF NOTES OF ENGLISH CASES.*

Equity.

L. C. Nov. 8, 1871.

In re LONDON AND MEDITERRANEAN BANK. WRIGHT'S CASE.

Companies—Allotment annulled—Misrepresentation—Contributory—Past Member.

THIS was a case where, four days after an allotment of shares had been cancelled and the deposit money returned by the directors on the ground of the refusal of the Stock Exchange to give a settling day, the Company was wound up voluntarily; and although the allottee (appellant) afterwards discovered that he could have had his name taken off the list of shareholders on the ground that the prospectus contained misrepresentations, his name was placed on the list of contributors as a past member. THE L. C. (reversing V. C. Wicken's order) held that the appellant's name must be struck off the list, because, although he could have had it removed on the ground of the fraud proved to have been committed if he had been aware of it, yet the directors having been aware of the fraud, and having annulled the shares before the winding-up, could not now insist on retaining the appellant as a shareholder.

L. J. J. Nov. 8.

In re ORIENTAL AND COMMERCIAL BANK. MORRIS' CASE.

Winding-up—Contributory—Class B.

IN this case each B contributory was held liable to contribute (provided no call should exceed the amount remaining unpaid on his share) to those debts of the Bank which were due at the time he transferred his shares and which remained due at the commencement of the winding-up, less the dividends paid upon them under the winding-up; the amount of each B contributor's contribution being applicable only to the payment of the debts owing at the time of his transfer of his shares.

M. R. Nov. 8.

KIMBERLEY *v.* DICK.

Builder's Contract—Extra works—Architect's Plans.

PLAINTIFF, a builder, contracted to build a house for defendant A for a certain sum according to the plans and specifications of defendant B. The cost of the house greatly exceeded plaintiff's estimate prepared according to the quantities alleged by him to have been given him by B; and plaintiff filed his bill claiming to be entitled for extra works not included in the contract, and to be paid by measure and value for all quantities of work executed by him in excess of the quantities included in his estimate. THE M. R. held plaintiff bound by his contract except as to the extra works as to which he was entitled to an account.

V. C. B. Nov. 8.

SLEEMAN *v.* WILSON.

Testamentary Guardian—Trustee—Stale Claim—Acquiescence.

BILL by S and his wife praying for a declaration that the late General Sir DeLacy Evans had committed a breach of trust, and that his estate might be ordered to make good the loss. The bill alleged that the General, as one of the testamentary guardians of two infants, took upon himself the entire care and control of the persons and property of the infants; and, acting in fact as their sole guardians, took over charge in 1811 of a bond and warrant of attorney given as a security for a debt due to the infant's father; that he thus became a trustee of the debt for the infants, but did not require or attempt to enforce payment of the debt, nor took any steps either by registering the bond or otherwise for making the same a charge on the debtor's real estate; that consequently the debt became in 1831 barred; that, on the female plaintiff attaining age and marrying the male plaintiff, the latter received the bond in 1833; and that the plaintiffs, not wishing to disturb the friendly relations subsisting between themselves and the General, took no steps to recover the debt and interest from him during his life-time. HELD that, the General had properly performed his duty, a testamentary guardian being trustee only of such property as came to his hands; and that the plaintiff's own statement of taking no steps to recover from 1838 to 1870 was as clear a case of acquiescence as ever existed, disposing of the whole case.

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* Selected and abridged from the ENGLISH WEEKLY NOTES. For full reports of cases of permanent interest, *see* the ENGLISH LAW REPORTS.

M. R. Nov. 6.

PEEK *v.* GURNEY.

Company—Prospectus—Concealment—Fraudulent Intent—Transferee of Shares—Costs.

In this case a shareholder in Overend Gurney and Company sought to make the directors of the Company liable for the loss occasioned to him by the concealment of an important fact (*viz.*, the insolvency of the firm) which ought to have been stated in the prospectus on the faith of which he took shares. THE M. R. held that the directors, though they had no fraudulent intention in concealing the fact, were liable in equity to make good the loss; that, if plaintiff had been an allottee of shares on the faith of the prospectus, and had before the winding-up filed a bill to be relieved of his shares, he would have had a decree; but that he could not succeed because he had been a purchaser from the allottee who knew all the facts, and had not enquired into the truth of the representations made to him until after the failure of the Company. The directors having been guilty of improper conduct, the appeal was dismissed without costs.

V. C. M. Nov. 6.

HEMMING *v.* MADDICK.

Company—Shares—Registered Owner—Real Owner—Indemnity.

SUIT by a registered owner of shares in a Company registered under the Act of 1862 which was unsuccessful and ordered to be wound up, praying to be indemnified, against calls made in the winding-up, by the alleged real owner or the person to whom the plaintiff, at the time of the allotment of the shares to him, gave a transfer of the shares in blank, which transfer, however, the directors refused to register. THE V. C. held that there was an implied agreement on the part of the defendant who was to derive whatever benefit might arise from the shares, to indemnify the plaintiff.

V. C. B. Nov. 7.

GREENE *v.* WEST CHESHIRE RAILWAY COMPANY.

Specific Performance—Railway Co.—Accommodation works—Damages.

BILL for specific performance of a contract by which, in consideration of plaintiff's withdrawal of opposition to defendant's bill, defendants agreed to contract and maintain a siding through plaintiff's land. Defendants had endeavoured to induce plaintiff's mortgagees to refuse their consent to defendant's entering upon the land, which consent the mortgagees had first refused but afterwards gave. There had also been an unsuccessful negotiation for a money compensation. At the trial the defendants contended that, where there had been a negotiation for compensation, the remedy was in damages; that the plaintiff should have made the siding and sent in a bill to the defendants; and that the agreement having been to construct accommodation works, not on the Company's, but on the plaintiff's land, the Court would not decree specific performance of such an agreement. HELD that there had been a wilful and determined violation of a plain contract, and that it was no excuse to say that there was a remedy in damages. Specific performance decreed.

V. C. B. Nov. 7.

DAWSON *v.* ROBINSON.

Annuity, whether for Lives or Perpetual.

UPON a marriage a settlement was made of the wife's property upon trusts for the wife's separate use without anticipation for life, then for the husband for life, then for the children or issue of the marriage as the wife should appoint; in default, for the children equally; if no child, as the wife should by deed or will appoint, and in default, for the wife if she survived, and if not, for her next of kin exclusively. By an agreement of even date which recited the above settlement, the husband's father agreed with the trustees of the settlement to pay £350 yearly as an allowance to his son during the natural life of the son; and in case he died before his wife, then to continue the yearly payment to the trustees of the settlement for the purposes thereof. The father died first, and then the son leaving four children; and the question having arisen whether the annuity would cease on the death of the son's widow or was perpetual, THE V. C. (deciding solely on the language of the instrument and without regard to the cases cited) held that, as the language of the father's covenant was not doubtful, not ambiguous, and not unreasonable with reference to the circumstances, the trustees of the settlement must take the fund which had been set apart to provide for the annuity and hold it upon the trusts of the settlement.

L. J. J. Nov. 8.

Ex parte COHEN.

In re SPARKE.

Bankruptcy—Injunction—Bill of Sale—Fraudulent Assignment.

THIS was an appeal from an order of the Chief Judge in Bankruptcy affirming an order of the County Court Judge restraining a creditor from commencing an action against the debtor upon a bill of sale. THE L. J. J. held that the jurisdiction was in the Court of Bankruptcy and refused to interfere.

It was then contended for the creditor that the bill of sale, having been given in pursuance of an agreement made at the time the money was advanced, was not an act of bankruptcy. But THEIR LORDSHIPS held that the existing bill having been given in removal of a former bill, constituted no agreement, and was only a scheme concocted to evade the Bills of Sale Act; and that to support such a scheme would only be to encourage fraud.

V. C. B. Nov. 8.

HEYMAN *v.* DUBOIS.

Principal and Surety—Marshalling—Consolidation of Securities—Policies.

T, at three different times, effected three policies on his life, and mortgaged them to the Assurance Company for three several loans. Plaintiff and B who soon afterwards became bankrupt were sureties under the third mortgage which was secured by the first and third policies. T then became bankrupt, and the Company sued plaintiff as one of the sureties and recovered judgment against him. He paid the Company in part discharge of the judgment and costs. The first policy was forfeited for non-payment of premium, and so also the third policy though afterwards allowed to be re-instated upon payment by plaintiff of the premium and interest. On T's death, plaintiff sought to recover, out of the balance of the proceeds of the second and third policies, the amount which he had been compelled to pay in the action brought against him as surety. On taking the accounts it being thought that the balance of the monies payable in respect of the third policy would not be sufficient to satisfy the plaintiff's claim, he now claimed to be entitled as against T's assignee in bankruptcy to have the monies payable in respect of both policies marshalled so as to give him the benefit of the balance of the second policy after satisfying the security of the Company thereon. It was contended for T's assignee in bankruptcy (1) that plaintiff had no right to the benefit of any securities except those pledged for the mortgaged debt for which he became security, and was not entitled to marshall the securities; and (2) that as plaintiff had received from T's wife, out of her separate estate, a certain amount in repayment of what he had paid, the balance of the policy monies was to that extent set free from any claim on his behalf. THE V. C. affirmed the right of marshalling claimed by plaintiff, holding that he was entitled to be paid, out of the balance of the policy monies, the sums which he had paid under the judgment including the costs of the action. As to the payment by T's wife out of her separate estate, THE V. C. held that it was just the same as a payment by a perfect stranger.

V. C. B. Nov. 8.

WARD v. WOLVERHAMPTON WATER WORKS COMPANY.

Construction—Agreement—Option of Purchase—When exercisable—Notice.

THIS case turned upon the construction of an agreement of January 1857, which gave a corporation the option of purchasing the works of defendant company, after notice "on or before any 25th day of December"; and the question was whether the corporation, having given notice in 1870 of exercising the option and failed to carry out the purchase from inability to raise the necessary funds, were thereby precluded from giving notice and exercising their option in 1871. THE V. C. held that the corporation were not so precluded.

V. C. W. Nov. 8.

BRIGGS v. UPTON.

Marriage Settlement—Legal Representatives of Wife—Next of Kin of Wife—Demurrer over-ruled.

THE "legal representatives" of a wife under a marriage settlement were held in this case not to be construed as "Executors or Administrators"; and a bill having been filed by the wife's next of kin claiming to be entitled, subject to the husband's life interest, to the property comprised in the settlement, a demurrer to the bill for want of equity was overruled.

Common Law.

C. P. Nov. 8.

PAPPA v. ROSE.

Arbitration—Selling Broker.

IN a contract for sale of black Smyrna raisins of 1869 growth, and of fair average quality in opinion of selling broker, the broker, acting as referee under the sale note, rejected the raisins tendered as not being fair average quality of 1869 growth. It appeared upon the evidence that the crop of 1869 was exceptionally bad, and that, although the raisins tendered were not of fair average quality generally, they were fair average growth of 1869. The action was against the broker for not exercising due and reasonable care and skill as broker in carrying out the contract and improperly rejecting the raisins tendered. HELD by BOVILL, C. J., that the words of the contract meant fair average quality generally, and therefore that the raisins tendered had been properly rejected; also that the defendant, in acting as referee under the sale note, was in the position of a *quasi* arbitrator, and therefore not liable to an action for an error in judgment provided he acted *bonâ fide*.

Q. B. Nov. 8.

WEBLEY, App.; WOOLLEY, Resp.

Gunpowder—Ammunition—Unlicensed Keeping.

IN this case the COURT OF Q. B. held that the 23 and 24 Vic., c. 139, s. 6 only applied to the keeping *by a manufacturer* of ammunition containing more than 5lbs of gunpowder without a license.

Ex. Nov. 11.

BUXTON v. RUST.

Statute of Frauds, s. 17—Sufficient Memorandum—Sale of Goods.

ON 11th January plaintiff and defendant met and entered into a contract for the sale by defendant to plaintiff of some wool to be cleared in about 21 days; and a memorandum was drawn up signed by plaintiff and handed to defendant. On 8th February defendant wrote to plaintiff to say that he would "consider the deal off" as plaintiff had not completed his part of the contract. On the following day plaintiff met defendant and asked to see the contract of 11th January; and on the same day defendant wrote to plaintiff enclosing a copy of the memorandum (calling it *letter*). Defendant having declined to deliver, this action was brought, and the Judge at the trial (Pigott, B), and the Court afterwards, held that the above correspondence constituted a sufficient memorandum in writing to satisfy the Statute of Frauds, s. 17.

Equity.

M. R. Nov. 9.

RICHARDSON v. MORTON.

Will—Legacy to Infant charged on Real Estate—Time for ascertaining insufficiency of Personal Estate.

A legacy was bequeathed to an infant with interest till he attained 21, to be paid to his father meanwhile; and testator devised his real estate to T. M. charged with the payment of such residue of his debts and legacies as his personal estate might be inadequate to discharge. Testator's personal estate was amply sufficient, and the executor, W. M., retained the amount of the legacy and paid the instalment to the infant's father. On W. M.'s death, his executor and residuary legatee J. M. squandered the money and became insolvent. The infant having attained 21 and died, his father filed this bill against J. M. and T. M. the devisee, seeking to make the legacy chargeable upon the real estate, on the ground that the time for ascertaining the insufficiency of the personal estate was on the infant attaining 21. The defendant contended that the deficiency had arisen through the default of J. M., the trustee of the legacy, and not through the insufficiency of the personal estate. THE M. R. held that the personal estate was sufficient at the time the legacy became vested, and that the only condition on which the legacy was chargeable on the real estate had not arisen.

V. C. W. No. 10.

SYKES v. SYKES.

Will—Remoteness—Charge—Demurrer allowed.

THIS was a case in which the plaintiff prayed for a declaration that a charge under a will was valid, and for directions for raising it; and the defendant demurred for want of equity alleging that the charge was too remote and void, and that the sum could not now be raised. THE V. C. allowed the demurrer, holding that this case was distinguishable from that of *Case* v. *Drosier* (2 Keen, 764; on App., 5 My. & Cr., 226), and that the construction of the limitation there had been since established by *Baker* v. *Tucker* (3 H. L. C., 106).

V. C. M. Nov. 11.

In re GREAT OCEANIC TELEGRAPH COMPANY. HARWARD'S CASE.

Company—Contributory — Director's Qualification—Implied Obligation to take Shares.

THE V. C. held that H, by allowing his name to appear on the list of directors printed on the prospectus which was largely advertised before registration, and attending a Board meeting of the directors at which a Committee was appointed for the allotment of shares, had incurred the obligation of taking the number of shares required for the qualification of a director.

V. C. B. Nov. 11.

In re GREENING & CO. MARSH'S CASE.

Company—Winding up—Contributory—B List —Call—Costs.

IN this case the liquidator had made a call on the B contributors, one of whom M having actually paid, or undertaken to pay, into Court all his liabilities, the question arose whether B contributors could be called upon to contribute to the general costs of the winding-up. THE V. C. held, as to the costs, that they should fall on those who had occasioned them according to the circumstances of the case, and that so far as costs had been occasioned by making out the B list, the B members were liable to contribute; and as to the call, that it was most unreasonable and uncalled for. M not having satisfied his liabilities until the last moment, would not receive his costs; but no costs would be awarded against him.

L. J. J. Nov. 13.

COWLES v. GALE.

Specific Performance—Sale of Public-house—License taken out in deceased Owner's Name.

THE executors of a deceased person sued as vendors of a Public-house to enforce contract against the purchaser who insisted on his right to repudiate the contract on the ground that, on the day fixed for completing the contract, the vendors were not in a condition to transfer the license to the purchaser by reason of their having renewed the license in the name of the deceased owner. The M. R. had granted the relief prayed, because, although the renewal of the license was irregular, yet the plaintiffs had the power of getting it transferred to the defendant. On appeal, The L. J. J. reversed the decree of the M. R., being of opinion that, in the sale of a Public-house as a going concern, time for the completion of the contract was of the essence of the contract; and that as the license, under which the Public-house was being carried on, was a void one, and the purchaser could not have legally carried on the business under it, he was entitled to repudiate the contract.

BANKRUPTCY. Nov. 13.

Ex parte BAILEY.

In re JECKS.

Bankruptcy Act, 1869—Execution-Creditor—Trustee—Trader.

In this case the Chief Judge held that the acceptance, by a person who was both attorney for the execution-creditor and under-sheriff, of a sum of money in payment of the sheriff's poundage, officer's fees, and costs, did not affect the rights of the execution-creditor under the execution, and that his title was good as against the debtor's trustee in liquidation; also that the Bankruptcy Act, 1869, had no retrospective operation, and that by the word "traders" were meant only those who were at the time of its commencement, or should afterwards become, traders.

V. C. B. Nov. 15.

SMITH v. GIBSON.

Will—Construction—Precatory Trust—Premature Questions.

Testator devised and bequeathed as follows:—"I give, devise, and bequeath all my real and personal estate and effects whatsoever and wheresoever, unto and to the absolute use of my dear wife H. S., her heirs, executors, administrators, and assignees, *in full confidence* that she will do what is right as to the disposal thereof between my children either in her life-time, or by her will after her decease; and I appoint my sons (naming them) executors hereof." On testator's death, a special case was submitted to the Court in which the questions were whether the widow took an absolute interest or only as trustee for the children. The V. C. (following the decision of the House of Lords in *Wright* v. *Atkins*, as stated and followed by L. J. Turner in *Lady Langdale* v. *Briggs*, 8 D. M. & G., 421) declined, during the widow's life-time (during which many interesting and important unforeseen and unexpected events might occur) to answer either question, or to say more than that the widow was, and was rightly, in possession of the testator's real and personal estate and effects.

Common Law.

C. P. Nov. 14.

BATESON v. GOSLING.

Bankruptcy—Conditional Release.

This was a case in which a deed, whereby the acceptor of a bill of exchange assigned all his estate, &c., to trustees for payment of his debts in full, contained a release from the creditors to the assignor; and the Court held that the deed operated only as a conditional release of the principal debtor, leaving the creditor's remedies against sureties untouched notwithstanding that the deed contained special provisions for (*inter alia*) enabling the trustees to carry on the business of the assignor for the benefit of the creditors.

P. & M. Nov. 14.

GRIFFITHS v. GRIFFITHS.

Will—Execution—Attestation.

In this case the deceased made a cross at the end of a testamentary paper in the presence of H & F, who signed their names in his presence, the former opposite to the word *executors*, and the latter opposite to the word *witness*. Plaintiff, as residuary legatee, propounded this paper as the last will and testament of deceased; and defendant pleaded that it was not executed in accordance with the 1 Vic., c. 26. It appeared in evidence that deceased wished H to be one of his executors, and to sign as executor; and Lord Penzance, on a consideration of the evidence, ordered probate to issue, being of opinion that H did not sign exclusively as executor but as intending to affirm that the deceased executed the will in his presence.

NOTIFICATIO

The following list of days, to be observed in the year 1872 as close holidays in the published by the High Court of Judicature at Fort William in Bengal, as directed by Se

In the said list the days printed in italic letters are to be observed in the districts remaining districts only :—

List of authorized Holidays for the y

NAMES OF HOLIDAYS.	ENGLISH DATE.	BENGALEE DATE.	DAYS
New Years Day and the two days following	1st to 3rd January ...	18th to 20th Pous 1278 ...	Monda
Bussunt Punchoomee	13th and 14th February ...	2nd and 3rd Falgoon 1278 ...	Tuesda
Eed-us zoha	20th February ...	9th Falgoon 1278 ...	Tuesda
Shibu Rattree	7th and 8th March ...	25th and 26th Falgoon 1278 ...	Thursd
Mohurrum	16th to 20th March ...	4th to 8th Choitro 1278 ...	Saturd
Dole Jattra	25th and 26th March ...	13th and 14th Choitro 1278 ...	Monda
Good Friday and the day following	29th and 30th March ...	17th and 18th Choitro 1278 ...	Friday
Baroouee Gungasnan ...	6th April ...	25th Choitro 1278 ...	Saturd
Mohabishub Sankranti ...	11th April ...	30th Choitro 1278 ...	Thursd
Sreeram Nobomee	17th April ...	6th Bysack 1279 ...	Wedne
Akheri Chaharshumba ...	8th May ...	27th Bysack 1279 ...	Wedne
Fattehi-doaz-dohum	21st May ...	9th Joisto 1279 ...	Tuesda
Day after the Eclipse of the Moon	23rd May ...	11th Joisto 1279 ...	Thursd
Queen's Birthday	24th May ...	12th Joisto 1279 ...	Friday
The Eclipse of the Sun ...	6th June ...	25th Joisto 1279 ...	Thursd
Dushohara Gungasnan ...	16th June ...	3rd Assar 1279 ...	Sunday
Ruth Jattra	7th July ...	24th Assar 1279 ...	Sunday
Olta Ruth	15th July ...	1st Srabun 1279 ...	Monda
Jummo Ustomee	26th and 27th August ...	11th and 12th Bhadro 1279 ...	Monda
Dusserah vacation, including Mohaloya, Lukamee Poojah, Shub-e-Barrat, Dewalee, and Bhratrieditia	2nd October to 3rd November ...	17th Assin to 19th Kartick 1279...	Wedne
Juggutdhatree Poojah ...	9th and 10th November ...	25th and 26th Kartick 1279 ...	Saturd
Chutter Mela	*12th to 17th November* ...	*28th Kartick to 3rd Aughran* 1279	*Tuesda*
Kartick Poojah	14th and 15th November ...	30th Kartick and 1st Aughran 1279	Thursd
Eed-ul-fitr	3rd and 4th December ...	19th and 20th Aughran 1879 ...	Tuesda
Christmas Day and the two days following	25th to 27th December ...	12th to 14th Pous 1279 ...	Wedne

HIGH COURT, &c.,
The 21st December 1871.

Equity.

L. C. Nov. 16.

PRIDE *v.* BUBB.

Contract by Married Woman—Deed of Separation—Devise of Real Estate—3 & 4 Wm. 4, c. 74, s. 77.

This was a suit by the heir of a deceased married woman against her devisees to whom she had devised her real estate by virtue of a deed of separation, the object of which was to make her as to her property perfectly independent of her husband and to enable her to dispose of it. The heir's contention that, though a married woman might convey under the 3 & 4 Wm. 4, c. 74, s. 77, she could not contract, was overruled by the L. C. confirming an order of the M. R.

L. C. Nov. 16.

PIKE *v.* DICKINSON.

Composition Deed—Account.

In this case the L. C. held that a composition deed was not a bar to a suit by the debtor for an account on the ground of overcharges.

V. C. B. Nov. 17.

KEMP *v.* SOUTH-EASTERN RAILWAY COMPANY.

Railway Company — Taking Land — Agreement —Notice to treat.

In September 1863, defendants agreed with plaintiff to take 9 acres of ground for a certain sum and to pay at the rate of £100 an acre for any more ground that they might require. In entering upon the 9 acres duly conveyed to them, in May 1865 defendants served plaintiff with notice to treat for 3 acres odd of land adjoining the 9 acres. In May 1867 they entered into possession of the 3 acres odd, and also upon 1 acre odd, making together 4 acres odd. After some correspondence, plaintiff filed a bill, and The V. C. granted an injunction restraining defendants from continuing in possession of the land until the value had been ascertained by arbitration and paid, holding that the agreement did not empower defendants at any time to take any amount of plaintiff's estate at £100 an acre, even although laid out in market-gardens or covered with buildings.

V. C. B. Nov. 18.

In re UNITED PORTS GENERAL INSURANCE COMPANY.

Company—Voluntary Winding-up — Acceptance of Shares—Specific Performance.

Application by B. J. and T. for the removal of their names from the list of contributories of the U. P. Company. B. J. and T. were shareholders in the B. Company, and on an agreement entered into for an amalgamation of the two Companies (the B. Company being wound up voluntarily), they were furnished with printed forms of application for shares in the amalgamated Company. They severally signed an application and returned it to the Company, and accordingly shares were allotted to each of them. The new Company having been ordered to be wound up, B. J. and T. disputed their liability as contributories, on the ground that the amalgamation was altogether void, and consequently that the allotment of shares (being part of a void arrangement) was also void. The V. C. held that even if the agreement to amalgamate was *ultra vires* and invalid (as to which he was not satisfied), there was a complete, binding, and independent contract by the contributories to take shares, of which completed agreement specific performance could have been enforced on either side, and that B. J. and T.'s names must all be placed on the list.

L. J. J. Nov. 18.

FARHALL *v.* FARHALL.

Executor—Loan—Power to borrow—Pledging Assets.

An executor cannot, by borrowing money, entitle the lender to stand as a creditor against the testator's estate for the money lent, the case being quite distinct from that of pledging the assets, which is only a mode of disposing of specific parts of the property.

V. C. W. Nov. 18.

In re CRAMER AND COMPANY.

Voluntary Winding-up—Additional Liquidator—Condition imposed upon Liquidators.

In this case the V. C. made an order to continue the voluntary winding up subject to the supervision of the Court, to appoint an additional liquidator, and to impose the same condition as in L. R., 3 Ch., 402,—*i. e.*, "subject to such restrictions as an Official Liquidator would in a compulsory winding-up be subject to, except so far as the Court may, upon an application for that purpose, modify or dispense with such restrictions in any case or class of cases."

V. C. W. Nov. 20.

HOLMES v. SYMONS.

Company — Winding-up — Neglect to execute Transfer—Deed of Inspectorship—Bill against Representatives of Transferee.

THIS was a case in which plaintiff had transferred his shares in a Company to S. and received his purchase money, and S. neglected to execute the transfers. The Company soon afterwards was ordered to be wound up, and plaintiff's name was placed on the list of contributories. Two months afterwards, S. executed a deed of inspectorship under the Bankruptcy Act of 1861, and on his death plaintiff sued his personal representatives for the amount of calls he had paid, and the V. C. held that the composition deed had not barred the plaintiff's claim.

Common Law.

C. P. Nov. 9.

WHITMORE v. HUMPHRIES.

Landlord and Tenant—Encroachment—Statute of Limitations.

RESPONDENT'S predecessor in title took a lease of a farm from appellant's predecessor in title for a term of years. During the term the landlord gave his virtual consent to the tenant enclosing into the farm a portion of the adjoining land belonging to the landlord. On the determination of the term, appellant brought ejectment against respondent for *(inter alia)* the piece of land so enclosed; and the question was from what time the Statute of Limitations ran against the landlord. The COURT held that, notwithstanding the consent, the case was one of encroachment, that the tenant held such enclosed land as part of the premises originally demised, and that the statute ran from the determination of the term.

C. P. Nov. 14.

CLARK v. SAUL.

Pledge with Power of Sale—Right of Sheriff to seize and sell.

S gave E a promissory note for an advance of £60 repayable by weekly instalments of £1, and to secure this payment, deposited certain goods with E with a written memo. by which it was agreed that E might sell the goods in case of default in payment of the instalments. The goods were seized by the Sheriff under an execution against the pawnee at a time when default was made by S, and there then remained £30 due to E upon the note. The COURT held that the goods were liable to seizure by the Sheriff to the extent to which E the pawnee had a right to sell, and that plaintiff was entitled to recover only the balance of the sale proceeds.

Q. B. Nov. 15.

FLEET v. MURTON.

Trade—Custom—Evidence—Broker's Liability.

IN this case evidence of custom in the London fruit trade, making the broker personally liable for not giving the names of his principals, and also evidence of custom in a similar trade, were admitted to control a written contract.

Ex. Nov. 17.

HEAD v. TATERSALL.

Warranty—Right to return—Knowledge of Breach of Warranty.

UPON a Monday plaintiff bought of defendant a horse warranted to have been hunted with the Bicester hounds, the following condition being annexed to the sale:—"Horses not answering the description must be returned before 5 o'clock on Wednesday evening next, otherwise the purchaser shall be obliged to keep the lot with all faults." As plaintiff did not require the horse for hunting purposes, he took it away from the stables, although he had learnt from the groom in charge of the horse that it had not been ridden with the Bicester hounds. On the way to plaintiff's stables, the horse met with a serious accident, but without any default on the part of plaintiff's servant. The COURT were of opinion that plaintiff, merely by taking the horse after the conversation with the groom, had not elected to treat the contract as binding, and that the accident not having occurred through plaintiff's default, he was entitled to return the horse, and sue for the price he had paid for it.

Q. B. Nov. 18.

JENNER v. A'BECKETT.

Action—Libel—Criticism on Advertisement.

IN an action for libel where the title of an article of manufacture, which was the subject of an advertisement, was described in a critique as "very silly, very slangy, and very vulgar," and as having "been forced upon the notice of the public *ad nauseam*" was held by MELLOR and HANNEN, JJ., to be libellous and actionable, LUSH, J. *dissentiente.*

Equity.

V. C. M. Nov. 21.

SHEFFIELD IMPROVED INDUSTRIAL AND PROVIDENT SOCIETY *v.* JARVIS.

Easement — Party-wall — Right to support— Building on Party-wall.

IN a suit to restrain interference with the use by plaintiffs of a wall for the support of their house, the V. C. held that, apart from the question of the ownership of the wall, an easement for support entitled the owner of the dominant tenement to put any amount of weight on the wall which did not endanger its stability.

L. C. L. J. J. Nov. 22.

HUNTER *v.* WALTERS.

Mortgage—Priority—Execution of Deed—Fraud —Negligence.

H the first mortgagee and D the second mortgagee executed a conveyance of the mortgaged property to W the Solicitor for all parties, who, professedly acting under the power of sale in one of the mortgages, put up the estate to auction sale and purchased it himself. The conveyance contained an acknowledgment of the receipt of the monies due to H and D respectively, and each signed the usual indorsed receipt, but through W's fraud, no money was paid to either. W afterwards mortgaged the estate to C, and the three mortgagees brought suits as to their priorities. V. C. MALINS laid down that C had the first claim, H the second, and D the third; and his order was confirmed by THEIR LORDSHIPS who observed that a deed might be voidable as between the parties but not as against a third party who relied on the deed as properly executed.

V. C. W. Nov. 22.

MILLER *v.* CAMPBELL.

Wife's Equity to a Settlement—Her Ante-nuptial Debts—Husband's Bankruptcy.

THIS was a bill by the wife after the bankruptcy of her husband against the trustees of her marriage settlement, her husband, and his assignee, to have a settlement of her life interest and of a policy effected by her on her life previously to her marriage upon which no settlement was made. THE V. C. was of opinion that under the circumstances the whole of her life interest should, after payment thereout of her ante-nuptial debts, be secured from the husband's creditors, and directed that, subject to such payment and to payment of costs of this suit, her life interest should be settled to her separate use. He declined, however, to make any order as to the policy.

V. C. M. Nov. 22.

EARL OF CORK *v.* RUSSELL.

Foreclosure Suit — Judgment-Creditors — Unnecessary Parties to Suits—Costs.

IN this case, those judgment-creditors who had not issued execution were held to have no interest in the bond, and not to be necessary parties to a foreclosure suit, and were allowed to have their costs paid by the plaintiff. Those again who had levied execution, but had assigned the benefit of their judgment before the filing of this bill, were also allowed to have their costs paid by the plaintiff; while the second mortgagee, who had complained of having been required to answer useless interrogatories, was required to pay his own costs, and add them to his security.

V. C. M. Nov. 22.

LEWIS *v.* LEWIS.

Locke King's Act—Interest in land—Mortgage Debt.

SETTLEMENT of a farm in trust for husband and wife for life, and after the death of the survivor on trust to sell and pay the proceeds to all their children who should attain 21 or marry. The wife died, leaving 3 children, one of whom died subsequently after attaining 21 years, leaving her father her heir-at-law and sole next of kin. The father then made his will, devising and bequeathing to trustees in certain trusts the third part of the farm which he inherited from his daughter, and devising and bequeathing the residue of his property to trustees on certain other trusts. The testator mortgaged the undivided third share of the farm after the date of his will, and it was held by the V. C. that that undivided share, being the aliquot part of the proceeds of the sale of land, was not an interest in land within the meaning of Locke King's Act, and that the mortgage-debt was not payable thereout, but out of the residuary personal estate.

V. C. B. Nov. 22.

ASHTON *v.* CORRIGAN.

Specific Performance—Agreement to execute Mortgage.

In this case the V. C. directed specific performance of a contract to execute a mortgage which the mortgagee might enforce by a sale the day after its execution.

L. C. Nov. 23.

PHILLIPS *v.* MULLINGS.

Voluntary Settlement—Setting Aside.

Where a voluntary settlement was made by a young man of extravagant habits vesting £1,000 in trustees on trust at their discretion to pay him the income during his life, and after death on trust for his wife and children if any, and if none then to certain relations, the L. C. (confirming V. C. Stuart's decision) declined to set aside the deed at the suit of the settlor.

L. J. J. Nov. 23.

Ex parte LLYNVI COAL AND IRON COMPANY.

Bankruptcy—Disclaimer of Lease by Trustee—Proof for Injury to Lessor.

Where a person, about 2 years after entering into an agreement to take a lease of some shops for 10 years, filed a petition for liquidation by arrangement, the trustees in the liquidation were held entitled to disclaim the lease under the provisions of Section 23 of the Bankruptcy Act of 1869, and the lessee also entitled under the proviso to that Section to come in and prove under the bankruptcy to the extent of the injury sustained by him by the operation of that Section.

L. C. Nov. 24.

TRAPPES *v.* MEREDITH.

Wife—Annuity—Forfeiture—Bankruptcy—Scotch Sequestration.

Where a wife by will gave her husband an annuity unless he should become bankrupt or assign it or suffer any act whereby the annuity should vest in any other person, and the husband had been adjudged a bankrupt in Scotland under Scotch sequestration two years before the date of the wife's will, the L. C. (reversing V. C. James' decision) held that the sequestration operated as a forfeiture notwithstanding the fact that the existence of the sequestration must have been known to the wife.

L. C. Nov. 24.

HOMEWOOD *v.* LAMBE.

Specific Performance—Acquiescence—Damages.

Plaintiff agreed to take from defendant L a house at Brighton. L disputed the agreement, and granted a lease for 21 years to defendant A. Plaintiff having stood by and allowed A to spend money on the house, the Court could not grant specific performance of the agreement, nor give damages as against L.

V. C. M. Nov. 24.

PENNOCK *v.* PENNOCK.

Will—Construction—Life Interest and Power.

A husband was held to take only a life interest, with a power of appointment under the following appointment made by the wife of certain undivided shares of real estate, followed by a power of sale given to the husband:—"Unto my said husband, J. H., his heirs, executors, administrators, and assigns, in trust to stand possessed thereof, and to enjoy the rents and profits and income arising and to arise therefrom for his own absolute use for and during the term of his natural life, with power to take and apply the whole or any part of the capital arising therefrom to and for his own benefit, and from and after the decease of my said husband, I direct the same, subject as assigned, to be equally divided amongst such of my nephews and nieces as shall be then living, and the two children of my late nephew J., they taking one share equally between them."

V. C. M. Nov. 24.

WELLESLEY *v.* MORNINGTON.

Stop-order—Petition—Consent—Costs.

Where an incumbrancer comes to the Court for a stop-order on a fund in Court, standing to the credit of a cause without enquiring whether the party entitled to the fund, subject to the charge of the petitioner, consents to the order, and it appears that the parties do consent, the petitioner must pay the difference between the costs of a summons in chambers and of a petition.

V. C. B. Nov. 24.

In re WARE'S TRUSTS.

Construction—Will—Administration.

IN this case the V. C. held that by the will the legacy was given to Mrs. C. for life, and afterwards to her children; and that, as the right of the children rested wholly on the will, letters of administration ought not to be taken out.

V. C. B. Nov. 24.

PALMER *v.* FLOWER.

Will—Legacy—Failure of Purpose—Abolition of Army Purchase.

IN this case a testator directed his trustees from time to time to expend out of his residuary estate any sum or sums of money not exceeding £6,500 for the purchase of any commission or commissions for or in obtaining the promotion of his nephew in H. M.'s army, and although the purpose had failed by reason of the abolition of purchase in the army, the V. C. held the gift good as to the whole of the £6,500.

M. R. Nov. 25.

MORGAN *v.* BRITTEN.

Will—Construction—Gift to all and every the Child and Children—Joint Tenancy.

A FUND was bequeathed to trustees on trust for testator's daughter during her life, and after her death, "for all and every her child and children, and his, her, and their executors, administrators, and assigns for his, her, and their own absolute use and benefit." The gift was held to constitute a joint tenancy.

Common Law.

Q. B. Nov. 21.

LOCKWOOD *v.* JENKINSON.

Bankruptcy—Composition Deed—Surplus Estate—Re-vesting—Right to sue.

BY the operation of Sections 192 and 197 of the Bankruptcy Act of 1861, the debtor's estate and the rights incident thereto vest in trustees on the execution of the deed of composition, and an order of the Bankruptcy Court is necessary to re-vest the surplus estate and the power to sue in the debtor before he can maintain the action.

Q. B. Nov. 21.

LEIGH *v.* ADAMS.

Marine Insurance—Open Policy—Defamed Ship—Concealment of Material Fact.

IN this case it was held that the fact that goods to which an open policy of Marine Insurance might apply would be shipped on board a defamed ship was a material fact which ought to have been communicated by the plaintiff to the defendant, and that the concealment thereof vitiated the policy.

P. & M. Nov. 21.

CHARTER *v.* CHARTER.

Will—Appointment of Executor—Latent Ambiguity—Parol Evidence.

IN this case parol evidence was admitted to explain a latent ambiguity in a will which appointed testator's son, by name Forster Charter, to be his executor when the names of his two sons were William Forster Charter and Charles Charter.

P. & M. Nov. 21.

In re Goods of G. H. FOSTER.

Will—Substitution of Executor.

TESTATOR appointed his wife sole executrix, and in default of her, J. K. and R. F. to be executors of his will. The wife took out probate, and died leaving part of her husband's estate unadministered, and leaving a will of which the executors took out probate.

THE COURT on motion granted probate to J. K. and R. F., there being by the wife's death a default, by reason whereof a substitution takes effect.

Q. B. Nov. 22

BAILEY *v.* FINCH.

Bankrupt—Set-off—Equitable Claims — Executorship Account.

PLAINTIFF, as trustee of a bankrupt bank, sued defendant to recover the amount of his over-drawn account, and defendant sought to set-off the balance in his favor of an executorship account, and the Court gave judgment for the defendant on the ground that the fact of the banker's knowing that it was an executorship account affected them with the equities which attached to the money in their hands.

C. P. Nov. 23.

In re AUSTIN.

Arbitration—Submission in Duplicate—Rule of Court.

WHERE a submission to arbitration was made in duplicate, and the attorney for one of the parties declined to file the copy in his possession, the other, which was executed by both parties, was allowed to be made a rule of Court.

C. P. Nov. 23.

In re STAPLES AND OTHERS.

Married Woman—Conveyance—3 & 4 William 4, c. 74, s. 91.

ON a motion under 3 & 4 Wm. 4, c. 74, s. 91, to dispense with the husband's concurrence in a conveyance of the wife's property, where the affidavit did not give the date of marriage, nor show what was the nature of the proceedings in the Divorce Court, nor negative distinctly the receipt by the wife of any maintenance from the husband, THE COURT held that the affidavit must be more precise.

EX. CH. FROM Q. B. Nov. 27.

COATES AND ANOTHER *v.* COLLINS.

Assignment of Lease for Lives—Covenant for Title—Covenant for subsisting Lease.

IN the assignment of a lease by defendant to plaintiff, defendant covenanted that the said lease was "a good, valid, and subsisting lease in the law for the lives of A, B, and C. and the survivor of them, and not forfeited, surrendered, or become void or voidable," and B having died before the date of the deed of assignment, plaintiff sued defendant for a breach of the covenant, and THE COURT held that the mention of the three lives was mere matter of description, and that the covenant only amounted to a covenant that the lease was still subsisting, and not to a covenant that the three lives were still in existence.

EX. CH. FROM Q. B. Nov. 27.

SMITH *v.* MYERS AND ANOTHER.

Contract of Sale—Cargo expected to arrive by particular Ship—Earthquake.

600 TONS of nitrate of soda were bought for defendants by their correspondent at Valparaiso, who chartered the barque *P.* in July to bring it to England. Defendants in September, on being informed of this, sold it to plaintiff as a parcel expected to arrive per *P.* The nitrate of soda, whilst lying at Valparaiso, was destroyed by an earthquake in August, and the Valparaiso house cancelled the charter of the *P.*; but, on hearing of the sale by the defendants to plaintiff, purchased other 600 tons of nitrate of soda at a higher rate (not knowing the rate at which defendants had sold to plaintiff), and shipped it on the *P.*; and THE COURT held that the cargo shipped was not within defendant's contract.

Equity.

M. R. Nov. 16.

ATWELL *v.* ATWELL.

Settlement—Power of Sale—Conversion—Proceeds of Sale—Realty or Personalty.

By a settlement lands belonging to the husband were vested in trustees to the use (after the death of the survivor of husband and wife) of all and every the child and children equally, his, her, and their heirs and assigns, with an ultimate use in favor of the settlor; and there was a power of sale with a proviso that the proceeds of sale should be paid to the trustees their heirs and assigns, and laid out in the purchase of other lands or in Government or real securities subject to the same uses as the trust premises; and the question being whether the proceeds of sale were to be treated as realty or personalty, the M. R. decided the latter.

V. C. M. Nov. 23.

TAYLOR *v.* MILLER.

Partnership—Capital—Will and Codicil—Condition in—Continuation of Business by Survivor—Good-will.

On 1st January 1863, C and M. became partners for 5 years, under the style of C and Co., the capital (£10,000) being advanced by C at 5 per cent. interest. By will in 1862 C desired the continuance of his business, under the same style after his death, and authorized his trustees to lend M the £10,000 at 5 per cent. interest, in case the business were so continued. By a codicil in January 1868 testator desired R to be taken into partnership; and in case of his death before R became a partner, the loan to M to be conditional on his taking R into partnership within 12 months after testator's death. C died in December 1869, and M was unwilling to take R into partnership. Two of C's executors filed a bill against the third executor M, praying substantially for a dissolution and winding-up. The V. C., upon a construction of the will, was of opinion that the intention of the testator was to give M the privilege of retaining the capital subject to paying the interest, not including in it the good-will. That privilege was revoked by the codicil, because the condition imposed by it had not been performed; but the testator's estate was under the circumstances entitled only to profits upon the capital less the good-will.

V. C. W. Nov. 24.

FRANCE *v.* FRANCE.

Sale—Partition—Trustee Act, 1850—Request by Infant Plaintiff.

Four infants were entitled as tenants in common of certain property, and three of them filed a bill, by their mother as their next friend, for a partition, "requesting" that the premises may be directed to be sold, and plaintiffs declared trustees of the premises within the meaning of the Trustee Act of 1850. The V. C. said he could not turn real estate into money except on "request," but that a request by an infant was a nullity, there being no case where an order was made on the request of an infant plaintiff.

L. J. J. Nov. 24.

In re DURHAM COUNTY PERMANENT BUILDING SOCIETY.

Ex parte WILSON.

Jurisdiction—Winding-up—Submission to V. C.'s Decision—Appeal to L. J. J.

In this case the parties having by agreement bound themselves to the decision of the V. C. personally, instead of agreeing that all questions should be decided in the winding-up, the L. J. J. were of opinion that there was no appeal from his decision, and that the Court of Chancery had no jurisdiction in the case independently of the submission.

L. J. J. Nov. 25.

In re ORIENTAL COMMERCIAL BANK.

Ex parte EUROPEAN BANK.

Contract—Bill of Exchange—Winding-up—Double Proof.

The O. Bank, notwithstanding that they had entered into two contracts with two separate parties, namely the acceptors and the holders, that they would see certain bills paid, could not have been obliged to pay the bills more than once if the parties had not been insolvent. But being insolvent, the question was whether they could be made to pay two dividends in respect of the same debt. The L. J. J. refused to admit the claim, applying to the case the long-settled principle, which their Lordships considered a sound one whether the estate was being administered in bankruptcy or chancery, that, if the holder of an ordinary accommodation bill received dividends both from acceptor and drawer, the drawer's estate could not be made to pay dividends on the bill twice over, it making no difference in this case that the O. Bank were not the drawer, but had entered into a special contract with the acceptors to meet the bills.

BANKRUPTCY. Nov. 27.

In re WEHNER.

Bankruptcy—Revocation of Resolutions by Creditors.

Two creditors of a *bankrupt* originally signed a resolution in favor of *bankruptcy* and against liquidation by arrangement. They afterwards desired to sign a resolution in favor of liquidation by arrangement. The CHIEF JUDGE thought that under Rule 275 resolutions once signed could not be recalled, but allowed the resolutions to be filed by the Registrar in this case, there being special facts and circumstances tending to show that the request was not lightly made. This case, it was expressly stated, was not to be taken as a precedent.

L. J. J. Dec. 4.

ELLIS *v.* BARKER.

Trustees—Coercion—Costs.

IN this case their LORDSHIPS held that the trustees had rightly been ordered to pay costs for having put pressure on the plaintiff by a threat of depriving him of a tenancy which the testator intended him to have.

V. C. M. Dec. 5.

In re IMPERIAL LAND COMPANY OF MARSEILLES.

TOWNSEND'S CASE.

Company—Contributory—Allotment posted—Wrong Address.

ON 6th March T applied through his brokers for shares in the Company, giving his address as 36 Westland Row, omitting Dublin. On 15th March 15 shares were alloted to him, and the letter of allotment was posted to the address given by him on the 16th March, but, by reason of the omission of Dublin, did not reach him, and was returned by the Post Office to the Company, who, on the 20th March, enclosed it to the brokers, who sent it to T on the 21st. On the 20th T wrote to the Company, revoking his application for shares, and subsequently repudiated the allotment. The V. C. held that his failure to receive the letter of allotment on the 17th March, when the contract would have been complete, arose from his error, and that he could not now repudiate the contract.

L. C. Dec. 5.

UPMANN *v.* ELKAN.

Trade-mark—Injunction—Carrier.

DEFENDANTS, forwarding agents in London, received from a firm in Hamburg a case of cigars bearing a fictitious brand in imitation of plaintiffs. They at first refused to give up the names of the consignees, but offered either to send back the cigars, or to erase the brand. After the bill was filed praying for an injunction, defendants offered to give up the names. The L. C. held that it was no defence in such a case for the defendants to set up that they were mere coiners, and that it was a mistake of theirs not to have given up the names of the consignees, but that their offer to erase the trade-marks was quite sufficient as giving plaintiffs all they were entitled to.

L. C. Dec. 6.

McILWRAITH *v.* DUBLIN TRUNK CONNECTING RAILWAY COMPANY.

Company—Shareholder—Registration—Scrip.

PLAINTIFF applied for shares in defendant Company, according to terms of prospectus, *i.e.* on registration of the scrip, whereof due notice would be given, the certificates would be divided into shares. The directors never gave him notice, and he never was registered. To an action brought against him for calls, he pleaded that he was not a shareholder; but he afterwards acted indiscreetly in attending a meeting called to oppose the directors and signing his name as a shareholder, thinking the meeting to be one of scripholders, and also in signing two proxies wherein he was described as a proprietor. On being informed that he was registered as a shareholder, he denied that he was one, and brought this bill to have his name taken off the list of shareholders. The L. C. was of opinion that, if creditors were claiming against him, he might have no defence, but that his indiscreet acts were not sufficient to make him a shareholder.

Common Law.

Ex. Nov. 21.

BANK OF IRELAND *v.* PERRY.

Bill of Exchange—Insolvency of Drawer and Acceptor—Bill drawn against Specific Cargo—Right of Holder to Proceeds of Cargo.

On 14th September P & Co. bought a cargo of maize from H, and resold it to defendant, a corn merchant at an advanced price. On 4th October they paid a deposit and drew on defendant at 3 months for that amount. The bill having been duly accepted was discounted by plaintiffs, bankers; and when it became due, a large balance was owing by defendant to P & Co. Defendant, on arrival of the cargo, sold it through P & Co., as his brokers to C, at a lower price than that originally agreed to be paid to H. The difference being less than the deposit, C at P & Co.'s request closed the sale by paying H what remained due; and taking up the shipping documents, a balance being being left in C's hands. On 2nd December P & Co. suspended payment, and executed an inspectorship deed to which plaintiffs assented and proved thereunder for the amount of the bill. On 20th December defendants executed a deed of arrangement to which plaintiffs assented reserving their rights in respect of the balance. P & Co., if they had not suspended, would have been entitled and bound to have specifically applied the balance to taking up the bill. The question being whether plaintiffs were entitled to have the sum in C's hands applied *pro tanto* to discharge the bill discounted by them, or whether it should be paid to the defendant, The Court decided in favor of the right of the plaintiffs.

C. P. Nov. 25.

NORTH BRITISH AND MERCANTILE INSURANCE CO., *v.* MOFFATT AND OTHERS.

Policy of Fire Insurance—Merchandise in Trust or on Commission for which Assured are responsible.

The question in this case was whether plaintiffs were entitled to recover from defendants a sum of money alleged to have been paid by plaintiffs to defendants in excess of the amount due to them for a loss upon two policies of fire insurance which were upon "merchandise the assured's own in trust or on commission for which they are responsible" in or on certain wharves, of which Beal's was one, where a fire took place and consumed *inter alia* certain chests of tea which formed the subject of the present action. The tea had been deposited in bond by the importer who sold it to defendants, who again, before the occurrence of the fire, sold specified chests to customers. The Court decided in favor of the plaintiffs, being of opinion that, at the time of the fire, the tea was no longer at the risk of the defendants but of the purchasers from them, and therefore not within the words of the policy "in trust or on commission for which they are responsible."

Q. B. Nov. 25.

STIMSON *v.* FARNHAM.

Sheriff (Action against)—False Return—Actual Damage—Estoppel.

A Sheriff's officer went with a *fi. fa.* to a debtor's premises and seized the goods found there. The goods were then in the possession of a bailiff under a bill of sale by which they had been recently assigned to a brother of the debtor. At the creditor's request, the Sheriff's officer remained on the premises until dismissed by him. Meanwhile the goods were sold under the bill of sale, and on plaintiff the creditor demanding a return to the writ, defendant the Sheriff returned that he had seized the goods and chattels of the debtor, and kept them safe until ordered by plaintiff to withdraw from possession of the same. The Court held that, as there were in fact no goods upon which to levy, plaintiff had not been damnified by defendant's conduct; that proof of actual damage was necessary to sustain the action; and that defendant was not estopped by his formal return from showing that the goods seized were not "goods of the debtor."

Q. B. Nov. 27.

MARSHALL *v.* ULLSWATER STEAM NAVIGATION CO.

Trespass to land—Public Right of Navigation—Obstruction.

Plaintiff brought a former action against defendants for trespass committed with steamboats by sailing over the bed of Lake Ullswater, of which plaintiff was seized in fee, to and from the pier belonging to plaintiff, and by causing persons to go thereon. Plaintiff obtained a decree, but did not demolish the pier which formed an obstruction to defendants bringing their vessels near the land leased to them. Plaintiff now sued defendants "for breaking and entering a pier or jetty of the plaintiff, and causing persons to go, pass, and re-pass over and upon the said pier or jetty, and there to embark or disembark from steamboats or other boats and vessels." THE COURT held that, as the defendants might have removed the pier which was an obstruction to their right of navigation, they were justified in passing over it, and gave judgment for defendants.

Q. B. Nov. 28.

SWEETING *v.* TURNER.

Principal and Agent—Auctioneer—Effect of Sale—Payment under Threat of Distress.

Two partners about to dissolve partnership, requested an auctioneer to sell their stock-in-trade, and hold the proceeds pending directions from them as to the dispossession thereof. The goods were put up for auction under conditions to the effect that the lots were to be paid for immediately after sale and before removal, and were to be taken as delivered at the fall of the hammer, after which they were to be at the exclusive risk of the purchaser. After the sale and before the goods were taken away, the landlord's agent was going to distrain the goods on account of a ground rent which turned out to be the private debt of one of the partners, whom the auctioneer happened to consult, and who authorized him to pay the rent out of the sale proceeds. The other partner having sued the auctioneer for the amount, THE COURT held that, as after the sale, the purchasers had to bear the risk of a distress, the promise by the auctioneer to pay the rent was not to save his employer but others from damage, and consequently that he had no implied authority to make the promise and payment, and that plaintiff was entitled to recover.

P. & M. Nov. 28.

In the Goods of WILLIAM COLES.

Will—"I have given"—Testamentary Intention.

IN this case a paper commencing with the words "I have given" was held to be testamentary.

P. & M. Nov. 28.

TEAGUE AND ASHDOWN *v.* WHARTON.

Administration—Nominee of all the next of Kin—Probate Act (20 & 21 *Vic., c.* 77), *s.* 73.

A HUSBAND and wife, who had each executed a will in favor of the other, died on the same day, but not at the same place, and the question of survivorship was in litigation. To carry on the litigation, a representative of the wife's estate was required, and her next of kin applied to the Court to grant administration to W, who had no interest in the estate, under Section 73 of the Probate Act (*i.e.* upon giving security). But LORD PENZANCE saw no special reasons to justify him in acting under Section 73, and observed that one of the next of kin must take the grant, or, if they all renounced, it would be granted to some other person who could be shown to have a sufficient interest in the property.

Q. B. Nov. 29.

DAVIS *v.* SOLOMON.

Slander of Wife — Special Damage — Loss of Husband's Consortium and of Hospitality of Friends.

IN this case a declaration by husband and wife, alleging slander of wife and loss by the wife of *consortium* of the husband and of hospitality of friends, was held good upon demurrer, the Court, without deciding whether loss by the wife of the *consortium* of her husband would be sufficient *per se*, being of opinion that the loss of hospitality of friends was a sufficient allegation of special damage.

Q. B. Nov. 29.

BROOKS AND ANOTHER *v.* BENNETT AND ANOTHER.

Absolute Covenant—Renewal of Lease—Impossible Performance.

A the lessee of an estate, and B the owner of another estate, agreed that A should allow B to make a road over A's estate; and in consideration thereof, B covenanted to pay A an annual rent, and A covenanted to renew and keep renewed his lease. Renewals of the lease were afterwards obtained; and on the expiration of the last, a further renewal was refused, except at a higher rent and upon building covenants which A declined on those terms. B brought an action against him for breach of the covenant to renew, and THE COURT held that the covenant being an absolute one, and the performance thereof not impossible, A was liable.

Equity.

BANKRUPTCY. Dec. 4.

In re WILSON.

Bankruptcy—Disclaimer of Leasehold Property by Trustee.

IN this case the trustee appointed under the liquidation of a debtor's estate was allowed to disclaim the debtor's interest under a lease, consisting of an equity of redemption.

V. C. W. Dec. 5.

In re INTERNATIONAL CONTRACT CO.

Ex parte IND.

Company—Contributory—Rectification of Register—Res Adjudicata.

IN this case a former unsuccessful application to remove applicant's name from the list of contributories, and the present application to rectify the register, were held to have been substantially for the same object, and the matter to have been *res adjudicata.*

V. C. W. Dec. 5.

In re DAVIES' TRUSTS.

Will—Power of Appointment—Bequest of Residue — Lapse — Ineffectual Appointment—Next-of-Kin.

A HUSBAND by his will gave his wife a life interest in his property, with a general power of appointment over a moiety of the residue of his personal estate. By her will she bequeathed the residue of her estate to four persons equally, two of whom died in her life-time. HELD that the husband's next-of-kin, and not the wife's, were entitled to the two ineffectually disposed of shares of the husband's moiety over which he had given his wife a power of appointment.

L. C. Dec. 6.

GLEGG *v.* REES.

Demurrer—Trust-deed—Parties.

A LEASEHOLD house was assigned to defendant as trustee for R. R assigned all his personal estate and effects upon trust in favor of his creditors, R's equitable interest in the leasehold vesting in plaintiff. To a bill praying for assignment of the house by defendant to plaintiff, defendant demurred for want of equity and of parties. The L. C., reversing the order of the M. R., overruled the demurrer, being of opinion that, as the bill alleged an assignment by R to plaintiff, that enabled him to sue third parties, and that there was enough on the bill to require an answer; and further that it was unnecessary to make any creditors parties, a trustee being now enabled to sue without making his *cestuis-que trust* parties.

L. J. J. Dec. 8.

In re CONTRACT CORPORATION.

BAKER'S CASE.

Company—Contributory—Infant Transferee—Repudiation—Retractation.

IN this case the purchaser of certain shares in the Company transferred them into the name of an infant as a trustee for him. When the infant came of age, the Company was being wound up under the order of the Court, and the transferee's name was settled in the list of contributories. On receipt of a notice of call, the transferee informed the official liquidator that he was an infant at the time of the transfer, and repudiated any interest in the shares. His name was not, however, removed from the list, and subsequently he wrote a letter to the official liquidator authorizing him, in consideration of his not enforcing the call against him, to use his name in any proceeding against the purchaser, the original owner of the shares. HELD that the last letter did not amount to a retractation of his former letter of repudiation.

V. C. M. Dec. 9.

In re ROBINSON AND PRESTON'S BREWERY COMPANY.

SYDNEY'S CASE.

Company—Contributory—Signing Memorandum.

ON the formation of the Company, the applicant signed the Memorandum of Association for 200 shares, under the alleged representation that a clause in the Articles of Association would enable him to withdraw, if two-thirds of the capital were not subscribed for. Instead of there being such a clause, there was a provision giving the Directors the option of not commencing business, if that amount were not subscribed. At a Board Meeting it was resolved (applicant dissenting) to commence business, though two-thirds of the capital had not been subscribed. No shares were allotted to him, but when the winding-up order was made, the official liquidator put him down for 200 of the unallotted shares, and the V. C. held that he was bound to take the shares for which he had subscribed the memorandum.

Common Law.

Ex. Ch. from Q. B. Nov. 29

MOUNTSTEPHEN v. LAKEMAN.

Statute of Frauds, s. 4—Guarantee—Promise to be primarily liable.

Plaintiff was employed by a Local Board of which defendant was chairman, to construct a main sewer, on completion of which he was about leaving the place when defendant asked him what objection he had to making the connections with the private houses. He replied that he had none if defendant or the board would order the work or become responsible for the payment; whereupon defendant said, "Go on and do the work, and I will see you paid." Held that this was not a promise to be answerable for the debt of another person within Section 4 of the Statute of Frauds and required to be in writing, but a promise to be primarily responsible for the payment which was not within that Statute.

Q. B. Dec. 11.

VESTRY OF St. MARY, NEWINGTON, Appellants v. JACOBS, Respondent.

Highway—Right of Owner of Soil to Access to his Property across a Public Foot-path.

In this case The Court held, that the Magistrate was justified in dismissing a summons taken out by the appellants against the respondent under 5 and 6 Wm. 4 c. 50 s. 72 for doing damage to a highway, observing that the owner who dedicates to public use as a highway a portion of his land, may exercise all other rights of ownership not inconsistent with such dedication; and that the appropriation made to, and adopted by, the public of a part of the street to one kind of passage, and another part to another, does not deprive him at Common Law of any rights as owner of the land which are not inconsistent with the right of passage by the public, and there was nothing in the Statutes modifying this law.

Q. B. Dec. 11.

HANNAFORD and others v. HANNAFORD and another.

Will—Devise—Construction—Cross-Remainders.

In this case the testator devised his estate in fee to his brother for life, after his death to the four sons of his brother for life as tenants in common, with remainder to their eldest and other sons then living in tail-male, in default of the issue of the sons then living to all and every the sons of his nephews hereafter to be born in tail-male, and on default of such issue to testator's own right heirs for ever, it being his will and intention that the said lands should go and remain in his name and family for ever so long as the laws would permit such enjoyment of the same. Plaintiffs were the daughters of the eldest nephew who claimed under the final clause of the devise in favor of the testator's right heirs in default of male issue of the devisees under the will, and contended that on failure of issue of any devisee the clause in question took effect in respect of his share. The defendants were the heirs of two other nephews, and contended that the effect of the limitations of the will was to create by implication cross-remainders between the devisees and their respective heirs, and that consequently they were entitled as tenants in common to the shares of the nephews where male issue had failed. The Court supported the contention of the defendants, and gave judgment in their favor.

Equity.

V. C. W. Dec. 8.

In re EVERTON AND WEST DERBY BUILDING SOCIETY.

Petition for Winding-up—Petitioner resident at Cape of Good Hope—Affidavit verifying Petition by Resident in England.

In this case the V. C., on the authority of another case, ordered that an affidavit made by some person resident in England, and acquainted with the facts, verifying a petition for the winding-up of the Society presented by a creditor resident at the Cape of Good Hope, should be received and filed in lieu of an affidavit by the petitioner.

V. C. W. Dec. 9.

BOURDIN *v.* GREENWOOD.

Promissory Note—Acknowledgment by Indorsement of Debtor's Name and Date—Statute of Limitations—Lord Tenterden's Act.

An indorsement in his own handwriting by the maker of a Promissory Note of his own name and the date (thus, "W. H. Langley, 1866"), without prefixing the word "due" or any similar word, was held to be an acknowledgment, within the meaning of Lord Tenterden's Act made or contained in a writing signed by the party chargeable, to save the note from the operation of the Statute of Limitations.

M. R. Dec. 9.

In re LANDON'S WILL.

Trust—Payment of Son's Liabilities.

Testator by his will dated 10th August 1870 directed his trustees to raise a sum of money, and to expend it in releasing from his liabilities his son who had been adjudicated a bankrupt in 1868, provided testator did not do so in his life-time (which he did not). Testator died in September 1870, and the money was paid into Court under the Trustee Relief Act. The M. R. was of opinion that testator's intention was not to provide for the payment of debts incurred by his son subsequently to his death, and directed payment, without interest, of the debts of the creditors before bankruptcy, as well as after bankruptcy, but in testator's life-time, and then payment of the surplus to the residuary legatee.

M. R. Dec. 11.

ATTORNEY-GENERAL *v.* FLETCHER.

Will—Construction—Children taking between them their Parent's Share—Joint Tenancy or Tenancy in Common.

In this case the question being whether, under the words in a will, "the children of the said A C taking *between them* only the equal share to which the said A C would have been entitled," the children of A C took as joint tenants or tenants in common, the M. R. held that the effect of the words "between them" was to create a tenancy in common.

V. C. W. Dec. 14.

BULLER *v.* HORNBY.

Will—Settlement—Construction—After-acquired Property of Wife.

A mother, by will and codicil, bequeathed all her property to all her children equally, except that one of them, Ann, had only a life-interest in the income of her shares, and after her death the capital was to go to "her next of kin." By a marriage settlement made between another daughter and her husband (the plaintiffs in this suit), it was agreed that all such further or other portion of the wife as should, during her life, become vested in or accrue to her, or as should or might be assignable in law or equity, either for a vested or contingent interest, should be assigned to the trustees, but not any specific chattel or bequest or any pecuniary legacy or interest to which the wife might from time to time become entitled either in possession or reversion, not amounting at any time to £500. The question was whether a sum of £852-17-7, which was the wife's share of her sister Ann's shares, should be paid to the trustees of the settlement, or to the plaintiffs in the wife's right. The V. C. held that the wife acquired an interest in the fund for the purposes of the covenant (which he hoped would not be made a precedent, as it was one almost impossible of construction) at the time when Ann died, and not before, and that therefore it was an interest distinct from that which was acquired from the testator's estate.

M. R. Dec. 14.

BUBB *v.* YELVERTON.

Legacy to Executor who did not act—"My friend P"—"As a remembrance."

Testator by will appointed Y and "My friend P" trustees and executors, and gave each of them a legacy of £1,000 "as a remembrance." Y alone proved the will, power being reserved to P to come in and prove. The M. R. held that the legacy was payable to P, without his proving the will.

V. C. W. Dec. 15.

In re SAMUEL BAKER'S TRUSTS.

Lunacy—Separate Estate of Wife—Wife a Lunatic.

In this case the V. C., upon the authority of Peters *vs.* Grote (7 Sim. 238), ordered the accrued dividends of certain consols settled upon Sarah Salmon for her life for her separate use with restraint on anticipation to be applied towards the expenses incurred for her during her confinement for the last 14 years as a lunatic in the Pauper Lunatic Asylum at Melbourne, and (after considering the terms of the Colonial Statute) also the future dividends to be paid to the Master in Lunacy of Victoria the person accountable for the appropriation of such dividends during Sarah Salmon's life or until further orders.

V. C. B. Dec. 15.

CHARLTON *vs.* CHARLTON.

Will—Construction—"Estate and Effects"—Whether Real Estate passed.

Testator by his will, after a specific gift of household goods and furniture, gave and bequeathed all the residue of his "estate and effects whatsoever and wheresoever" to his wife and two other persons, their executors, administrators, and assigns upon certain trusts. Held that the real estate of which the testator was seised at his death passed by the will to the trustees.

L. C. Dec. 15.

ORIENTAL FINANCIAL Co. *vs.* OVEREND GURNEY & Co.

Bills of Exchange—Principal and Surety—Time to Principal.

Upon the suit of the acceptors of certain accommodation bills of exchange, the L. C. (reversing V. C. Malin's order) made a decree restraining an action by the holders of the bill, on the ground that they knew that the person for whose accommodation the plaintiffs had accepted the bills was the principal, and that time had been given to the principal without any reservation of the rights of the holders as against the surety.

V. C. B. Dec. 16.

WATERHOUSE *vs.* CLOUT.

Real Assets—Marshalling—Estates devised and descended—Mortgages.

Testator devised three separate freehold estates, A, B, and C, all subject to mortgages to trustees upon trust (after payment of a small annuity) to apply the surplus to the support, education, and advancement of his son and two daughters, and towards paying off the principal and interest due on his mortgages if his personal estate not thereinbefore specifically bequeathed should prove insufficient; and after all the mortgages were satisfied, he devised A and B to his son, and C in moieties to the daughters and their children. After the date of his will, he further charged A, B, and C, and purchased another freehold estate D, which he also mortgaged, and died without making a devise of D. The prior mortgages sued for foreclosure, and obtained a decree under which the properties were sold: A, for £540; B, £195; C, £1,110; and D, £540. After payment of the prior incumbrances, a balance was left of £723; and the daughters claimed to have the produce of D first applied in payment of the mortgages upon A, B, and C, and the residue of the £723 divided between themselves and their brother in the proportion of £1,110 to £735, on the ground that, independently of the express provisions of the will, descended estate, if not expressly excepted, stood in the same position as personalty. The V. C. held that the petitioners were entitled to the right they claimed, and made an order accordingly.

M. R. Dec. 17.

INDIA AND CHINA TEA COMPANY *vs.* THEDE.

Injunction—Trading Firm—Name descriptive of Business.

The India and China Tea Company, Limited, sued to restrain defendants from carrying on business under the name of the India and China Packet Tea Company. The M. R. held that the defendants were entitled to call themselves the India and China Tea Company, which was a name simply descriptive of the business they carried on, so long as they did nothing to induce the public to believe that they were the plaintiff company.

Equity.

BANKRUPTCY. DEC. 18.

Ex parte COLLINS.

In re DAVIES.

Bankruptcy—Execution-creditor—Trustee.

HELD that the rights of an execution-creditor who seizes the goods of his debtor subsequent to the filing of a petition from liquidation must be postponed to those of the trustee in liquidation, and that the goods of the debtor are not bound from the date of the delivery of the writ to the bailiff.

BANKRUPTCY. DEC. 18.

Ex parte STURT & CO.

In re PEARCY.

Bankruptcy—Petition—Debt due.

IN this case the CHIEF JUDGE held that a debt payable *in futuro* was not a debt due at law or in equity on which a petition for adjudication could be founded.

L. C. DEC. 18, 20.

SHARP v. ST. SANVEUR.

Will—Conversion—Alien Act, 1870—Rights of Crown.

TESTATRIX and her brother were entitled to certain freehold and copyhold estates at Ealing as tenants in common. By a deed of 10th March 1862, they conveyed the estates to the plaintiff in trust for sale without any further concurrence on their part and with powers of exchange and partition. By a deed of 8th April 1862, they agreed to a partition of the estates between brother and sister, without prejudice to plaintiff's powers under the former deed. By her will, the sister, who was domiciled in France and was married to an alien, gave all her landed property at Ealing to her husband for life, and after his death to her brother and sister, the latter of whom died in testatrix's life-time. Testatrix died in October 1866.

The first question was whether testatrix's share to the freehold and copyhold property at Ealing was converted into money or passed as real estate under her will; and the Lower Court held that the effect of the two deeds was not to impress an absolute trust for conversion on the land, and that it passed as real estate by the will; also that as the recent Alien Act (33 Vic., c. 14,) enabling aliens to hold real estate in this country was not retrospective, the husband was incapable of holding the life estate devised to him.

As to the other question whether the husband's life estate belonged to the Crown, or to the testatrix's heir-at-law, the L. C., following the decision of the M. R. in *Barrow* v. *Wadkin* (24 Beav., 1), decided in favor of the Crown.

V. C. W. DEC. 19.

FRANCE *vs.* FRANCE.

Sale—Trustee Act, 1860—Request by Infant Plaintiff.

IN this case the V. C., upon the strength of an order of V. C. M. in the precisely similar case of Young *vs.* Young, dated 19th March 1870, made the order which he declined to make on 24th November last (*ante*, p. 18), for the sale of certain premises at the "request" of infant plaintiffs.

M. R. DEC. 19.

LONGLEY v. LONGLEY.

Will—Construction—Gift of Estate and Effects—Personalty—Realty.

IN this case the M. R. held that the testator's real (freehold and copyhold) estate passed by the words in his will "and all other the estate and effects" of which he should be possessed at the time of his death, but that the trusts declared by the will were exclusively applicable to the testator's personal estate, and consequently that there was a resulting trust in favor of the heir-at-law and customary heir.

V. C. M. DEC. 20.

SCULTHORP v. TAYLOR.

Liability of Trustees—Shares in an Unlimited Company.

IN this case the V. C. held the trustees liable to make good to the estate of the testator the loss which had been incurred by them in not selling, as positively directed by will, within a reasonable time (*i. e.* within a year from testator's death), testator's shares in an unlimited Company, and by accepting new shares, notwithstanding that the Company was considered a wealthy and prosperous Company, and that it was in evidence that the testator had told one of his trustees that he considered these shares to be the best of his investments.

V. C. B. Dec. 20.

BOND v. MILBOURN.

Partnership—Good-will—Name of Firm—Return of Purchase-money.

M took B as his partner under the firm of M & Co. The capital was to be brought in in equal shares, and thereout a good portion was to be paid to M as the agreed valuation for good-will, plant, &c. Disagreements arose resulting in B filing a bill for the usual dissolution decree, and praying for a return of a proportionate part of the purchase-money. The V. C. held that B had mistaken his rights in supposing that, on purchase of the good-will, he was entitled to the use of the name of M; and that as M had not been guilty of misconduct, there must be the ordinary partnership decree; but he dismissed that part of the bill which called for the return of the purchase-money in whole or part.

V. C. W. Dec. 20.

FLOWER v. FLOWER.

Separation of Husband and Wife—Settlement—Covenant by Wife—Petition by Wife for Judicial Separation and Alimony—Injunction.

On 19th May 1870, six months after marriage, a deed of separation was executed by husband and wife and a trustee for the wife, by which the husband covenanted with the trustee to pay the wife £60 a year quarterly in advance, and the trustee covenanted that the wife would not sue for restitution of conjugal rights or alimony, nor in any manner molest, trouble, or disturb the husband. The husband had made the quarterly advances up to 25th March 1871, and was willing to make the subsequent payment. The trustee was adjudicated bankrupt in October 1870, and in January 1871 the wife having filed a petition for judicial separation on the ground of cruelty, and in March following a petition for alimony *pendente lite*, the husband now filed this bill for an injunction. In May 1871 the V. C. granted an injunction until the hearing of the cause with liberty to the wife to file a cross-bill to set aside the deed of separation. The cause now came on for decree, and it having been stated that no cross-bill had been filed by the wife, and that the proceedings by her in the Divorce Court had been dropped, the V. C. granted a perpetual injunction to restrain the wife from prosecuting the petition for alimony *pendente lite.*

V. C. M. Dec. 21.

WILSON v. FERRAUD.

Litigation in France—Injunction—Motion to stay Proceedings.

An Englishman domiciled in France, who had instituted proceedings in the French Courts against a co-contractee to establish his rights to participate in the profits of a contract, sued to restrain the defendants, Swiss merchants in London, from parting with the money in their hands arising out of the contract transactions pending the decision of the French Courts. Defendants now moved to set aside proceedings in this suit on the ground that this Court had no business to interfere, and that the French Court was the proper tribunal to determine the question. The V. C. considered the application most unusual and unjustifiable, holding that defendants were bound to answer if (as happened to be) there was anything in the bill, or a single interrogatory, requiring to be answered.

V. C. W. Dec. 21.

In re ROSS' TRUSTS.

Statute of Distributions—Intestate—No Children—Grandchildren and Great Grandchildren—Division per stirpes.

Testator by his will gave one-fifth of his residuary estate to his daughter Margaret (the youngest of 5 children) for life with remainder to her children and in default "in trust for the person or persons who under the statutes made for the distribution of the estates of intestates would then be entitled thereto in case I were then to die possessed thereof and intestate, and to be divided between and amongst such persons, if more than one, in the proportions in which the same would be divisible by virtue of the same statutes." Margaret died unmarried in 1871; two of the other children of testator having pre-deceased her without issue. The V. C. held that, on the construction of the statute of distributions, the same in question was divisible into moieties, one among the descendants of one of the children of the testator who survived Margaret and the other among the descendants of the other of the testator's children who survived Margaret, the division among each class being in each case *per stirpes.*

Equity.

V. C. W. Dec. 21.

In re BANK OF HINDOOSTAN, CHINA, AND JAPAN.

TUCKER'S CASE.

Company — Liquidation — Contributory — Summons for Examination of a Relative or Connection.

In this case the liquidators under supervision having been unable to have balance orders served upon two brothers and two sisters settled on the list of contributories, and it having been ascertained that one of the brothers had recently married the daughter of Mrs. E., who had refused to give his address, or to make satisfactory answers to questions regarding his brother and sisters, the V. C., upon the authority of *Swan's case* (L. R., 10 Eq., 675), granted a summons for the examination of Mrs. E.

L. C. Dec. 22.

WILSON *v.* LEGH.

Lease—Excess Land—Rectification—Injunction—Acquiescence.

A lessee having occupied double the quantity of land comprised in his lease granted under a power by a tenant for life, and having built thereon, the remainderman on coming into possessoin brought ejectment to recover the excess lands, whereupon the lessee filed this bill to restrain the action and for rectification of the lease as contrary to the intention of the parties and on the ground of acquiescence by the lessors. Held, that the plaintiff had not shown that the lease was contrary to the agreement or intention of the parties; and that though there might have been acquiescence on the part of the tenant for life if alive, there could be none against the remainderman.

L. C. Dec. 22.

TURNER *v.* COLLINS.

Voluntary Settlement—Parental Influence—Laches—Partial Revocation of Trust.

Though the Court looks with jealousy upon a settlement made by a child for the benefit of his father, and requires to be satisfied that the settlement was the independent act of the child before it can be allowed to stand, yet, in this case, the Lower Court refused to set aside a settlement made by a son of a reversion on the father's life which had not come into possession, in favor of his father and his father's second family, on the ground of laches on the part of the son, who for seven years after he left his father's protection took no steps to set aside the settlement. But His Lordship struck out of the settlement a power given to the father to revoke the trusts of a part of the property and to deal with it as he pleased on the ground that the power was unreasonable, and the son did not appear to understand it.

L. J. J. Dec. 22

HEASMAN *v.* PEARSE.

Will—Construction—Remoteness—Joint-Tenancy—Tenancy in Common.

In this case the L. J. J. (over-ruling an order of V. C. M.) held that the proviso at the end of a will respecting the issue of deceased issue taking their parent's shares was not void for remoteness inasmuch as it was dependent on the termination of an estate tail, the effect of it being to extend the meaning of the word *issue* to remoter descendants of the issue of a deceased child who should survive the period of distribution; so that, although the gift to each class of issue would be originally in joint-tenancy *inter se*, yet if any one of such class died leaving issue, the joint tenancy would be severed as to his share and would go to his issue.

M. R. Jan. 11.

RENNIE *v.* MORRIS.

Transfer of Shares—Infant Transferee—Usage of Stock Exchange—Liability of Jobber.

By the usage of the stock exchange (binding on the Court when not contrary to law), a jobber, in purchasing shares, is considered to have fulfilled his contract with the vendor's broker if on the "name-day" he gave the broker the name of the transferee, and paid the price of the shares, and is not liable (as held in this case) though the transferee was an infant but unknown to him at the time.

V. C. M. Jan. 11

HADLEY *v.* McDOUGALL.

Production of Document—Entry in Partnership-Book—Individual Transaction.

Where an entry is made in a partnership-book of a transaction made by a partner on his sole account, the production of the partnership-book may be enforced.

V. C. B. Jan. 11.

In re EUROPEAN CENTRAL RAILWAY CO.

SYKES' CASE.

Company—Directors' Fees—Fraudulent Preference.

The payment of their calls in advance by the Directors under a clause in the Articles of Association empowering any shareholder to do so, followed by the immediate appropriation of the money so raised in payment of their own fees, was held to be invalid and as not made, and therefore incapable of relieving them from all further liability on their shares.

M. R. Jan. 12.

NESHAM *v.* SELBY.

Agreement for Lease—Memorandum in Writing—Correspondence—Statute of Frauds.

In this case a correspondence (consisting of two letters signed by the defendant, one containing the terms of a parol agreement to take a lease of a house, and the other written on the following day supplying an omission in the former letter as to the commencement of the lease) was held to amount only to a negotiation, and not to constitute an agreement for the specific performance of which a suit could be brought; the M. R. holding that the former letter was not a sufficient memorandum to satisfy the Statute of Frauds.

V. C. M. Jan. 12.

In re EUROPEAN ASSURANCE SOCIETY.

Assurance Society—Compulsory Winding-up—Meeting of Policy-holders.

When there is no scheme suggested for keeping a-going a company in liquidation, there is no necessity for calling a meeting of the policy-holders, and the best thing to be done is to get an order for winding it up compulsorily.

V. C. W. Jan. 12.

In re BELFAST TRAMWAYS COMPANY.

Company—Winding-up—Petition of fully paid-up Shareholder.

In this case it was held that the request of a fully paid-up shareholder for the return of part of his purchase-money, and the refusal of the Company to do so, afforded no ground for his presenting a petition to wind-up the Company compulsorily, a resolution having been passed at a meeting of the Company to wind it up voluntarily.

V. C. W. Jan. 12.

WILKINSON *v.* JOUHIN.

Ward of Court—Marriage—Settlement.

A young lady married whilst a minor, both she and her husband not having the slightest knowledge of her being a ward of the Court, and entitled to a small fund in Court. Upon petition to obtain a settlement of the fund, the V. C. settled the fund on her for life for her separate use, and remainder to her children, with power to appoint by will only to her husband a life-interest in the fund.

V. C. W. Jan. 16.

In re SHILLITOE'S ESTATE.

SHILLITOE *v.* SHILLITOE.

Husband and Wife—Wife's Chose-in-action—No Settlement—Reduction into Possession of Husband.

Where a wife's chose-in-action was reduced into possession by the husband and not settled, and he died soon after the marriage insolvent, the Court was obliged to order payment of the money over to the husband's estate, instead of to the widow.

Common Law.

Q. B. Jan. 11.

LLOYD and another *v.* FLEMING.

LLOYD and another *v.* SPENCE.

Marine Assurance—Assignment of Policy—Action by Assignee after Loss—31 & 32 Vic., c. 86.

In this case it was held that, after a loss of goods by the perils insured against, a policy of marine assurance could be assigned under 31 & 32 Vic., c. 86, so as to enable the assignee to sue on it.

P. & M. Jan. 16.

SIDEBOTTOM and HOLME *v.* SIDEBOTTOM.

Will—Residuary Legatee—Failure of Issue ascertained.

Testator gave the residue of his estate to his brothers W and J in trust for any child living at his death, or born in due time afterwards, and on failure of trust, to such of his brothers W and J as should be living at the time that the failure of the trust is ascertained. Testator died on 30th January without any child living or born afterwards, and J died on 14th February following. W, on citation to take out probate or administration, did not appear. Administration with will annexed to J's executors was applied for on the ground that the failure of the previous trust was ascertained by the death of the testator, as *per* 1 Jarman on Wills, 797, n. (d), and granted.

Equity.

V. C. B. JAN. 13.

In re LADY AMHERST'S TRUSTS.

Tenant for Life—Cesser of Life Estate—"Part from"—Liquidation—Forfeiture.

TESTATRIX by will gave B a life-estate in the income of certain Consols, with remainder to his children, provided that if B should at any time or in any manner "part from" the income (in whole or part) until due, his right and interest in such income shall cease and determine as if he were actually dead. B filed a petition for liquidation; but afterwards at a general meeting of creditors, a special resolution was passed, declaring that B's affairs should be liquidated by arrangement, and not in bankruptcy, and a trustee was appointed without a committee of inspection. HELD that the filing of the petition for liquidation operated as a forfeiture of B's life-estate.

V. C. W. JAN. 18.

In re BARBER.

Marriage Articles—Covenant to effect and assign Policies—Policies effected—No Assignment.

BY articles of agreement made on his marriage, B covenanted to effect a policy or policies of assurance on his life within 12 months of the date thereof, and to assign the same to the trustees of the articles on the trusts thereof. At the time of the marriage, there existed four policies on his life subject to certain charges, and B afterwards effected two others and died insolvent 2½ years after his marriage, without having assigned the two new policies to his trustees. HELD upon the evidence that these two policies were within the covenant.

L. C. JAN. 15.

HARDING *v.* METROPOLITAN RAILWAY Co.

Compulsory Purchase—Contract—Leaseholds—Assignment.

IN this case a railway company, the purchaser of certain leasehold lands, was compelled to accept the assignment of the lease and to covenant for indemnity; the L. C. holding that the assignor of leaseholds was entitled to a covenant of indemnity; and that, though the mere notice to treat did not constitute a contract, yet when the price had been fixed by an arbitrator, there was a contract which could be enforced in equity.

M. R. JAN. 15.

ELSE *v.* ELSE.

Vendor and Purchaser—Sale by Court—Condition as to Commencement of Title—Prior Title bad.

THE question in this case was whether, in a sale by order of the Court under conditions of sale which provided that the title should commence with a conveyance on a sale in 1888, the purchaser was bound, notwithstanding that he had discovered that the vendor in 1838 was still alive and childless and claimed under a will by which the property in question was devised to him in fee but followed by a gift over in the event of his dying leaving no children. The M. R. held that the title was bad, and not binding on the purchaser in a sale by the Court, without deciding what the case might be on an ordinary sale.

M. R. JAN. 15.

COOPER *v.* KYNOCK.

Settlement—Construction—Estate of Trustee—Rule in Shelley's Case.

BY a settlement made on the marriage of plaintiff and her late husband, certain real estate was limited to the use of her father and mother successively during their respective lives, with remainder (in case of plaintiff's discoverture at the death of her mother) to the use of plaintiff in fee, but (in case she should then happen to be married) to the use of a trustee his heirs and assigns upon trust to pay the rents and profits to plaintiff for life for her separate use, with power to her to appoint by will, and in default of such appointment, to the use of her heirs and assigns. HELD that plaintiff was not entitled to an estate in fee-simple; that the estate of the trustee was confined to the life of the plaintiff; and that the limitation to the plaintiff's heirs and assigns was legal and did not coalesce with her equitable life estate.

BANKRUPTCY. JAN. 15.

Ex parte SIR PETER TAIT.

In re TAIT & Co.

Bankruptcy Act, 1869—*Injunction—Deed of Inspectorship.*

In this case the Chief Judge, acting under Section 72 of the Bankruptcy Act, 1869, granted an injunction restraining a creditor whose claim to prove against the estate of a firm, under a deed of inspectorship made between the firm and their creditors, for arrears of salary due to him by the firm, had not been admitted by the inspectors, from continuing proceedings commenced by him against a partner of the said firm for the recovery of the said debt due to him from the firm and also for a private debt due to him from the said partner.

V. C. M. JAN. 16.

In re IMPERIAL ANGLO-GERMAN BANK.

Company—To be registered according to Law of Germany—Winding-up.

This was an association of more than seven persons which was to be registered according to the law of Germany; the prospectus stating that, according to that law, all the deposits would have to be returned in full in case the Company was not formed and registered. Upon failure to obtain shareholders in Germany, the project for forming the Bank was abandoned; and the Directors having expressed their intention to return the deposits in full, a winding-up order was made upon the petition of an advertising agent who had expended a large sum of money for advertising the Company, and of two clerks in the Company claiming payment of their salaries; the V. C. holding that the order for publishing advertisements having been given by the duly appointed Secretary with the approbation of the Directors, they were liable; and that this was an Association that could be wound-up under the Act of 1862.

L. C. JAN. 16

SAVAGE *v.* TYERS.

Will—Construction—Direction to settle upon Marriage—Special Case—Future interests.

Testator gave shares in certain Companies for the benefit of three of his grand-daughters and their issue respectively, and also a leasehold house for the benefit of a fourth grand-daughter, and her issue upon their attaining 21 or before upon marriage with the consent of the majority of their guardians or trustees, to be settled for their separate use with power to dispose of the same by deed or will among their issue if there be issue, or (if none) as they should think fit respectively, with remainder (in case any of them died under 21 or unmarried) to the other grand-daughters or their issue, to be settled or secured in like manner as their original portions; and if all died under 21 and unmarried, to sink into the residue of his personal estate which he gave after the death of his daughter to his two grandsons. Upon a special case filed by two unmarried daughters against the residuary legatees to determine the nature of plaintiff's interest in their respective legacies, the L. C. agreed with V.C.B. that the plaintiffs took only a life-interest in their respective legacies, but declined to declare future interests upon a special case.

Common Law.

Q. B. JAN. 15.

JONES AND WIFE *v.* CUTHBERTSON.

Husband and Wife—Loan—Mortgage of Wife's Separate Property.

A loan was obtained by a mortgage effected by both husband and wife on real property settled to wife's separate use, in order to enable the husband to pay off a debt, and the wife to build and repair some cottages on her property, husband and wife each depositing a policy on his and her life for a like amount. The husband covenanted for the payment of the money borrowed, and both gave the solicitor who was advising them a joint authority to receive the money from the mortgagee. The solicitor, after paying off the husband's debt, kept a portion of the money in payment of a debt due to him from the husband, and handed over the balance only to them. Upon an action by husband and wife against the solicitor, The Court, considering that defendant had full knowledge of the facts and had been employed to carry out the several objects of the plaintiffs, held, that the money received by him had been received as agent for the plaintiffs to carry those objects into effect and that he could not against the will of the parties treat the transaction as a reduction into possession by the husband on his own account and for his own purpose of a chose-in-action of the wife, and gave judgment for the plaintiffs.

Equity.

L. C. Jan. 17.

SINNETT v. HERBERT.

Mortmain—Endowment of future Church—Cy-près—43 Geo. 3, c. 108.

In this case the L. C. ruled that the bequest for an endowment of a future Church was a good charitable gift; but before deciding as to the applicability of the doctrine of *Cy-près*, directed an enquiry whether the bequest could be employed in endowing a new Church at the place mentioned in the will. As to the effect of the statute of 43 Geo. 3, c. 108, His Lordship considered that £500 out of the mixed personalty was applicable to the erection of a new Church, leaving all the pure personalty applicable to the endowment.

V. C. B. Jan. 18.

In re NORTH-WEST OF IRELAND DEEP SEA FISHING COMPANY.

Company—Voluntary Winding-up—Creditor's Lien.

In this case the V. C. ruled that a voluntary winding-up did not differ from any other winding-up, and that, upon the passing of a resolution by a Company to wind up voluntarily, the right to all property of the Company at once became vested in the liquidators, so that no lien could thereafter be established against it.

V. C. B. Jan. 18.

FORD v. FOSTER.

Trade-mark—Onus of proving.

In this case the V. C. held that plaintiff, whilst claiming a trade-mark in the words "R. Ford's Eureka Shirt," had prayed for relief as to shirts marked "Eureka" only, which word was not the trade-mark he claimed; and that the plaintiff, coming to a Court of Equity for protection of a right, was bound to show that he had exercised that right honestly.

V. C. B. Jan. 19.

CADMAN v. CADMAN.

Will—Construction—Navigation Shares.

In this case the V. C. was of opinion that the effect of the South Yorkshire Railway Act, 1847, was that the testator's navigation shares became converted in equity and passed under the bequest of personal estate; but that, even assuming that they remained in their original condition of real estate, they would pass, with reference to the general scope of the will, under the words "personal estate and effects."

V. C. M. Jan. 19.

ROBINS v. GOLDINGHAM.

Solicitor and Client—Papers of Suit—Lien for Costs—Discharge by Client.

A solicitor applied to his client for money to pay Counsel's fees; and not being furnished with any, declined to act further in the suit and to hand over the papers relating to the suit until he was paid his bill of costs. Upon motion to compel the solicitor to hand over the papers, the V. C. held that, instead of the solicitor having been discharged by the client, it was a discharge by the solicitor, and that he was not entitled to keep the papers.

M. R. Jan. 19.

SMITH v. STONE.

Will—Construction—Shares to Daughters—Daughter dying in Testator's lifetime—Intestacy.

Testator directed a moiety of his general trust fund to be divided into five parts, and one-fifth to be given to each of his three daughters and two-fifths to his son, provided that if his son or any of his daughters should die in his lifetime without leaving issue living at the death of the testator, the shares given to his son and to each of his daughters so dying, should sink into and form part of his general trust fund as if the name of the said son and daughter had never appeared in the will. Testator died, one of his daughters having predeceased him; and upon a suit instituted to obtain the opinion of the Court as to who were entitled to her share, the M. R. held that there was an intestacy as to the whole share in question.

M. R. Jan. 19

PALMER v. NEWELL.

Settlement—Construction—Gift to pay a sum not exceeding £300—Discretion of Trustees.

A settlor covenanted with his trustees that if R B attained 21 either before or after settlor's death, the heirs, executors, or administrators of the settlor, should at such time after his death or after R B attained 21 (whichever should last happen), *as the trustees or the survivors or survivor of them should in their or his uncontrolled discretion think fit*, pay R B £300 in one sum or from time to time in various sums. R B survived the settlor and on attaining 21 applied to the trustees for the £300. They paid him £5 and expressed their intention to exercise their discretion for his benefit no further; whereupon, a suit having been instituted for the administration of the trusts, R B presented a petition asking for payment of the remaining £295, and the M. R. held that the discretion of the trustees was confined to the time at which the sum or sums were to be paid to R B, and that R B was entitled to be paid the full sum of £300 at the death of the surviving trustee, if the trustees did not exercise their discretion sooner; and as they had announced their intention against further exercising their discretion, the M. R. ordered payment of the £295 to R B.

V. C. M. Jan. 20.

ROLLINS v. HINCKS.

Patent—Threats of Legal Proceedings.

In this case the V. C., in making an order to restrain the publication of a circular, held that there was no presumption in favor of the validity of a patent, and that a patentee had no right to issue circulars calculated to intimidate persons from buying the articles of rival manufacturers, without being prepared to assert his legal right to his patent.

V. C. B. Jan. 20.

In re UNITED PORTS AND GENERAL INSURANCE COMPANY.

ADAM'S CASE.

Winding up—Contributory—Allotment—Cancelment.

The B. Company became amalgamated with the U. P. Company under an agreement entered into in March 1869, according to which, each B. shareholder was entitled to receive one £1 share in the U. P. Company for every share with £2 paid thereon in the B. Company. In April 1869, A a director and shareholder in the B. Company, signed the printed form of application for 50 shares in the U. P. Company, by which he expressly agreed to receive the same, and authorized the directors to insert his name in the register of shareholders. A afterwards declined to accept shares, and the solicitor of the Company informed him of the allotment having been cancelled. Held that the directors had no power to cancel an actual allotment.

V. C. W. Jan. 20.

In re CLINTON'S TRUST.

Marriage Settlement — Court to settle After-acquired Property — Construction — "Shall become entitled."

Where a marriage settlement contained a covenant by a husband and wife jointly and separately that, "if at any time or times after the solemnization of the intended marriage, and during the joint lives of husband and wife, they, or either of them in her right, shall, by gift, descent, succession, or otherwise howsoever, become entitled to any real or personal estate, property, or effects, of the value or to the amount of £100 or upwards at any one time," the same should be paid to the trustees upon the trusts declared; and the reversionary interest fell into possession during the coverture; it was held by the V. C. that the words "shall become entitled" meant in this case ***shall become entitled in possession during the coverture***, and that the fund was bound by the covenant.

Common Law.

Ex. Jan. 17.

MOUFLET v. COLE.

Covenant not to carry on Trade within certain Distance—Mode of Measurement.

In this case the Court held that the proper mode of measurement of the distance within which a covenant not to carry on a trade was to prevail, was in a direct line "as the crow flies."

Ex. Jan. 17.

WILSON v. HOBSON and another.

Executors of Executrix de son tort—Liability for Breach of Contract by Person whose Assets intermeddled with.

In this case the Court held that the executors of an executrix *de son tort* were not liable for a breach of contract by the person with whose assets the executrix *de son tort* had intermeddled.

Equity.

M. R. JAN. 22.

LABOUCHERE *v.* DAWSON.

Vendor and Purchaser—Sale of Business and Good-will—New Business by Vendor—Soliciting Customers of old Business.

DEFENDANT who had, on the death of his partner, concurred in a sale to plaintiffs of their brewery business as a going concern, including the good-will of the business and the exclusive right to use the name of the old firm, was restrained from applying to a customer of the old firm prior to the sale thereof to the plaintiffs, privately by letter or personally, or by his partners, travellers, servants, or agents, asking such customer to continue dealing with defendant or not to deal with plaintiff.

L. C. JAN. 22.

KEMP *v.* S. E. RAILWAY COMPANY.

Railway Company—Agreement with Landowner—Time—Land required.

A RAILWAY Company, whose compulsory powers of taking land were to cease in April 1865, and the Railway was to be completed in June 1867, agreed with the landowner to buy for £2,000 ten acres of land with an additional acre for the station, and if more than one acre was required for the station or any additional ground for any purpose, to pay for the same at the rate of £100 an acre. By some mistake it was not until May 1865 that they gave notice to treat for four additional acres required for the station, and they entered on about four acres in May 1867, having already been in occupation of some land covered by the slipping of an embankment. HELD that the Company were entitled under their agreement to take a reasonable quantity, if necessary, at the rate of £100 per acre, and that this power would cease when the time for construction ended, but that the land covered by slips did not come under the agreement, and must be taken under the powers given to the Board of Trade.

M. R. JAN. 23.

COHEN *v.* WATSON.

Vendor and Purchaser—Specific Performance—Delay.

THIS was a bill filed for specific performance of a contract of sale of certain leasehold property by auction; and the M. R. held that, though the plaintiffs were right in refusing to comply with the defendant's request, yet as the defendant's letter to the auctioneer asking for a return of his deposit was a complete repudiation of the contract, and as the auctioneer was the plaintiff's agent and therefore must be taken to have known of the letter, the plaintiffs had, by not filing their bill for nearly two years afterwards, come too late to obtain relief in that Court.

M. R. JAN. 23.

GOUGH *v.* SMITH.

Breach of Trust—Liability of Co-trustees.

A AND B were trustees under a marriage settlement to collect C's share of certain fee farm rents. A collected C's share of the rents, and paid the same to C till Lady-day 1862, when he discontinued doing so. C brought A's default to B's notice, but expressed no desire that he should take legal proceedings to compel A to perform his duty as trustee. C filed a bill against both A and B, seeking for an account and payment of her share of the fee farm rents; and the M. R. held that A and B were jointly and severally liable for C's share of the rents received since Lady-day 1862; that it was B's duty on A's default being brought to her attention, to give notice to the tenants not to pay C's share of the rents to A alone; and if this failed to make A perform his duty as trustee, then to file a bill.

V. C. M. JAN. 24.

RUBERY *v.* GRANT.

Exception to Bill—Scandalous and Impertinent Matter.

IN this case the V. C. allowed an exception to a paragraph in a bill charging defendant with dishonesty and fraud, holding that such a charge could not be permitted unless it was relevant to the matter in issue between the parties; but as in the prayer of the bill, no relief was founded upon this charge of fraud, the V. C. considered that the allegation was not pertinent to the issue raised between the parties, and ordered the scandalous matter to be expunged.

V. C. B. Jan. 24.

GOMPERTZ v. KENSIT.

Marriage Act (4 *Geo.* 4, *c.* 76)—*Undue Publication of Banns—Presumption in favor of Marriage.*

Plaintiff, as one of the trustees of his daughter's marriage settlement of a reversionary interest in certain shares to which, by the bill of a testatrix, she was entitled in reversion expectant on the death of a tenant for life, applied on the death of the tenant for life to the executor of testatrix's executor, who refused to transfer them on the allegation that the plaintiff's marriage was invalid because without due publication of banns under 4 Geo. 4, c. 76, s. 22, the irregularity consisting of the omission of plaintiff's and his wife's first Christian names from the register of banns. The V. C. held that there was no direct evidence as to how the banns were actually published; no evidence of the wife's complicity in any irregularity; and the evidence of the plaintiff as to motive was uncontradicted. The presumption in favor of the marriage must prevail, and there was no reasonable ground for the refusal by the defendant of the plaintiff's request.

Common Law.

P. & M. Jan. 19.

JONES v. JONES.

*Suit for Judicial Separation—Wife's Costs—*20 & 21 *Vic., c.* 85, *ss.* 51, 53.

In an appeal before the full Court against a decree of the Judge Ordinary dismissing a wife's petition for a judicial separation, and refusing to condemn the respondent in any costs incurred by the petitioner, held that the wife was entitled to alimony pending the appeal; that the decision of the Judge Ordinary was not against the evidence; that the 20 & 21 Vic., c. 85, ss. 51 and 53 gave the Judge Ordinary full authority to make orders as to the wife's costs, even in suits for judicial separation; and that in the present case it was a proper exercise of discretion to refuse to order the husband to pay his wife's costs.

P. & M. Jan. 28.

In the goods of T. RUDDY.

Executor out of Jurisdiction—38 *Geo.* 3, *c.* 87, *ss.* 1, 2, 3—*At the Expiration of* 12 *Months from Death of Testator.*

In this case Lord Penzance, comparing the words "at the expiration of twelve months" in 38 Geo. 3, c. 87, s. 1, with the form of affidavit given in s. 2, and the form of grant in s. 3, was of opinion that the period at which an executor must be absent from this country in order that the statute might have operation, was at or after the expiration of 12 months from the time of the death of the testator.

P. & M. Jan. 28.

TWISLETON v. TWISLETON.

Dissolution of Marriage—Husband's Petition—Withdrawal—Alimony.

Husband's petition for dissolution of marriage was filed on 3rd March 1871. Wife's petition for alimony was filed on 6th December, and was not answered. The Judge Ordinary, in dismissing the former petition, held that the mere presentation of a petition for alimony at the last moment was not sufficient to oblige the Court to stay its hands, and to order the motion for dismissal of the petition for dissolution to stand over until the husband had answered the petition for alimony, and paid what might be allotted thereon, although the result might have been different had the wife acted promptly.

Q. B. Jan. 26.

GEISSEL and others v. SMITH and others.

Charter-Party—Justification for Breach of—Blockade of Port of Discharge—Restraint of Princes.

In this case the blockade of the port of discharge was held to be a restraint of princes and rulers justifying the breach of a Charter-Party.

Ex. Jan. 27.

JAMES v. LONDON AND S. W. RAILWAY CO.

*Admiralty Jurisdiction—Injunction—*24 *Vic., c.* 10, *s.* 13.

In this case the Court held that the Court of Admiralty had no power under 24 Vic., c. 10, s. 13, to issue an injunction against all actions arising out of a collision when neither the ship nor the proceeds nor anything in the opinion of the Court equivalent to the proceeds were under arrest at the time of the application.

Equity.

BANKRUPTCY. JAN. 22.

Ex parte APPLEBY AND PIKE.

Ex parte WYCHE.

In re WYCHE AND BRYAN.

Bankruptcy—Joint and Separate Estate—Rent—Landlord and Tenant.

W, the owner in-fee of a mill and some land subject to a mortgage, entered into partnership with others, and the articles of partnership provided that the business should be carried on upon the mill and premises, and that the stock and effects of W should be valued and purchased by the partnership, and that 210*l*. per annum should be allowed and paid out of the partnership property to W for the rent of the mill and premises. The CHIEF JUDGE held that no rent was created by the clause in the partnership deed, as the relation of landlord and tenant was not created between the parties; and that the claim of the trustee of the joint estate must be preferred to that of the trustees of the separate estate.

V. C. M. JAN. 25.

BURGESS v. EVE.

Guarantee of Banker—Limited or Continuing.

IN this case the question was as to the construction of the following guarantee under seal given to a banker by a father on behalf of his son:—"In consideration of your discounting for my son my promissory note to him for £2,000 dated this day payable four months after date, and of the sum of 5*s*. the receipt of which I hereby acknowledge, I deposit with you the several documents mentioned in the schedule hereunder written, which I agree shall remain with you as a security for the payment to you of all money due or to become due from him to the said Company on any account whatsoever, including charges for interest, commission, and all costs, charges, and expenses which you may incur in enforcing or obtaining payment of such money, or in realising this or any further security. And I agree to pay you upon demand all such money, and I hereby charge the hereditaments and premises comprised in such documents respectively with payment thereof." The V. C. was of opinion that the guarantee was not limited to the promissory note, but was a continuing guarantee extending to all money then due or to become due from the son on any account whatsoever.

L. C. JAN. 26.

NEWILL v. NEWILL.

Will—Construction—Gift to Wife and Children.

WHERE a testator devised and bequeathed all his property unto his wife for the use and benefit of herself and all his children whether born of her or his former wife, it was held that the property passed to the widow and children as joint tenants.

M. R. JAN. 26.

LEMAN v. SAFFERY.

Settlement—Proviso for Cesser on Alienation or Bankruptcy—Mortgage of Life Interest.

BY a marriage settlement the intended wife's property was settled upon trust during the joint lives of husband and wife, after certain payments, to pay the residue of the income to the husband, and after his death upon trust for the wife and children of the marriage, provided that, "in case the husband shall commit any act of bankruptcy, or do any act with a view to assign, anticipate, or incumber any interest to which he is entitled under or by virtue of these presents in the trust moneys, and premises *hereby settled*, or any of them, or any part thereof, or of the income of the same . . . . then the interest of the said husband, in the said trust moneys, funds, and premises shall cease;" and by the same indenture the husband's property was settled upon him for his life with remainder upon other trusts. The husband assigned to plaintiff by way of mortgage all his life and other interest under the settlement and became a bankrupt. HELD that the proviso for cesser in the event of bankruptcy or alienation was not limited to the wife's property, but extended to the whole settlement; that the words "hereby settled" could not be taken to mean "hereinbefore settled," so as to limit the operation of the proviso to the wife's property; and that the Court could not rectify the settlement, so as to enable the plaintiff to enforce his security against the husband's property comprised in the latter part of the settlement.

V. C. B. JAN. 26.

GRAY v. SECKHAM.

Company—Liquidation—Proof of Debts—Principal Debtor and Surety.

FOUR directors of a company stood security for any balance that might be due from the company to a bank. During the winding-up of the company, the bank recovered judgment against one of the sureties for a portion of the company's certified debt to the bank; and upon a special case settled by consent, the V. C. held that the bank was entitled only to the balance after deducting the amount received by the bank from the aforesaid surety and subject to the deduction arising from the ruling in *ex parte* Turner (8 Ves., 248).

V. C. B. JAN. 27.

ANDERSON *v.* ANDERSON.

Will—Republication.

IN this case it was held that a codicil, duly executed and attested, and confirming a will, had the effect of republishing the will and rendering it a new and original disposition, thereby curing the defect attaching to a legacy to a man from the attestation of the will by the man's wife.

V. C. W. JAN. 27.

THOM *v.* SYDDALL.

Copyright of Designs—"Pattern"—Registration—Novelty—Infringement.

WHERE an inventor moved for an injunction to restrain defendants from infringing a design for printing calico, and defendants objected (1) that plaintiff had registered his "pattern" or design only without a written description; (2) invention not novel; and (3) no infringement; the V. C. decided that there had been no substantial or even colorable infringement of the plaintiff's design.

V. C. M. JAN. 27.

In re GARNIER.

Trustee Relief Act—Discretion of the Court—Lunatic—Curator Bonis under French Law.

AN English subject became a lunatic while travelling in France. He was confined in an asylum in Paris, and a registrar in one of the French Courts was appointed the *curator bonis* of the lunatic. The curator having petitioned for payment out of Court to him of a sum of money belonging to the lunatic which had been paid in under the Trustees Relief Act, the V. C., in exercise of the discretion vested in the Court, declined to hand over the principal to a foreign curator, and directed all costs and expenses properly incurred for the maintenance of the lunatic to be paid to the curator.

Common Law.

Q. B. JAN. 24.

CORREY AND ANOTHER *v.* PATON AND ANOTHER.

Marine Insurance—Slip Policy—Concealment.

PLAINTIFFS, at the time a policy was effected for them, concealed from the defendants a material fact then known to plaintiffs but not known to defendants and not known to plaintiffs until after the slip which had been previously made was initialed. The Court, on the authority of L. R., 6 Q. B., 674, gave judgment for plaintiffs.

EX. JAN. 29.

CROUCH *v.* TREGONNING.

Landlord and Tenant—Assignment—Implied Indemnity.

BY an agreement not under seal, plaintiff, the tenant of a farm, professed to assign the residue of his interest to defendant who entered and occupied the farm, but the landlord withheld his license (which was necessary under the plaintiff's lease). No actual legal assignment was ever executed. The landlord never accepted defendant as his tenant, and the defendant during his occupation paid rent to the landlord for the plaintiff. HELD that there was no promise by defendant to indemnify plaintiff against rent, to be implied from the relation between the parties, at any rate after defendant's actual occupation had ceased; and that no relation of landlord and tenant had ever been established between them.

EX. JAN. 29.

BRITTON *v.* GREAT WESTERN COTTON CO.

Master and Servant—Dangerous Machinery—Duty to fence—Contributory Negligence.

IN an action brought under Lord Campbell's Act by the widow and child of a person who was employed by the defendant to stand on the edge of a wheel-race to grease the bearings between a fly and spur-wheel of a steam engine and who was caught by the fly-wheel, whirled into the air, and killed, THE COURT held that the defendants were bound to fence the place where the deceased was put to work, and that the dangerous character of the employment was not so obvious that he must necessarily be taken to have known it; or even supposing he did know it, that circumstance taken by itself was not enough to enable them to say that there was no evidence which ought to have been left to the jury; and that as the jury had on all the facts found that he had not been guilty of contributory negligence, THE COURT saw no reason to dissent from that finding.

Equity.

V. C. W. Jan. 27.

HOLLAND v. HOLLAND.

Partition—31 & 32 Vic. c. 40 s. 4—Sale.

Where a bill filed under 31 & 32 Vic. c. 40 s. 4 prayed "a sale" only of certain hereditaments, and not "for a partition or in the alternative for a sale," the V. C. directed the bill to be amended by adding a prayer for a partition.

L. C. Jan. 29.

BRIGGS v. UPTON.

Marriage Settlement—Personal Representatives—Next of Kin.

By a marriage settlement certain real estate and a sum of consols were assigned to trustees on trust to sell the real estate and to pay the annual produce of the trust estate to husband and wife for their lives, and after the death of the survivor in trust as the wife should appoint, and in default upon trust to pay the same to her legal representatives in due course of administration. The husband survived and took out letters of administration to his wife. Considering that part of the settled property was land in which the husband's representatives but for the settlement would take no interest, the L. C. had great doubts whether the executors or administrators of the wife were not to take; but having such doubts, he thought it better to affirm the V. C.'s decision holding that the wife's next of kin were entitled.

M. R. Jan. 29.

In re HASLEFOOT'S ESTATE. CHAUNTLER'S CLAIM.

Mortgage of Testator—Balance in hand—Private Debt—Right to tack.

In this case a firm of solicitors, a testator's mortgagees of a policy of assurance, after repaying themselves for principal, interest, and costs, were held entitled to retain the amount of other bills of costs due to them by the testator out of the balance in their hands.

V. C. W. Jan. 29.

JACUBS v. RYLANCE.

Leaseholds—Administration with Will annexed—Sale—Purchaser for Value without Notice—Enquiries.

The question in this case was what interest actually passed on a sale of certain leaseholds by the administrator with will annexed of a testatrix under which trusts were created. The V. C. held that the deeds executed by the administrator passed whatever beneficial interest he had in the leaseholds, and directed consequential enquiries accordingly.

L. C. & L. J. J. Jan. 29.

PILCHER v. RAWLINS.

Mortgages—Fraud—Priority—Legal Estate—Notice of Trust.

Where new mortgagees had no notice of a prior mortgage and re-conveyance or of the mortgagor being a surviving trustee under a deed of settlement, and had acquired the legal estate, the Court of Equity declined to interfere.

V. C. M. Jan. 30.

HENRIQUES v. BENSUSON.

Trust—Recognition of Claim bound by Limitation—Direction to pay Amount due when required.

A bond dated in 1813, and not recognised by obligee since 1817, was referred to in obligor's sister's marriage settlement dated in 1833 by which a fund was vested in trustees upon trust to pay to the Bank of England the amount due and owing under the bond when required, and then upon other trusts. By a further ante-nuptial settlement dated in 1835 recognising the trusts of the previous deed, the sister held a testamentary power of appointment, in exercise of which she by her will in 1869 directed the funds to be held upon trust to pay the principal and interest on the bond if and when the trustees of the deed of 1833 should be required to pay the same. The V. C. held that no trust was created by the terms of the deed in favor of the bank; that the fact of the settlement not being communicated to the bank showed that no trust for them was intended; and that on the terms both of the deeds and the will the trustees were only directed to discharge any legal liability of the obligor.

V. C. M. Jan. 31.

In re EAST OF ENGLAND BANK.

Winding-up—Compromise of Debt—Power of Liquidators—Jurisdiction of Court.

A claim was made by the liquidators of a bank against a female contributory who supported herself by literary and other occupations, for 900*l.* on account of calls. In her affidavit she averred that her only property consisted of an annuity of 60*l.* and a sum of 40*l.* expected from the publication of a book, and she offered to compromise the debt by a payment of 50*l.* The liquidators having declined an enquiry into her means, the V. C. made an order in chambers that the liquidators do accept the offer, and upon motion to discharge the order, over-ruled the objection that the Judge had no jurisdiction to decide upon a compromise until after it was sanctioned by the liquidators, observing that a liquidator was an officer of the Court, and was bound to obey the directions of the Judge.

L. J. J. Jan. 31.

In re NATIONAL ASSURANCE AND INVESTMENT ASSOCIATION.

In re CROSS.

Solicitor's Lien—Appeal for Small Amount.

The L. J. J. refused on account of the smallness of the amount to entertain an appeal from a decision of the M. R. refusing an application of a Solicitor for a declaration that he had a lien on the dividends payable to a client who had been successful in a claim against a company under a winding-up, for costs assessed at 1*l.* 15*s.*

Common Law.

Q. B. Jan. 29.

THE QUEEN *v.* THE LORDS OF THE TREASURY.

Mandamus—Lords of the Treasury.

In this case The Court held that a *mandamus* would not lie to the Lords of the Treasury, inasmuch as they received the money which was granted to Her Majesty as servants of the Queen, and no duty was imposed upon them as between them and the persons to whom the money was payable.

Q. B. Jan. 31.

NEWBY *v.* VAN OPPEN AND COLT'S PATENT FIRE ARMS MANUFACTORY COMPANY.

Practice—Foreign Corporation—Service of Writ.

In this case The Court held that a foreign corporation could be sued in an English Court, and that service of the writ on the head officer of the English branch of the corporation was a proper service.

Ex. Ch. from Ex. Feb. 1.

BURROWS *v.* MARCH GAS AND COKE COMPANY.

Damages—Remoteness—Injury resulting from two independent Causes—Negligence—Breach of Contract.

Gas escaped from a service pipe laid down by a Gas Company, under a contract to supply a proper pipe, from the main outside to a meter inside plaintiff's premises, and a gasfitter's servant employed by plaintiff, upon hearing of it, went into the shop with a lighted candle in his hand with a view to ascertain the cause and an explosion took place doing damage to plaintiff's premises and stock. The Court affirmed the judgment of the Court below who upon the finding of the jury as to defect in the pipe and gasfitter's servant's negligence in carrying a lighted candle, held that plaintiff was entitled to recover, and that the defendants, the Gas Company, were not exonerated by the negligence act of the gasfitter's servant.

Ex. Ch. from Ex. Feb. 2.

CASTLE AND OTHERS *v.* PLAYFORD.

Vendor and Purchaser—Condition Precedent—Bills of Lading—Loss of Vessel.

Plaintiffs agreed to ship a cargo of Ice to any ordered port in the kingdom "the vendors forwarding bills of lading to the purchaser and upon receipt thereof the purchaser takes upon himself all risks and dangers of the seas," and the defendant agreed to buy and receive the Ice on its arrival, and pay for it in cash on delivery at a certain rate. The vessel was lost during the voyage by risks and dangers of the seas within the meaning of the agreement and after the receipt by the defendants of the Bills of Lading. The Court of Exchequer Chamber (reversing the judgment of the Court of Exchequer reported L. R., 5 Ex., 165), held that, after the bills of lading had been received, the defendant became liable to pay the plaintiffs the value of the cargo, and was answerable to them for all loss arising from risks and dangers of the seas.

Ex. Ch. from Ex. Feb. 3.

MOULE *v.* GARRETT.

Lease—Liability of ultimate Assignee to Original Lessee.

In this case The Court of Exchequer Chamber affirmed the decision of the Court below in favor of plaintiff in an action brought to recover from defendant sums of money which, as original lessee, the plaintiff, had been compelled to pay the lessor in respect of dilapidation which had occurred during the tenancy of the defendant, the ultimate assignee of the case (reported L. R., 5 Ex., 132).

Equity.

V. C. B. JAN. 27.

MANNING *v.* GILL.

Voluntary Deed to avoid Forfeiture—Lunacy.

WHERE a criminal lunatic, the day before his trial, was told by his solicitor that, on conviction of felony, his property would be forfeited, and was persuaded by him to execute deeds by which he conveyed all his real and personal estate to his brother, and the question was whether the accumulated fund arising from the lunatic's property belonged to the brother beneficially so as to pass to the latter's residuary legatees, the V. C. held that the deeds in question were purely gratuitous deeds executed by an insane man under a total misapprehension, and for a purpose which had not taken effect; and that the brother knew that he was a trustee, and never touched the money.

V. C. W. JAN. 30.

GARDINER *v.* JEWERS.

Will—Devise of "my House" where Testatrix had two—Interest on Legacy—Investment in India Stock.

TESTATRIX by will devised "to my brother F. J. my house in Guildhall Street for his use during his life, my trustees keeping the same insured against fire and in tenantable repair," and bequeathed £2,000 to her executors upon trust to pay the income to her brother for his life, and then for his children; the insurance and repair being paid for out of the income of the £2,000. She had two houses in Guildhall Street, Nos. 62 and 63, adjoining each other, in the former of which the brother had lived rent-free; and the questions were (1), whether he took either and which or both or any house; (2), whether he was entitled to interest on the £2,000 from testatrix's death; and (3), whether the property invested in the 5 per cent. India stock should be continued there. The V. C. held that the house No. 62 passed by the devise; that the interest on the £2,000 was only payable from the time when it was actually set apart, or from the end of one year from testatrix's death, whichever was earliest; and declined to approve the continuance of the investment in India stock.

L. C. FEB. 8.

ABBOTT *v.* BAKERS' AND CONFECTIONERS' TEA ASSOCIATION.

Trade Mark—Injunction.

IN this case the L. C., in affirming an order of V. C. M. granting an injunction to restrain the use of a paper wrapper like that used by the plaintiff, said that, though no one particular mark was exactly imitated, the combination was very similar and likely to deceive; and that proof of any one having been deceived, or of the plaintiff's having incurred any loss, was not material where the similarity was obvious.

V. C. M. FEB. 8.

JACKSON *v.* BRIGHTON AQUARIUM COMPANY.

Contempt of Court—Newspaper Comments—Pending Litigation.

UPON a motion to convict a printer and publisher and the proprietor and editor of a paper to prison for contempt of Court, the V. C. said that the object of the article complained of was to run down every one connected with certain directors of this Company. Where such attacks were made, the writers should be careful to ascertain correctly the facts which they asserted. The statement as to the plaintiff having withdrawn from the litigation against the Company was a gross misrepresentation, and was calculated to prejudice the plaintiff in this Court, and to injure him in the eyes of the public and the shareholders. There was nothing to prevent the writers in newspapers from making statements as to proceedings in Court so long as such statements were true; but it was a contempt of Court to misrepresent the proceedings to the injury of any one.

V. C. M. FEB. 9.

In re THOROLD'S SETTLED ESTATES.

Settled Estates Act—Investment of Purchase-money.

IN this case the V. C. directed an investment, under the Settled Estates Act, of the proceeds of the sale of a settled estate.

V. C. M. Feb. 9.

LETHBRIDGE v. ADAMS.

Ex parte LIQUIDATOR OF THE INTERNATIONAL LIFE ASSURANCE SOCIETY.

Policy of Assurance—Assets of Society—Limited Liability—Breach of Contract—Failure of Company.

This was a claim by the liquidator of a Life Assurance Society, under the terms of whose policy and deed of settlement the policy-holders were only entitled to be paid out of the assets of the Society, to prove against the estate of an individual share-holder for the amount necessary to make good to subsisting policy-holders, the loss they had sustained by the failure of the Company, on the ground that the failure to continue the business was a breach of contract which would entitle subsisting policy-holders to damages against an individual share-holder. The V. C. held that the question could only be raised on a bill filed by a policy-holder on behalf of himself and all the other policy-holders; and that by the terms of the deed of settlement and the policy a limited liability had been constituted, and the only claim of the policy-holders was upon the assets of the Society.

V. C. W. Feb. 10.

DIXON v. ENOCH.

Libel in Newspaper—Action at Law—Bill of Discovery against Printer and Publisher—Names of Proprietors.

In this case the V. C. held that, by 6 & 7 William IV, c. 76, s. 19, as re-enacted by 32 & 33 Vic., c. 24, a person complaining of a libel in a newspaper might file a bill against the printer and publisher to ascertain the names of the proprietors for the purpose of bringing his action against the proprietors alone.

L. J. J. Feb. 12.

In re BIGNOLD'S SETTLEMENT TRUSTS.

Appointment of New Trustees—"Incapable to act"—Residence Abroad—Trustee Act, 1850, s. 32.

This was an application for the appointment of a new trustee in the place of one out of the jurisdiction. The authorities were conflicting on the subject, but the better opinion seemed to be that a trustee permanently out of the jurisdiction was "incapable to act." The L. J. J. inclined to that opinion, but they suggested the appointment of a trustee by the Court under Section 32 of the Trustee Act, 1850, and ruled that the Court could remove a trustee without his consent.

Common Law.

Ex. Ch. from Ex. Feb. 4.

PICKWELL v. SPENCER AND OTHERS.

Will before 1838—Gift without words of Limitation enlarged to a Fee.

Plaintiff claimed, as heir-at-law to a person, lands which the latter had devised without words of limitation to his widow, with a direction to pay a sum of money yearly to his son, and a limitation over, on her marrying again, for the benefit of all his children. Defendants claimed through a purchaser from the widow who had died without having married again. The Court of Exchequer Chamber affirmed the judgment of the Court of Exchequer (reported L. R. 6 Ex., 190) in favor of defendants.

Ex. Ch. from Ex. Feb. 6

SLATER v. PINDER.

Bankruptcy Act, 1869—Execution—Seizure and Sale—Seizure before Act of Bankruptcy—Sale after Adjudication.

An execution-creditor for a sum less than £50, who has seized the goods of a bankrupt before the committing of any act of bankruptcy, is entitled to the proceeds of them as against the trustee, although the adjudication is prior to the sale.

P. and M. Feb. 6.

In the goods of ADAMS.

Will—Printed Form—Partly filled up in Ink, and partly with Pencil.

A will was executed on a printed form, with blanks for the names of the legatees, one of which was filled up in the deceased's handwriting with words in ink and pencil. Not only was the pencil writing written over by the words in ink, but it was in part obliterated; whilst the writing in ink was of such a character as to work in with the printed matter. Held that the presumption was that the writing in ink was the will, and not that in pencil; and that it was the intention of the testatrix to supersede the pencil writing.

Equity.

M. R. Feb. 12.

GILCHRIST v. HERBERT.

Ante-nuptial Promise of Testamentary Gift—Lost Document—Parol Evidence—Stamp Act.

PLAINTIFF, a widow, residing in Calcutta, and having a family by a former husband, was engaged to be married to Dr. E., when G. proposed to marry her, and wrote to her several letters, in one of which he said,—"If you will decline Dr. E. and marry me, I will undertake to maintain and educate your children. I will settle on you £10,000 for pin-money, and I will make a will leaving you half my fortune, and that will shall not be altered." Plaintiff thereupon accepted G., and broke off her engagement to Dr. E., to whom she showed the letter. After marriage, they went over to England, and the husband left her, and a seperation-deed was executed securing to plaintiff £400 a year, during their joint lives, and £200 a year after the husband's death. Plaintiff wrote to him several letters, complaining of the inadequacy of the provision, without referring to the alleged ante-nuptial promise. Plaintiff returned to India; and during the voyage, all her luggage, including her husband's letters, were destroyed in a storm. A few years afterwards, the husband died, leaving by will all his property, after some legacies, to his daughter by a former marriage. The M. R. held that the evidence established the fact of a written promise in the terms alleged by plaintiff, though the documents were lost; that the Court must give effect to the promise as against the testator's estate; that the objection as to the letters being unstamped failed, as such a promise in writing respecting property at Calcutta did not come within the provisions of the Stamp Act then in force; and that plaintiff was entitled to one-half of the estate, which must bear all the costs of the suit.

L. J. J. Feb. 13.

In re CONTRACT CORPORATION. GOOCH'S CASE.

Winding-up—Official Liquidators—Affidavit of Documents.

IN this case the Court held that, where the question was between a Company as a litigant, and a person outside the Company, as in the case of a person whom the official liquidator sought to place in the list of contributories, the official liquidator, as representing the Company, was bound to make the ordinary affidavit as to documents. But where, as here, the main contest lay between a past shareholder and other past shareholders and particular creditors, the question was one in which the Company had really no concern. In such a case, therefore, the only duty of the official liquidator, as an officer of the Court, was to afford every facility to the contending parties, and to see that each had fair play.

L. J. JAMES. Feb. 13.

In re PATENT BREAD MACHINERY COMPANY. Ex parte VALPY.

Companies' Act, 1862, s. 43—Registry of Charge—Duty of Solicitor.

WHERE a solicitor employed by a Company required security for costs, and obtained from two of the Directors and the Secretary a note agreeing that his costs should be a first charge on certain specified debts of the Company, HELD that it was his duty to see that the charge was registered according to the Companies' Act, 1862, s. 43; and that as he had failed to perform that duty, he could not claim the benefit of the security.

V. C. W. Feb. 13.

In re PALMER'S WILL.

Trustees for Sale—Sale of Surface reserving Minerals—Parties—Cestuis-que-Trust.

WHERE trustees for sale wished to sell the surface, without selling the subjacent minerals, the V. C. made an order for that purpose upon the *cestuis-que-trust* being made copetitioners, and upon being satisfied that the sale was expedient.

V. C. W. Feb. 14.

PHILLIPS v. GREAT WESTERN RAILWAY COMPANY.

Railway—Mail Trains—Breach of Covenant—Swindon Refreshment-rooms.

PLAINTIFF'S predecessors and defendants entered into a covenant according to which certain passenger trains of the defendants were to stop at Swindon for ten minutes, in order that passengers might procure refreshments at the plaintiff's rooms there. The Post-Master General having given notice to defendants that the mail trains must in future stop at Swindon for five minutes only, the plaintiffs moved for an injunction to restrain defendants from breach of covenant, and to compel defendants to allow the trains in question to stop for ten minutes at Swindon, and the V. C. granted the injunction to restrain defendants from carrying between Swindon and the defendant's railway to which Swindon was intermedite, any passengers other than their own and the Post Office guards, servants, and officers, by any trains appointed to run at stated times which might be lawfully required to stop for any shorter time than ten minutes.

M. R. FEB. 8.

In re BOWEN.

Solicitor and Client—Bill of Costs—Taxation.

The M. R. upheld an order for taxation of costs of a solicitor who had been requested by another solicitor to search among the documents in his possession for certain deeds which the latter required for one of his clients, promising to pay him for his trouble; and observed that the former had been employed by the latter as solicitor for a certain qualified purpose.

V. C. M. FEB. 10.

In re ALFRED AVERAGE ASSOCIATION. CLARK'S CASE.

Mutual Marine Insurance—Losses incurred after Cancellation of Policies.

In this case the V. C. held that the liability of applicant (who was a member of a Marine Insurance Club or Association formed for the protection of the members by mutual insurance of their ships) for losses on other ships terminated on the date when his protection ceased.

V. C. W. FEB. 10.

In re UNION CEMENT AND BRICK COMPANY.

Ex parte THE OFFICIAL LIQUIDATOR.

Winding-up—Liquidator—Calls received by Solicitor—Costs.

In this case the V. C. said he had no doubt as to the general principle that neither a liquidator nor his solicitor had a right to retain any moneys without the order of the Court; and as the orders in this case was not intended to authorize any retention by the solicitor of the moneys received by him, he must pay them into Court. A solicitor to a liquidator was only entitled to retain the costs received by him from those litigating parties who had been ordered to pay costs.

V. C. M. FEB. 12.

LARIVIERE *vs.* MORGAN.

LARIVIERE *vs.* FERAR.

Suit against Foreign Government—Notice to Representative of that Government.

These were suits arising out of the supply of cartridges to the French Government during the late war; and the V. C. held that information must actually be given to the representative of the French Government so as to enable them, if they chose, to submit to the jurisdiction.

Common Law.

C. P. FEB. 9.

LEE AND OTHERS *vs.* WALKER.

Patent Agent—Negligence.

In this case a patent agent was held liable in damages for not getting plaintiff's patent sealed before a second patent for the same invention of which the provisional specification had been filed subsequently; it being want of reasonable care and skill to be ignorant of a decision pronounced only a year ago, and so materially affecting the practice of the profession which he carried on, *viz.* that of *Ex parte Bates and Redgate* (L. R., 4 Ch., 577), where it was held that a second patent will not be granted for the same invention after one has already been sealed, though provisionally specified at a later date.

C. P. FEB. 9.

EVANS *vs.* ROE AND OTHERS.

Contract of Service—Weekly Hiring—Evidence to explain.

Plaintiff having entered into the service of the defendants under a memorandum in writing by which he agreed to serve defendants faithfully and promote their welfare, on his receiving a salary of £2 a week, and house to live in, from a certain date; The Court held that this was a weekly hiring, and that oral evidence was not admissible to show that a yearly hiring was intended.

C. P. FEB. 9.

DUNVILLE AND OTHERS *vs.* NOWLAN.

Principal and Agent—Authority of Agent—Payment in Goods.

Where an agent supplied goods to a customer, it was held that he had no authority to receive payment in goods, but only in money.

Equity.

V. C. W. Feb. 18.

BEST *v.* STANDEVEN.

Will and Codicils—Devise of Real Estate—Leasehold Estate—Mortgage of the whole Property together.

This was a case which the V. C. considered a peculiar one and not likely to govern any other, and in which, after reference to the 26th Clause of the Wills Act, 1837, he held that a testator's leasehold estate passed by the devise of his real estate under the will and codicils, both the freehold and leasehold estate having been mortgaged together.

V. C. M. Feb. 14.

CRUIKSHANK *v.* DUFFIN.

Mortgage by an Executor to a Building Society—Power of Sale.

In this case the V. C. said he considered it now settled, contrary to some of the older decisions, that an executor might give a power of sale in a mortgage, and no question would have arisen if this had been an ordinary mortgage. It was the first case he had ever known of an executor becoming a member of a Building Society for the purpose of obtaining money upon mortgage; but from the nature of this property it was doubtful whether he could have raised the money by any other means. The executor, by taking shares in the Society, rendered himself liable to pay the instalments and premium, but he could not see that this was a ground for declaring the mortgage invalid. He should therefore decree specific performance of the contract.

M. R. Feb. 15.

HUDSON *v.* COOK.

Contract for Purchase of Realty—Death of Purchaser—Intestacy—Rescission by Vendor—Right of Heir of Purchaser to Purchase-money.

In September 1868 A entered into a contract, which was to be completed on the 21st December, for the purchase of certain realty, the contract containing a clause enabling the vendor to rescind in case the purchaser should make any requisition with which the vendor should be unable or unwilling to comply. Requisitions were made in October, which were not completely answered at the time of A's death, intestate, in January 1869. In April the vendor rescinded the contract, alleging his inability and unwillingness to comply with the purchaser's requisitions. On the suit of the intestate's heir for the purchase-money, the M. R. held that, at the time of the intestate's death, a contract existed which the vendor might have enforced if so minded; that the intestate's heir was entitled to the benefit of that contract; and that it was immaterial that the vendor had subsequently rescinded under the power reserved to him by the contract; and he made a decree in favor of the plaintiff.

V. C. M. Feb. 16.

In re BRISCOE'S TRUSTS.

Will—Charitable Gift—Insufficient Description—Evidence of Intention.

This was the case of a gift by will to the "Victoria Hospital," and the question being which of two Victoria Hospitals was meant, the V.C., upon the evidence, decided in favor of the Hospital with which the testator was connected.

L. J. J. Feb. 16.

In re EAST OF ENGLAND BANK.

Jurisdiction—Winding-up—Power of Liquidator—Compromise.

The L. J. J. held that the Court had no jurisdiction to compel the liquidators in winding-up of a Company to agree to a compromise with a contributory, and discharged the order of V. C. M. (*ante*, p. 38).

L. J. J. Feb. 16.

HADLEY *v.* McDOUGALL.

Production of Documents—Partnership Books.

The L. J. J. discharged V. C. M.'s order (*ante*, p. 23) to compel the production of books belonging to a partnership firm, one of the partners of which was a defendant, without the consent of the other; observing that an order for production could not be made against a person who was not a party to the suit.

V. C. W. Feb. 17.

ATTORNEY-GENERAL *v.* AKERS.

Infant—Clandestine Marriage—Mis-statement of Facts—Forfeiture by Husband—Settlement on Wife and Issue—Costs.

In this case a young lady of the age of 16 years had contracted a valid marriage under

19 & 20 Vic., c. 119, by license, the husband having falsely sworn before the Registrar that she was of age, that she had her mother's consent, and that the parties had resided within the due parochial limits for the prescribed time. The V. C. made a declaration that, under the 4 Geo. IV c. 76, and the 19 & 20 Vic., c. 119, the husband had incurred a forfeiture of all estate, right, title, and interest in and to any property which had accrued or should accrue to him by virtue of his marriage with the young lady, that her property must be settled upon her and her issue, exclusive of the husband, and that he must not be allowed his costs.

V. C. M. Feb. 17.

In re MARSEILLES EXTENSION RAILWAY AND LAND COMPANY.

HOLMES' CASE.

Obligations—Promissory Notes—Stamp Duty—Guarantees.

In this case the question was whether certain documents issued by the Company and denominated "obligations,"—which were in the following terms, "This obligation is redeemable at the sum of 30*l* sterling, and will "be guaranteed by the produce of the re-sale "of the lands belonging to the Company. "Its redemption will be effected by annual "drawings in conformity with the table an- "nexed. The drawings will take place at "Marseilles, commencing in the year 1870, "under the superintendence of the Board of "Directors,"—were promissory notes, and required a stamp according to the English law before they could be receivable in evidence, or were mere guarantees that a certain sum would be paid to the persons who might at any time be the possessors of the documents; and the V. C. was clearly of opinion that these obligations were promissory notes, and that the period of payment was the first drawing at Marseilles.

V. C. W. Feb. 17.

BAILE *vs.* BAILE.

Suit on behalf of Infant Plaintiff—Solicitor—Real Estate—Costs—Charge.

In this case the V. C. held that a suit had been properly instituted on behalf of an infant plaintiff; that Mr. J. the solicitor had been well "employed" within the meaning of 23 & 24 Vic. c. 127 s. 28; that the plaintiff had adopted the suit after attaining his majority; that the claim of Mr. J.'s widow to a declaration that she, as his executrix, was entitled to a charge on plaintiff's real estate for the taxed costs, charges, and expenses of and in reference to the suit, was a valid one; and that the Statute of Limitations was not a bar to it.

Common Law.

Ex. Ch. from Q.B. Feb. 18.

TOLEMAN *vs.* PORTBURY.

Ejectment—Breach of Covenant—Forfeiture—Waiver.

Where, in an action for ejectment for breaches of covenants in a lease, the breaches stated were the permitting a sale by auction on the premises without plaintiff's consent, and the non-payment of rent due after the date of the sale, the *Court of Ex. Chamber*, affirming the judgment of the Court of Q.B., held that the claim of subsequent rent was no waiver of the forfeiture by the sale by auction.

Ex. Ch. from Q. B. Feb. 16.

DENNETT *vs.* ATHERTON.

Covenant for quiet Enjoyment—Restriction by a Covenant as to a particular Trade.

In this case the Court of Exchequer Chamber held that a restriction, founded upon a covenant by the lessor with his vendor against the use of the premises in a particular manner, was no breach of a covenant by the lessor with the lessee for quiet enjoyment.

Ex. Ch. from Q. B. Feb. 16.

NOTARA *vs.* HENDERSON.

Ship-owner and Shipper—Duty of Master—Preservation of Goods.

Plaintiffs shipped beans on board the defendant's steamer from Alexandria to Glasgow. The steamer having put into Liverpool, met with a collision on coming out, and was obliged to put back for repairs. The beans were wetted by sea-water by the direct consequence of the collision; and the plaintiffs, being in Liverpool, offered to receive them there, paying freight *pro ratâ*, but the master refused to deliver without full freight, and he carried them on to Glasgow without drying them, the consequence being that they were much deteriorated in value. The Court of Exchequer Chamber held that it was the duty of the master, acting for the ship-owners, to have dried the beans; and that the defendants were liable for the neglect of the master to do so.

Equity.

M. R. Feb. 12.

In re PARNHAM'S TRUSTS.

Will—Clause of Forfeiture—Bankruptcy—Annulment.

Petitioner had a life-interest under a will subject to forfeiture in the event of his assigning or otherwise disposing of such life-interest. Testator died on 16th January 1862. Petitioner became bankrupt on 19th August 1864. On 13th November 1871 petitioner executed an assignment, to the assignee of his estate in the bankruptcy, of his interest in the dividends which had accrued due on the fund which had been transferred into Court. On 21st November 1871, the bankruptcy having been annulled, the present petition was presented by petitioner praying for payment of the past dividends to the assignee in bankruptcy, and the future dividends to himself. The M. R. held that the petitioner had forfeited his interest under the will, and dismissed the petition with costs.

L. J. J. Feb. 17.

In re IMPERIAL ANGLO-GERMAN BANK.

Winding-up—Liability of Promoters of Railway Scheme.

The L. J. J., on an appeal from an order of V. C. M. (*ante*, p. 26), ruled that, as the projected Company had not been formed, the scheme had fallen to the ground, and the winding-up order could not be sustained. The case as to the promoters of railway schemes go on the principle that the promoters incur no collective responsibility, each being answerable only for those claims to which he made himself individually liable.

L. J. J. Feb. 19.

HARDY *v.* METROPOLITAN LAND AND FINANCE COMPANY.

Liability of Company—Fraud of Manager.

Plaintiffs, a building society, allowed their manager (who was also manager of defendant Company) to deposit moneys belonging to the Society with the defendant Company, the Society and its officers having no power to make such deposits. In 1869 the defendants drew a cheque for the amount of the deposit, and handed it to their manager, who applied it to his own use, and died insolvent. Plaintiffs now sue to recover the amount from the defendants; and the L. J. J. held (apart from the question of notice of illegality) that, as the defendants had handed the cheque to their manager who remained their agent until he had paid the money to the plaintiffs to whom it was due which he never did, the defendants never discharged themselves from the debt.

V. C. M. Feb. 18.

In re VALPARAISO WATER-WORKS COMPANY.

Company—Agreement to become a Member—Notice of Allotment.

In this case the V. C. held upon the facts that it was part of the original arrangement that the agents should take shares in the Company, and that consequently the application for shares, and the appointment as agents, constituted together an agreement to become a member of the Company, and that it was not necessary that the applicant should have notice of allotment.

V. C. W. Feb. 19.

PROSSER *v.* BANK OF ENGLAND.

Bank of England—Fund in the Names of three Persons—Death of One—Evidence.

A fund stood in the books of the Bank in the names of three persons, on the death of one of whom an extract from the entry in the Register of the parish where the deceased was buried, together with a statutory declaration as to the identity of the deceased, was forwarded by the other two persons to the Bank, in order to enable the Bank to affix to the name of the deceased in their books the usual memorandum of her death. The Bank however declined to do so on the ground that the statutory declaration did not state that the extract had been compared with the original Register for the parish where the deceased was buried, and the V. C. held that the Bank had a discretion to exercise in this case, and that in this instance they had exercised it *bonâ fide*.

V. C. B. Feb. 20.

GROVE *v.* MARSHALL.

Will—Construction—"Issue" held to mean "Children."

In this case the V. C. held, upon the construction of a will, that the testator had himself put his own interpretation upon the word "issue," and had confined its meaning to children or child of the first degree.

V. C. M. Feb. 24.

In re CITY TERMINUS HOTEL COMPANY.

CLAIM OF SOUTH-EASTERN RAILWAY COMPANY.

Loan to a Company—Security of Shares—Shareholders or Creditors.

It being of importance to the Railway Company that the hotel should be completed as it formed part of their station works, the Railway Company agreed to advance 40,000*l.* to the Hotel Company, and to receive from them 4,000 shares in the Hotel Company, which were placed in the names of two trustees for the Railway Company. The Railway Company had recently purchased the hotel for 201,000*l.* under the powers of their Act, and the Hotel Company was wound up in order to effect the sale; and the V. C. held that the Railway Company must stand as creditors for the amount of the advances, and were at liberty to deduct the 40,000*l.* from the amount of their purchase-money.

M. R. Feb. 26.

BLOOMER *v.* SPITTLE.

Conveyance to Purchaser—Common Mistake—Rectification—Setting aside Sale.

In a contract for the sale of land including the minerals, the conveyance (by a common mistake on the part of the solicitors on both sides) contained a reservation of the minerals to the vendor; and the M. R. held that, having regard to the lapse of time, and to the resistance to rectification offered by the defendant, the latter must have his option either to have the conveyance rectified, or else to have the whole transaction set aside. In the latter event the plaintiff would be fixed with an occupation rent, while the defendant would have to repay the purchase-money with interest, and also all sums expended by the plaintiff for permanent improvements.

M. R. Feb. 25.

JAMES *v.* JAMES.

Secret Invention—Right to use Name of Original Discoverer—Advertisement of Article as "the only Genuine"—Injunction.

In this case the M. R. refused an injunction to restrain the defendant Robert Joseph James, who had discovered the secret of the invention without any breach of confidence, from selling Lieut. Robert James' Horse Blister (an unpatented chemical preparation), or from using Lieut. James' name in connection therewith, provided he did not represent his manufacture as the manufacture of the successors of Lieut. James, and did not put the signature of Robert James (omitting his second name of Joseph) on his labels, or advertise his preparation as the only genuine.

L. J. J. Feb. 28.

SHEFFIELD IMPROVED INDUSTRIAL AND PROVIDENT SOCIETY *v.* JARVIS.

Party Wall—Right to support.

In this case the L. J. J. upheld an injunction granted by V. C. M. restraining the defendant from interfering with the use by the plaintiffs of the wall which divided the houses of the plaintiffs and the defendant.

Common Law.

P. & M. Feb. 20.

In the goods of PUNCHARD.

Will—Executor according to the Tenor—Trustee.

In this case grant of probate was refused to C as executor according to the tenor of the will, where testator left a house which he desired to be sold to pay expenses and legacies, and wished C to act as trustee to the estate, and where he gave several legacies but did not dispose of the residue.

P. & M. Feb. 20.

RAVENSCROFT *v.* RAVENSCROFT AND SMITH.

Matrimonial Suit—Decree Nisi—Intervention of Queen's Proctor — Reversal of Decree — Damages.

In this case the Judge Ordinary reversed a decree *nisi*, the petitioner having, upon the intervention of the Queen's Proctor, been found by a jury guilty of adultery himself, and gave his opinion that the Legislature did not intend that damages should be recovered when the marriage was not dissolved.

Equity.

BANKRUPTCY. FEB. 12.

Ex parte CROSSLEY.

In re TAYLOR.

Power of Court—Examination of Trustee.

THE Court has power, on the application of a creditor, to summon a trustee and compel him to disclose all his dealings with a bankrupt's property.

BANKRUPTCY. FEB. 19.

In re SUTHERLAND.

Judgment on Joint Guarantee—Right of Action against Joint Guarantor as against whom Judgment was set aside.

AN action was brought by a Company upon a guarantee, and judgment recovered against all the guarantors. Thereupon a debtor's summons was issued against one of them S, who ultimately was adjudicated a bankrupt notwithstanding that it appeared that the judgment had been set aside as against him on the ground of irregularity. The CHIEF JUDGE held, upon the appeal of S, that the debt having merged in the judgment, the Company had no right of action against S, and that there was no debt either at law or in equity sufficient to support a petition in bankruptcy.

L. J. J. FEB. 28.

CLIVE *v.* CLIVE.

Apportionment—Determination of Interest—Estate for Life without Impeachment of Waste.

AN apportionment was allowed of the current income of a testator's residuary personal estate settled on his two grand-daughters at the time of their marriage, notwithstanding that it had been contended that there could be no apportionment in this case because there was no determination of property but only an alteration in the mode of enjoyment of the property; and it was held that the trust for the separate use of one of them, with restraint on anticipation, was given for her protection; and that if the estate was without impeachment of waste, the timber might be cut and sold for the husband's debts.

M. R. FEB. 28.

In re CARNEY'S TRUSTS.

Lands Clauses Consolidation Act, 1845—Re-investment in Land—Costs of Abortive Investment.

THE M. R. held that a Railway Company was bound, under s. 80 of the Lands Clauses Consolidation Act, to pay the costs of an abortive attempt to re-invest in land a fund paid into Court in respect of lands taken for the purpose of their undertaking; the contract for the proposed purchase having been sanctioned by the Court, and having fallen through simply by reason of the vendor's title being unsatisfactory.

M. R. FEB. 28.

In re SOUTHAMPTON IMPERIAL HOTEL COMPANY.

HUNT'S CLAIM.

Company—Winding-up—Trustee of Lease.

WHERE a few years after H, as trustee of a Company, had entered into an agreement to take a lease of land for 89 years, the Company was ordered to be wound up, and H was compelled to pay a sum due under the agreement, and, in order to put an end to his liability, entered into an agreement to assign the benefit of the agreement in consideration of a sum of money to be paid by him in instalments, the M. R. held him entitled to prove for both sums.

V. C. W. FEB. 28.

CASS *v.* RILEY.

Will — Construction — Gift to late Husband's Sisters—Issue of such Sisters who died before Testatrix not entitled.

ON the marriage of a widow, her personal estate was assigned to trustees in trust to pay the income to her for life for her separate use, and after her death to stand possessed of the estate upon such trusts as she should appoint. By her will she directed the trustees to stand possessed of the estate upon trust for her late husband's sisters, her own brothers and sisters, and her husband, and one of the trustees equally *per capita;* but in case, at the time of her decease, any of her late husband's sisters, or any of her own brothers and sisters were dead having left issue, such issue should take their parent's share. Before the date of the will, four sisters of the testatrix's late husband had died, each of them having left issue, and the question was whether, upon the true construction of the will, such issue were entitled to share in the trust fund, and the V. C. held that they were not.

L. J. J. MARCH 1.

In re EUROPEAN BANK.

MASTERS' CASE.

Contributory—Bonâ fide—Transfer—Misdescription.

WHERE a retired butcher had transferred

some shares in a Bank to his son-in-law, a journeyman butcher, but described in the deed of transfer as a gentleman, and the Bank stopped payment a few days afterwards, the L. J. J. held that the transfer was valid, because the description of the son-in-law as "gentleman" was merely vague, and not intended to deceive the Company, and it did not appear that the Company would not have accepted him if they had been distinctly informed that he was a journeyman butcher.

V. C. M. MARCH 2.

In re HERCULES INSURANCE COMPANY. PUGH'S CASE.

HARMAN'S CASE.

Company—Contributory—Misdescription—Taking Shares in Name of Fictitious Person—Substitution of Party really entrusted.

A FATHER had a number of shares in a Company and, being unable to take any more in his own name, procured his daughter, a married woman, to sign a paper for him, without telling her what the object was. It was in fact an application for 400 shares, and her name appeared simply without stating her condition. The father paid the allotment money, and always acted as the owner of the shares. Neither the daughter nor her husband knew that she was on the list of contributories until after the winding-up order; and the V. C. considered the case like that of shares being taken in the name of a fictitious person, and directed the father to be placed on the list in substitution for the daughter.

V. C. M. MARCH 4.

In re IMPERIAL LAND COMPANY OF MARSEILLES.

HARRIS' CASE.

Company—Allotment of Shares—Complete Contract—Repudiation—New Term of Contract.

ON 5th March, 1866, H sent through post a printed form of application for shares up to 200, which had been annexed to a copy of the prospectus, which contained a provision for payment of 10 per cent. interest. The Directors appointed an Allotment Committee, who on 15th March allotted 100 shares to H. The notice of allotment was posted early on the 16th, and reached H at Dublin on the 17th, stating the balance due from H, and containing in red ink the words "As the interest warrants attached to the shares bear interest from the 21st of March 1866, punctual payment of the above balance is requisite. The bankers are instructed not to receive payments after that day, without charging interest at 10 per cent. per annum." On the 16th H wrote from Dublin repudiating the shares. The V. C. held that the contract was complete directly the notice of allotment was posted, that it was posted in sufficient time, that the words in red ink in the letter made no new term but simply worked out the provision for payment of 10 per cent. in the prospectus, and that the allotments made by the Committee were valid.

M. R. MARCH 5.

HARRISON *v.* HARRISON.

Election—Compensation—Application of Assets—Costs of Suit.

WHERE a testator devised certain real estate in Scotland, and gave a legacy to his eldest son who was his heir according to the Scotch law, and the eldest son elected to take against the will, and it appeared that the testator's personal estate was insufficient to pay the costs of suit, the debts of the testator, and the legacies given by his will in full, the M. R. held that the legacy given to the eldest son must be applied in compensating the parties disappointed by the election to take against the will, and that the debts and costs of suit must be paid out of the Scotch estate, which had descended on the heir-at-law before the pecuniary legacies abated.

Common Law.

P. & M. FEB. 20.

BONDON *v.* MORGAN.

Limited Administration—Assignee—Property assigned not belonging to Assignor in his own Right.

WHERE a claim was made to the grant of administration of an unadministered estate by the executor of the assignee of the unadministered estate (the property assigned not belonging to the assignor in his own right), LORD PENZANCE on the grounds that the claim was not free from doubt, and that the person primarily entitled to take out administration had not been personally served with the citation, made a grant limited to taking proceedings in Chancery, and to receiving what that Court should consider the applicant entitled to.

Equity.

V. C. W. MARCH 4.

BLAKISTON v. TEBBS.

Will—Construction—Realty (Estate-Tail in)—Personalty—Life-Estate.

WHERE a testator devised and bequeathed all his real and personal property to trustees upon trust to pay the rents and profits "unto his sister M for the term of her personal life; and after her decease in like manner unto his sister S; and after her decease unto his brother J; and after his decease to his issue (if any); if no issue unto his godson (an infant) and to his issue, second son to be preferred to older—" HELD that the will created successive life-estates in the property, and that J the brother took that interest in the personalty.

V. C. W. MARCH 4.

DEACON v. YEARSLEY.

Infant's Suit — Specific Legatee — Bill for general Administration—Limited Decree.

IN a suit instituted on behalf of an infant, a specific legatee of leaseholds, and praying a decree for the general administration of the testator's real and personal estates, the V. C. made a decree for the administration of the estate limited to the plaintiff's legacy, with enquiries as to debts, incumbrances, and income; reserving further consideration; and allowing the executors to retain their costs out of the residue.

V. C. M. MARCH 5.

LARIVIERE v. MORGAN.*

Suit against Foreign Government—Breach of Contract—Deposit of Fund with Banker—Money brought into Court.

IN this case the V. C. held that, though a foreign government could not be sued for a breach of contract, yet where money had been actually deposited with a banker as security for the performance of the contract, that enabled him to order the bankers to bring the money into Court, and to direct an enquiry as to what was due to the plaintiff on the contract.

V. C. B. MARCH 6.

BEATTIE v. LORD EBURY.

Railway Company—Bank—Security for Advances—Shares and Debentures—Contract—Representations.

IN this case the V. C. found upon the evidence that the bank, of which plaintiffs were trustees, never intended to advance money to a Company on the security of worthless documents (*i. e.* debentures which had been issued before the Company had acquired the statutory power of issuing them, *viz.* when the whole of the additional capital was *boná fide* subscribed for); and that the Directors of the Company were liable to make good the representations on the faith of which the bank had advanced money and had withheld proceedings; and ruled that the Directors were liable to pay the debt and hand back the documents which they had received.

V. C. B. MARCH 6.

HUNTER v. BULLOCK.

Will—Legacy—Gift made subject to Trust impossible to be performed—Legacy valid.

WHERE a gift by will to an institution was upon trust for keeping in repair a gravestone for a certain day yearly if required, and appropriating the balance, the trust was held to be one impossible to be performed, but the gift to the institution perfectly good.

V. C. B. MARCH 7.

In re PATENT FLOOR CLOTH COMPANY.

DEAN AND GILBERT'S CLAIM.

Winding-up—Contract—Remuneration by Commission.

IN this case the V. C. held that an agreement for the employment of claimants as travelling agents of the Company for three years at a certain remuneration by commission was distinctly proved, and also that the authority of the manager of the Company extended to the employment of travelling agents, and that he had exercised that right in the case of the claimants with the knowledge of the Directors; and ordered that the claimants should be allowed compensation for the two years of their engagement remaining unexpired when the Company went into liquidation, notwithstanding the contention made on behalf of the official liquidator that there was no written agreement within the Statute of Frauds capable of being enforced against the Company, that the manager had no authority to bind the Directors, and that the contract to remunerate services by commission differed from an engagement at a fixed salary, and that the person employed must take his chance.

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* *Ante*, p. 88.

V. C. M. **March 7.**

THRUPP *v.* SCRUTON.

Party Wall—Joint Landlord.

B, the owner of houses Nos. 65 and 66, rented the latter to plaintiff and, in consideration of defendant at plaintiff's request placing a wooden pilaster with the end fixed into an iron girder on the party wall between the two houses, was to pay an increased annual rent. B assigned the lease of the former house to the use of the defendant who, in carrying out certain considerable alterations in the frontage of his house, determined upon removing the pilaster and iron girder from the party wall. The V. C. granted an injunction restraining the defendant from removing the pilaster and iron girder, and considered it clear upon the evidence that the defendant was aware, before he purchased his house, that the pilaster and girder had been erected by the plaintiff's landlord, that defendant could not have taken under the assignment from B more than B had power to give him, and that the wall was not the property of the defendant, but a party wall between the two houses which the defendant had no right to appropriate to his own purpose.

L. J. J. **March 8.**

HEMMING *v.* MADDICK.

Evidence to discredit Witness—Exhibit appended to Affidavit (how to admit).

Where J made an affidavit for the plaintiff that there had been no understanding as to a certain matter, and the defendant's solicitor filed an affidavit in answer stating that J had made a statement to him which was at the time reduced into writing and signed by J, and in which he said that there was that understanding, and the solicitor appended this statement to his affidavit as an exhibit, the L. J. J. were clearly of opinion that the statement was not evidence, and that the only way in which such a statement could be admitted would be by cross-examining J and putting the statement into his land for the purpose of discrediting him.

V. C. M. **March 9.**

NARRAWAY *v.* BEATTIE.

Insolvent Partnership—Proof by one Partner of Debts in a separate Firm.

C was partner with P in London but resided at Bombay, where he carried on a separate mercantile business. The two firms were distinct, but had large mercantile dealings and bill transactions together. Both firms stopped payment in the same month, and the question was whether the Bombay firm was entitled to prove against the London firm. The V. C. held that, as a general rule, a partner in a bankrupt firm could not prove in competition with the creditors of the firm who were in fact his own creditors, and that even if an exception were made in favor of allowing proof where the debt was in respect of a distinct trade carried on by one of the bankrupt partners, it could only be in respect of goods supplied, and not in respect of cash balances.

M. R. **March 12.**

WARD *v.* WEIGHTMAN.

Breach of Trust—Liability of Estate of deceased Trustee—Advertisement for Claims by Executors—22 & 23 Vic. c. 35 s. 29.

In this case the M. R. held that the estate of a deceased trustee was liable for a breach of trust committed by him in allowing his solicitor to receive and retain in his hands certain trust moneys when the mortgage on which they were invested was paid off, whereby the same was lost to the trust-estate; that the advertisements in the local newspapers published by the executors previously to the distribution of the estate were not a proper compliance with the 22 & 23 Vic. c. 35 s. 29, the Court always requiring notices to be inserted in the *London Gazette*, and generally in the *Times*; that three weeks from the date of the notice was too short a time for claims to be sent in; and that the executors were personally liable, as well as the estate of the testator.

L. J. J. **March 13.**

COOPER *v.* KYNOCK.

Estate of Trustee.

The L. J. J. in this case, reversing the decision of the M. R. (*ante*, p. 25), held that the trustee took an estate in fee.

Common Law.

P. & M. **March 12.**

In the Goods of PARNELL.

Appointment of Guardian—Authority to one Guardian to appoint a new one—12 Car. 2 c. 24.

Where a testator in effect said, "I appoint A and B guardians for life, and on the death of either the person whom the other shall nominate," Lord Penzance held that he thereby properly disposed of the custody of his child under 12 Car. 2 c. 24.

House of Lords.

March 14.

SHAW, Official Liquidator, *v.* FOSTER, *Bart.*

Contract—Notice of Deposit—Equitable Mortgage.

F entered into a contract to sell the Alhambra Palace to P, the deeds to be in the hands of the vendor until the purchase-money was completely paid, when a conveyance of the premises was to be executed. To secure payment of certain bills accepted by P, he deposited with a bank the agreement between himself and F, and executed a memorandum of the deposit by which he undertook (*inter alia*) to execute a valid assignment of his contract with F by way of mortgage. Notice of the deposit and memorandum was duly given to F by the bank's solicitor to whom F sent a memorandum of acceptance of such notice. The purchase was completed without prior notice to the bank, and the bank having afterwards gone into liquidation, the Official Liquidator filed a bill in Chancery against F praying for a declaration that, by virtue of the deposit and the memorandum and the notice thereof given to F, the bank became entitled to an equitable charge on the Alhambra Palace, that the conveyance by F after such notice was a breach of trust, and that F was liable to make good to the bank the loss thereby occasioned. The Lords affirmed the decision of the L. C. holding that F was not liable.

Equity.

V. C. M. March 11.

LEAN *v.* CARRICK.

Bill of Sale—Bankruptcy—Registration.

It was held in this case that bills of sale given by a sheriff were not exempt from registration, that it was not necessary to plead non-registration, and that apparent ownership did, under the Bankruptcy Act of 1861, apply to non-traders.

V. C. M. March 12.

WILSON *v.* WILSON.

Mortgage of a Ship—Freight included—Notice of Incumbrance.

In this case it was held that the mortgage of a ship included the freight and the earnings of the ship, and that as notice of a previous assignment of the freight and the earnings to the plaintiff by the mortgagor had not been given to the mortgagee, plaintiff could not recover the amount of the freight upon the home-ward voyage.

V. C. W. March 18.

HEXT *v.* GILL.

Mines and Minerals—China Clay.

In this case the V. C. said that probably the original meaning of the term "mines and minerals" was mines and what was gotten from mines; but etymology was a very unsafe guide to meaning, and he must hold that the word "minerals" had acquired a meaning of its own independently of any question as to the manner in which the minerals were gotten; that the evidence showed that "kaolin" or China clay was a metalliferous mineral distinguishable from, and much more valuable than, ordinary agricultural earth, and that it produced metal in a larger proportion to its bulk than many ores; and that "mines and minerals" included China clay.

L. J. J. March 14.

In re BROADWOOD'S SETTLED ESTATES.

Settled Estates Act s. 37—Married Women—Infant.

In this case it was held that a married woman, who was under age, was, for the purposes of the Settled Estates Act (19 & 20 Vic., c. 120), in the same position as a married woman of full age, and that she must be examined under s. 37.

V. C. M. March 14.

SHEPPARD *v.* HONG-KONG AND SHANGHAI BANKING COMPANY.

Lessor and Lessee—Covenant not to under-let without Consent—Reasonable Ground for withholding Consent.

In this case it was held that the plaintiffs (lessors) had no right to withhold their consent to any under-tenant proposed by the defendants (lessees) without showing some reasonable ground for their conduct, and that mere dislike to the character of the proposed under-tenant was not such a reasonable ground for withholding consent as the plaintiffs were entitled to set up, particularly when the effect might be to oblige the defendants to pay a heavy rent for keeping the house empty.

V. C. B. March 14.

In re BEAK'S ESTATE.
BEAK *v.* BEAK.

Donatio Mortis Causâ—Delivery of Bank Pass-book and Cheque—Cheque not presented till after Donor's Death.

THE difference between a pass-book and a deposit-note, the delivery of which had been held to be a good *donatio mortis causâ*, is enormous. Nor is a pass-book in any degree like a bond. The delivery of the pass-book was not distinguishable from the simple one of the delivery of a cheque drawn by the donor but not presented till after his death.

V. C. B. March 14.

MEINERTZHAGEN *v.* WALTERS.

Bill—Ademption—Residue.

ON a bill filed for administration of a testator's estate, one of the questions on further consideration was whether, in estimating the moiety of the residuary estate to which the testator's widow (the plaintiff) was entitled under the will, the sums advanced to the children by the testator during his life-time were to be taken into account as part of their shares in the residue, so that the widow would be entitled to one equal moiety of the income of the residuary estate, including the value of such advances or settlements. The V. C. said that the argument in favor of the widow proceeded on the fallacy that the residue of which the testator died possessed had undergone some augmentation by virtue of the advances made by him to his children in his life-time. The widow was entitled to the income of one moiety of the property of which the testator died possessed, and there was no trace of any intention to give her anything more. She was not, therefore, entitled to the benefit of the hotchpot.

V. C. B. March 16.

HICKS *v.* ROSS.

Will—Legacies—Whether for Life or Perpetual.

TESTATOR left a sum of 50*l.* per annum to be paid quarterly to his wife, and afterwards gave an annuiety to another legatee "during her life." He also left a sum of 800*l.* a year out of the proceeds of the profit of the working of his East Indian estate to the maintenance and education of the eight children of his daughter, provided they exchanged their own names for his, under forfeiture of the said 800*l.* per annum should they decline to do so. The V. C. held that the legacy to the widow was for life only; and that the gift of the 800*l.* a year to the daughter's children was unlimited in time, and payable out of the whole estate of the testator; and His Honor thought that the 800*l.* should not be paid to the daughter.

M. R. March 18.

In re NANTOOS CONSOLS COMPANY.
THOMAS' CASE.

Winding-up—Contributory—Agreement to take Shares—Power of Directors to rescind Contract.

IN this case T, the secretary of a Company, under an agreement to take 1,000 shares, took up 850 shares up to the time of his resignation of the secretaryship, and in consideration of his resignation the directors agreed to relieve him from further payments in respect of such shares as he had agreed to take. An order having been made a few months afterwards for winding-up the Company, the question arose whether T should be made a contributory in respect of the remaining shares which he had not taken up at the time of his resignation, and the M. R. held in the negative.

V. C. M. March 19.

ARCEDECKNE *v.* LORD HOWARD.

Accommodation Bills—Agreement to share Liabilities.

THE V. C. was of opinion, both with regard to the intention of the parties and the legal effect of an agreement signed by plaintiff and three other guarantors to share liabilities as to several accommodation bills of which all had been signed by plaintiff and some one or more by the others, that they were to contribute each one-fourth to the liabilities of the debtor, and one of the four having died insolvent, the other three must contribute each a third of the amount.

V. C. B. March 19.

SUTCLIFFE *v.* RICHARDSON.

Life-Annuity to a Wife so long as she and Testator's Son should live together—Death of Son—Non-cesser of Annuity.

TESTATOR by his codicil left an annuity to his wife during her life (in addition to the provision made for her by his will) "so long as my said wife and my son Edwin should live together; but if they should cease to reside together, then I direct that the said payment should cease." The V. C. held that the annuity did not cease on the death of the son.

House of Lords.

APRIL 12.

OVEREND, GURNEY & Co. v. GIBB AND ANOTHER.

Company—Agent—Directors—Authority to purchase a Business.

THE LORDS affirmed the decision of the L. C. allowing a demurrer to a bill filed against the directors of Overend, Gurney & Co. (Ld.) in respect of the purchase of the good-will and assets of the bill brokers Overend & Gurney with the liabilities of the firm, on the grounds that the plaintiff Co. had given the directors full authority to purchase the business of Overend & Gurney; that at the time the authority was given the persons composing the Co. knew all the facts; that the purchase was a hazardous one, but that the persons who gave the authority to purchase it must have known it to be so, and probably had made up their minds to incur the hazard in the hope of great profit; that the bill did not allege any violation of a direct duty, nor any gross negligence in the discharge of that task which the directors had been authorised to perform, and there was no imputation that the directors had acted in the manner complained of for their own profit; and that the directors were not acting in the character of trustees, but in that of agents in the discharge of a duty, and they appeared to have performed it according to the instructions given to them.

Equity.

V. C. B. MARCH 22.

HARDING v. HARDING.

Purchase — Lien for unpaid Purchase-money—Intestate Purchaser—Locke King's Amendment Act.

WHERE a person died intestate having in his life-time contracted for the purchase of the reversion in fee expectant upon a church lease and accepted the title, nothing remaining at his death for completion of the matter but payment of the purchase-money and execution of the conveyance, the V. C. (with reference to Locke King's Amendment Act 30 & 31 Vic. c. 69) held the heir-at-law entitled to have the contract carried into effect at the expense of the personal estate.

V. C. W. MARCH 22.

MULKERN v. WARD.

Building Society—Book containing alleged libellous Paragraphs—Injunction to restrain Publication.

IN this case the V. C. refused to grant an injunction to restrain the publication (until an action for libel could be brought in a Court of law) of a book or certain alleged libellous paragraphs therein impugning and reflecting upon the principles of the calculations on which building societies generally were based, and, in doing that, singling out the name of the plaintiff's society; the V. C. being of opinion that there had been no malice on the part of the author in mentioning the name of the plaintiff's society.

V. C. B. MARCH 28.

In re BAYLEY'S SETTLEMENT.

Will—Construction—Estate for Life in Father—Remainder to Son in tail.

WHERE a testator gave his residuary real estate to A and to his eldest son at his death; should A have no male issue, then over; and A had a son who was born in the testator's life-time, and was still living; it was held that A took an estate for life in the residuary real estate with remainder to the son in tail.

V. C. W. MARCH 28.

In re WILKINSON'S MORTGAGED ESTATES.

Mortgage—Sale of Surface of mortgaged Property—Reservation of Mines and Minerals.

THE V. C. said that the 25 & 26 Vic. c. 108 applied to mortgagees, as well as to trustees, and that therefore he had jurisdiction to say that the power of sale in this case must be read as if it had expressly authorized a sale of the surface separate from the minerals; and as the evidence satisfied him that the power of sale would be more productive if the surface and minerals were sold separately, he would authorize the sale of the surface, reserving the minerals.

V. C. B. APRIL 16.

DAVIES v. NICHOLLS.

Legacy—Statute-barred Debt—Set-off by Executor.

WHERE a legatee was indebted to the testator 100*l.* upon a promissory note found in a secret drawer of the testator's desk, although the statute was a bar, yet according to the well-established rule that an executor might set-off a debt, upon the principle that the legatee having had payment once was not to have it over again, the V. C. was of opinion that the 100*l.* must be deducted but without interest.

V. C. B. APRIL 16.

In re BASSETT'S ESTATE.

PERKINS *v.* FLADGATE.

Will—Construction—"I leave to M"—Good Gift of Residue.

TESTATRIX by her will gave to A and B's three children the sum of 10*l.* each (whereas A and B had four children), and after giving other legacies went on to say, "after these legacies and my doctor's bills and funeral expenses are paid, I leave (without mentioning what) to my sister M," it was held that A and B's four children were entitled each to a legacy of 10*l.*, and that the testatrix's intention was to give the whole of her residue to M.

V. C. B. APRIL 16.

MACKETT *v.* MACKETT.

Will—Construction—Personalty—Proceeds to be applied to the Maintenance of Children—Absolute Gift.

TESTATOR by his will gave the residue and remainder of his estate, both real and personal, unto Sarah M, the wife of George M, and to her heirs and assigns for ever, but upon trust as to all the freeholds for the sole and separate use and for the maintenance of her son John until he was 21; and as to the personalty to the said Sarah M to and for her proper use and benefit free from the control of her present or any future husband, "and the proceeds to be applied by her in the maintenance of the said John and all other the children of the said Sarah M." The V. C. held that there was an absolute gift to Sarah M of the personalty unaccompanied by any trust or obligation attaching to the property.

M. R. APRIL 16.

In re ENGLISH ASSURANCE COMPANY.

HOLDICH'S CASE.

Life Assurance Company—Winding-up—Value of Policy (how to be determined).

THE question in this case was as to the proper mode of valuation of current policies or the proper amount for which holders of life policies were entitled to prove in the liquidation of a life office. In *Bell's case*, L. J. JAMES had laid down the rule that the measure of proof was the sum which would, under the particular circumstances of the case, be required to purchase a policy to the same amount at the same premium in a similar office. In *Carpenter's case*, however, *Lord Cairns*, in his arbitration in the Albert Life Assurance Company, differed from the above decision, and held that the then present value of the reversion of the sum assured was to be ascertained, and the then present value of the future premiums, taking into consideration the pure premiums only without the loading, and that the difference between the two sums was the value of the claim on the policy. The M. R. held that, in this case, the rule laid down in *Bell's case* must be followed.

L. C. & L. J. J. APRIL 17.

PHILLIPS *v.* GREAT WESTERN RAILWAY COMPANY.

Covenant to stop Train at Swindon—Post-Master General.

THEIR LORDSHIPS dissolved the injunction granted by V. C. W. (*ante*, p. 37) restraining the Railway Company from carrying passengers by any trains which did not stop for 10 minutes at Swindon, on the ground that trains, which, by the legal orders of the Post-Master General, were not allowed to stop 10 minutes at Swindon, were not under the control of the Company, and therefore did not come within the covenant to cause all such trains to stop, inasmuch as the agreement clearly contemplated that trains might be run, over the stopping of which the Company had not control, and it could not be said that the Company might not hook on to these trains carriages with passengers.

M. R. APRIL 18.

In re BRISTOL VICTORIA POTTERY COMPANY.

Company—Winding-up—Change from Compulsory Winding-up to Winding-up voluntarily under Supervision.

IN this case the M. R. made an order changing the compulsory winding-up of a Company into a winding-up voluntarily under supervision of the Court, it being stated that the Company was solvent, and that the only reason for winding-up was that it was found impossible to carry on the business profitably.

ACT NO. I OF 1872.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

(Received the assent of the Governor-General on the 15th March 1872.)

The Indian Evidence Act, 1872.

Preamble. WHEREAS it is expedient to consolidate, define and amend the Law of Evidence; It is hereby enacted as follows:—

PART I.

RELEVANCY OF FACTS.

CHAPTER I.—PRELIMINARY.

Short title. 1. This Act may be called "The Indian Evidence Act, 1872:"

Extent. It extends to the whole of British India, and applies to all judicial proceedings, in or before any Court, including Courts Martial, but not to affidavits presented to any Court or Officer, nor to proceedings before an arbitrator;

Commencement of Act. and it shall come into force on the first day of September 1872.

Repeal of enactments. 2. On and from that day the following laws shall be repealed:—

(1.) All rules of evidence not contained in any Statute, Act, or Regulation in force in any part of British India:

(2.) All such rules, laws, and regulations as have acquired the force of law under the twenty-fifth section of 'The Indian Councils' Act, 1861,' in so far as they relate to any matter herein provided for; and

(3.) The enactments mentioned in the schedule hereto, to the extent specified in the third column of the said schedule.

But nothing herein contained shall be deemed to affect any provision of any Statute, Act, or Regulation in force in any part of British India and not hereby expressly repealed.

Interpretation-clause. 3. In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:—

"Court." "Court" includes all Judges and Magistrates, and all persons, except arbitrators, legally authorized to take evidence.

"Fact." "Fact" means and includes—

(1) any thing, state of things, or relation of things, capable of being perceived by the senses;

(2) any mental condition of which any person is conscious.

Illustrations.

(a.) That there are certain objects arranged in a certain order in a certain place is a fact.

(b.) That a man heard or saw something is a fact.

(c.) That a man said certain words is a fact.

(d.) That a man holds a certain opinion, has a certain intention, acts in good faith, or fraudulently, or uses a particular word in a particular sense, or is or was at a specified time conscious of a particular sensation, is a fact.

(e.) That a man has a certain reputation is a fact.

'Relevant.'

One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts.

"Facts in issue."

The expression "Facts in issue" means and includes—

any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature, or extent of any right, liability, or disability, asserted or denied in any suit or proceeding, necessarily follows.

Explanation.—Whenever, under the provisions of the law for the time being in force relating to Civil Procedure, any Court records an issue of fact, the fact to be asserted or denied in the answer to such issue, is a fact in issue.

Illustrations.

A is accused of the murder of B.

At his trial the following facts may be in issue:—

That A caused B's death;

That A intended to cause B's death;

That A had received grave and sudden provocation from B;

That A, at the time of doing the act which caused B's death, was, by reason of unsoundness of mind, incapable of knowing its nature.

"Document."

"Document" means any matter expressed or described upon any substance by means of letters, figures, or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

Illustrations.

A writing is a document.

Words printed, lithographed, or photographed are documents.

A map or plan is a document.

An inscription on a metal, plate, or stone is a document.

A caricature is a document.

"Evidence."

"Evidence" means and includes—

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry;

such statements are called oral evidence:

(2) all documents produced for the inspection of the Court;

such documents are called documentary evidence.

"Proved."

A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case to act upon the supposition that it exists.

"Disproved."

A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

"Not proved."

A fact is said not to be proved when it is neither proved nor disproved.

"May presume."

4. Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it.

"Shall presume."

Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.

"Conclusive proof."

When one fact is declared by this Act to be conclusive proof of another, the Court shall on proof of the one fact regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.

CHAPTER II.—OF THE RELEVANCY OF FACTS.

Evidence may be given of facts in issue and relevant facts.

5. Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, aud of no others.

Explanation.—This section shall not enable any person to give evidence of a fact which he is disentitled to prove by any provision of the law for the time being in force relating to Civil Procedure.

Illustrations.

(*a.*) A is tried for the murder of B by beating him with a club with the intention of causing his death.

At A's trial the following facts are in issue—

A's beating B with the club;
A's causing B's death by such beating;
A's intention to cause B's death.

(*b.*) A suitor does not bring with him, and have in readiness for production at the first hearing of the case, a bond on which he relies. This section does not enable him to produce the bond or prove its contents at a subsequent stage of the proceedings, otherwise than in accordance with the conditions prescribed by the Code of Civil Procedure. [illegible]

Relevancy of facts forming part of same transaction.

6. Facts which though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.

Illustrations.

(*a.*) A is accused of the murder of B by beating him. Whatever was said or done by A or B or the by-standers at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact.

(*b.*) A is accused of waging war against the Queen by taking part in an armed insurrection in which property is destroyed, troops are attacked, and gaols are broken open. The occurrence of these facts is relevant, as forming part of the general transaction, though A may not have been present at all of them.

(*c.*) A sues B for a libel contained in a letter forming part of a correspondence. Letters between the parties relating to the subject out of which the libel arose, and forming part of the correspondence in which it is contained, are relevant facts, though they do not contain the libel itself.

(*d.*) The question is whether certain goods ordered from B were delivered to A. The goods were delivered to several intermediate persons successively. Each delivery is a relevant fact.

Facts which are occasion, cause, or effect of facts in issue.

7. Facts which are the occasion, cause, or effect, immediate or otherwise, of relevant facts, or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant.

Illustrations.

(*a.*) The question is, whether A robbed B.

The facts that, shortly before the robbery, B went to a fair with money in his possession, and that he showed it, or mentioned the fact that he had it, to third persons, are relevant.

(*b.*) The question is, whether A murdered B.

Marks on the ground, produced by a struggle at or near the place where the murder was committed, are relevant facts.

(*c.*) The question is, whether A poisoned B.

The state of B's health before the symptoms ascribed to poison, and habits of B, known to A, which afforded an opportunity for the administration of poison, are relevant facts.

Motive, preparation, and previous or subsequent conduct.

8. Any fact is relevant which shews or constitutes a motive or preparation for any fact in issue or relevant fact.

The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

Explanation 1.—The word "conduct" in this section does not include statements, unless those statements accompany and explain acts other than statements: but this explanation is not to affect the relevancy of statements under any other section of this Act.

Explanation 2.—When the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affects such conduct, is relevant.

Illustrations.

(*a.*) A is tried for the murder of B.

The facts that A murdered C, that B knew that A had murdered C, and that B had tried to extort money from A by threatening to make his knowledge public, are relevant.

(*b.*) A sues B upon a bond for the payment of money. B denies the making of the bond.

The fact that, at the time when the bond was alleged to be made, B required money for a particular purpose, is relevant.

(*c.*) A is tried for the murder of B by poison.

The fact that, before the death of B, A procured poison similar to that which was administered to B, is relevant.

(*d.*) The question is whether a certain document is the will of A.

The facts that, not long before the date of the alleged will, A made inquiry into matters to which the provisions of the alleged will relate, that he consulted vakils in reference to making the will, and that he caused drafts of other wills to be prepared, of which he did not approve, are relevant.

(*e.*) A is accused of a crime.

The facts that, either before, or at the time of, or after the alleged crime, A provided evidence which would tend to give to the facts of the case an appearance favorable to himself, or that he destroyed or concealed evidence, or prevented the presence or procured the absence of persons who might have been witnesses, or suborned persons to give false evidence respecting it, are relevant.

(*f.*) The question is, whether A robbed B.

The facts that, after B was robbed, C said in A's presence—'the police are coming to look for the man who robbed B,'—and that immediately afterwards A ran away, are relevant.

(*g.*) The question is, whether A owes B rupees 10,000.

The facts that A asked C to lend him money, and that D said to C in A's presence and hearing—'I advise you not to trust A, for he owes B 10,000 rupees,'—and that A went away without making any answer, are relevant facts.

(*h.*) The question is, whether A committed a crime.

The fact that A absconded after receiving a letter warning him that inquiry was being made for the criminal, and the contents of the letter, are relevant.

(*i.*) A is accused of a crime.

The facts that, after the commission of the alleged crime, he absconded, or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it, are relevant.

(*j.*) The question is, whether A was ravished.

The facts that, shortly after the alleged rape, she made a complaint relating to the crime, the circumstances under which, and the terms in which, the complaint was made, are relevant.

The fact that, without making a complaint, she said that she had been ravished is not relevant as conduct under this section, though it may be relevant

as a dying declaration under section 32 (1), or

as corroborative evidence under section 157.

(*k.*) The question is, whether A was robbed.

The fact that, soon after the alleged robbery, he made a complaint relating to the offence, the circumstances under which, and the terms in which, the complaint was made, are relevant.

The fact that he said he had been robbed without making any complaint is not relevant as conduct under this section, though it may be relevant

as a dying declaration under section 32, clause (1), or

as corroborative evidence under section 157.

Facts necessary to explain or introduce relevant facts.

9. Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of anything or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose.

Illustrations.

(*a.*) The question is, whether a given document is the will of A.

The state of A's property and of his family at the date of the alleged will may be relevant facts.

(*b.*) A sues B for a libel imputing disgraceful conduct to A. B affirms that the matter alleged to be libellous is true.

The position and relations of the parties at the time when the libel was published may be relevant facts as introductory to the facts in issue.

The particulars of a dispute between A and B about a matter unconnected with the alleged libel are irrelevant, though the fact that there was a dispute may be relevant if it affected the relations between A and B.

(c.) A is accused of a crime.

The fact that, soon after the commission of the crime, A absconded from his house, is relevant under section eight, as conduct subsequent to and affected by facts in issue.

The fact that, at the time when he left home, he had sudden and urgent business at the place to which he went, is relevant as tending to explain the fact that he left home suddenly.

The details of the business on which he left are not relevant, except in so far as they are necessary to show that the business was sudden and urgent.

(d.) A sues B for inducing C to break a contract of service made by him with A. C, on leaving A's service, says to A—'I am leaving you because B has made me a better offer.' This statement is a relevant fact as explanatory of C's conduct, which is relevant as a fact in issue.

(e.) A, accused of theft, is seen to give the stolen property to B, who is seen to give it to A's wife. B says, as he delivers it—'A says you are to hide this.' B's statement is relevant as explanatory of a fact which is part of the transaction.

(f.) A is tried for a riot and is proved to have marched at the head of a mob. The cries of the mob are relevant as explanatory of the nature of the transaction.

Things said or done by conspirator in reference to common design.

10. Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, any thing said, done, or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.

Illustration.

(a.) Reasonable ground exists for believing that A has joined in a conspiracy to wage war against the Queen.

The facts that B procured arms in Europe for the purpose of the conspiracy, C collected money in Calcutta for a like object, D persuaded persons to join the conspiracy in Bombay, E published writings advocating the object in view at Agra, and F transmitted from Delhi to G at Cabul the money which C had collected at Calcutta, and the contents of a letter written by H giving an account of the conspiracy, are each relevant, both to prove the existence of the conspiracy, and to prove A's complicity in it, although he may have been ignorant of all of them, and although the persons by whom they were done were strangers to him, and although they may have taken place before he joined the conspiracy or after he left it.

When facts not otherwise relevant become relevant.

11. Facts not otherwise relevant are relevant—

(1) if they are inconsistent with any fact in issue or relevant facts;

(2) if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

Illustrations.

(a.) The question is, whether A committed a crime at Calcutta on a certain day.

The fact that on that day A was at Lahore is relevant.

The fact that near the time when the crime was committed, A was at a distance from the place where it was committed, which would render it highly improbable, though not impossible, that he committed it, is relevant.

(b.) The question is, whether A committed a crime.

The circumstances are such that the crime must have been committed either by A, B, C, or D. Every fact which shows that the crime could have been committed by no one else and that it was not committed by either B, C, or D, is relevant.

In suits for damages, facts tending to enable Court to determine amount are relevant.

12. In suits in which damages are claimed, any fact which will enable the Court to determine the amount of damages which ought to be awarded is relevant.

Facts relevant when right or custom is in question.

13. Where the question is as to the existence of any right or custom, the following facts are relevant—

(a.) Any transaction by which the right or custom in question was created, claimed, modified, recognized, asserted or denied, or which was inconsistent with its existence.

(*b.*) Particular instances in which the right or custom was claimed, recognized, or exercised, or in which its exercise was disputed, asserted, or departed from.

Illustration.

The question is, whether A has a right to a fishery. A deed conferring the fishery on A's ancestors, a mortgage of the fishery by A's father, a subsequent grant of the fishery by A's father, irreconcileable with the mortgage, particular instances in which A's father exercised the right, or in which the exercise of the right was stopped by A's neighbours, are relevant facts.

Fact showing existence of state of mind, or of body or bodily feeling.

14. Facts showing the existence of any state of mind—such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing the existence of any state of body or bodily feeling—are relevant, when the existence of any such state of mind or body or bodily feeling, is in issue or relevant.

Explanation.—A fact relevant as showing the existence of a relevant state of mind must show that it exists, not generally, but in reference to the particular matter in question.

Illustrations.

(*a.*) A is accused of receiving stolen goods knowing them to be stolen. It is proved that he was in possession of a particular stolen article.

The fact that at the same time he was in possession of many other stolen articles is relevant, as tending to show that he knew each and all of the articles of which he was in possession to be stolen.

(*b.*) A is accused of fraudulently delivering to another person a piece of counterfeit coin which, at the time when he delivered it, he knew to be counterfeit.

The fact that, at the time of its delivery, A was possessed of a number of other pieces of counterfeit coin, is relevant.

(*c.*) A sues B for damage done by a dog of B's, which B knew to be ferocious.

The facts that the dog had previously bitten X, Y, and Z, and that they had made complaints to B, are relevant.

(*d.*) The question is whether A, the acceptor of a bill of exchange, knew that the name of the payee was fictitious.

The fact that A had accepted other bills drawn in the same manner before they could have been transmitted to him by the payee if the payee had been a real person, is relevant, as showing that A knew that the payee was a fictitious person.

(*e.*) A is accused of defaming B by publishing an imputation intended to harm the reputation of B.

The fact of previous publications by A respecting B, showing ill-will on the part of A towards B, is relevant, as proving A's intention to harm B's reputation by the particular publication in question.

The facts that there was no previous quarrel between A and B, and that A repeated the matter complained of as he heard it, are relevant, as showing that A did not intend to harm the reputation of B.

(*f.*) A is sued by B for fraudulently representing to B that C was solvent, whereby B, being induced to trust C, who was insolvent, suffered loss.

The fact that, at the time when A represented C to be solvent, C was supposed to be solvent by his neighbours and by persons dealing with him, is relevant, as showing that A made the representation in good faith.

(*g.*) A is sued by B for the price of work done by B, upon a house of which A is owner, by the order of C, a contractor.

A's defence is that B's contract was with C.

The fact that A paid C for the work in question is relevant, as proving that A did, in good faith, make over to C the management of the work in question, so that C was in a position to contract with B on C's own account, and not as agent for A.

(*h.*) A is accused of the dishonest misappropriation of property which he had found, and the question is whether, when he appropriated it, he believed in good faith that the real owner could not be found.

The fact that public notice of the loss of the property had been given in the place where A was, is relevant, as showing that A did not in good faith believe that the real owner of the property could not be found.

The fact that A knew, or had reason to believe, that the notice was given fraudulently by C, who had heard of the loss of the property and wished to set up a false claim to it, is relevant, as showing that the fact that A knew of the notice did not disprove A's good faith.

(*i.*) A is charged with shooting at B with intent to kill him. In order to show A's intent, the fact of A's having previously shot at B may be proved.

(j) A is charged with sending threatening letters to B. Threatening letters previously sent by A to B may be proved, as showing the intention of the letters.

(k.) The question is, whether A has been guilty of cruelty towards B, his wife.

Expressions of their feeling towards each other shortly before or after the alleged cruelty, are relevant facts.

(l.) The question is, whether A's death was caused by poison.

Statements made by A during his illness as to his symptoms, are relevant facts.

(m.) The question is, what was the state of A's health at the time when an assurance on his life was effected.

Statements made by A as to the state of his health at or near the time in question, are relevant facts.

(n.) A sues B for negligence in providing him with a carriage for hire not reasonably fit for use, whereby A was injured.

The fact that B's attention was drawn on other occasions to the defect of that particular carriage, is relevant.

The fact that B was habitually negligent about the carriages which he let to hire, is irrelevant.

(o.) A is tried for the murder of B by intentionally shooting him dead.

The fact that A, on other occasions, shot at B is relevant, as showing his intention to shoot B.

The fact that A was in the habit of shooting at people with intent to murder them, is irrelevant.

(p.) A is tried for a crime.

The fact that he said something indicating an intention to commit that particular crime, is relevant.

The fact that he said something indicating a general disposition to commit crimes of that class, is irrelevant.

Facts bearing on question whether act was accidental or intentional.

15. When there is a question whether an act was accidental or intentional, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant.

Illustrations.

(a.) A is accused of burning down his house in order to obtain money for which it is insured.

The facts that A lived in several houses successively, each of which he insured, in each of which a fire occurred, and after each of which fires A received payment from a different insurance office, are relevant, as tending to show that the fires were not accidental.

(b.) A is employed to receive money from the debtors of B. It is A's duty to make entries in a book showing the amounts received by him. He makes an entry showing that on a particular occasion he received less than he really did receive.

The question is, whether this false entry was accidental or intentional.

The facts that other entries made by A in the same book are false, and that the false entry is in each case in favor of A, are relevant.

(c.) A is accused of fraudulently delivering to B a counterfeit rupee.

The question is, whether the delivery of the rupee was accidental.

The facts that soon before or soon after the delivery to B, A delivered counterfeit rupees to C, D, and E are relevant, as showing that the delivery to A was not accidental.

Existence of course of business when relevant.

16. When there is a question whether a particular act was done, the existence of any course of business, according to which it naturally would have been done, is a relevant fact.

Illustrations.

(a.) The question is, whether a particular letter was despatched.

The facts that it was the ordinary course of business for all letters put in a certain place to be carried to the post, and that that particular letter was put in that place, are relevant.

(b.) The question is, whether a particular letter reached A.

The facts that it was posted in due course, and was not returned through the Dead Letter office, are relevant.

ADMISSIONS.

Admissions defined.

17. An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned.

Admission—
by party to proceeding or his agent;

18. Statements made by a party to the proceeding, or by an agent to any such party, whom the Court regards, under the circumstances of the case, as expressly or impliedly authorized by him to make them, are admissions.

by suitor in representative character.

Statements made by parties to suits suing or sued in a representative character are not admissions, unless they were made while the party making them held that character.

Statements made by—

by party interested in subject-matter;

(1) persons who have any proprietary or pecuniary interest in the subject-matter of the proceeding, and who make the statement in their character of persons so interested, or

(2) persons from whom the parties to the suit have derived their interest in the subject-matter of the suit,

by person from whom interest derived.

are admissions if they are made during the continuance of the interest of the persons making the statements.

Admissions by persons whose position must be proved as against party to suit.

19. Statements made by persons whose position or liability it is necessary to prove as against any party to the suit, are admissions if such statements would be relevant as against such persons in relation to such position or liability in a suit brought by or against them, and if they are made whilst the person making them occupies such position or is subject to such liability.

Illustration.

A undertakes to collect rents for B.

B sues A for not collecting rent due from C to B.

A denies that rent was due from C to B.

A statement by C that he owed B rent is an admission, and is a relevant fact as against A, if A denies that C did owe rent to B.

Admissions by persons expressly referred to by party to suit.

20. Statements made by persons to whom a party to the suit has expressly referred for information in reference to a matter in dispute are admissions.

Illustration.

The question is, whether a horse sold by A to B is sound.

A says to B—'Go and ask C, C knows all about it.' C's statement is an admission.

Relevancy of admissions against or in behalf of persons concerned.

21. Admissions are relevant and may be proved as against the person who makes them, or his representative in interest; but they cannot be proved by or on behalf of the person who makes them or by his representative in interest, except in the following cases:—

(1.) An admission may be proved by or on behalf of the person making it when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under section thirty-two.

(2.) An admission may be proved by or on behalf of the person making it when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable.

(3.) An admission may be proved by or on behalf of the person making it if it is relevant otherwise than as an admission.

Illustrations.

(a.) The question between A and B is, whether a certain deed is or is not forged. A affirms that it is genuine, B that it is forged.

A may prove a statement by B that the deed is genuine, and B may prove a statement by A that the deed is forged; but A cannot prove a statement by himself that the deed is genuine, nor can B prove a statement by himself that the deed is forged.

(b.) A, the Captain of a ship, is tried for casting her away.

Evidence is given to show that the ship was taken out of her proper course.

A produces a book kept by him in the ordinary course of his business, showing observation alleged to have been taken by him from day to day, and indicating that the ship was not taken out of her proper course. A may prove these statements, because they would be admissible between third parties if he were dead under section thirty-two, clause (2).

(c.) A is accused of a crime committed by him at Calcutta.

He produces a letter written by himself and dated at Lahore on that day and bearing the Lahore post-mark of that day.

The statement in the date of the letter is admissible, because, if A were dead, it would be admissible under section thirty-two, clause (2.)

(*d*) A is accused of receiving stolen goods knowing them to be stolen.

He offers to prove that he refused to sell them below their value.

A may prove these statements, though they are admissions, because they are explanatory of conduct influenced by facts in issue.

(*e*.) A is accused of fraudulently having in his possession counterfeit coin which he knew to be counterfeit.

He offers to prove that he asked a skilful person to examine the coin, as he doubted whether it was counterfeit or not, and that that person did examine it and told him it was genuine.

A may prove these facts for the reasons stated in the last preceding illustration.

When oral admissions as to contents of documents are relevant.

22. Oral admissions as to the contents of a document are not relevant, unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such document under the rules hereinafter contained, or unless the genuineness of a document produced is in question.

Admissions in civil cases when relevant.

23. In civil cases no admission is relevant, if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given.

Explanation.—Nothing in this section shall be taken to exempt any barrister, pleader, attorney, or vakíl from giving evidence of any matter of which he may be compelled to give evidence under section 126.

Confession caused by inducement, threat, or promise, irrelevant.

24. A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat, or promise, having reference to the charge against the accused person, proceeding from a person in authority, and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

Confession made to a Police officer not to be used as evidence.

25. No confession made to a Police officer shall be proved as against a person accused of any offence.

Confession made by accused while in custody of Police not to be used as evidence.

26. No confession made by any person whilst he is in the custody of a Police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

So much of statement or confession made by accused as relates to fact thereby discovered, may be proved.

27. Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a Police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

Confession made after removal of impression caused by inducement, threat, or promise, relevant.

28. If such a confession as is referred to in section 24 is made after the impression caused by any such inducement, threat, or promise has, in the opinion of the Court, been fully removed, it is relevant.

Confession otherwise relevant not to become irrelevant because of promise of secrecy, &c.

29. If such a confession is otherwise relevant, it does not become irrelevant merely because it was made under a promise of secrecy, or in consequence of a deception practised on the accused person for the purpose of obtaining it, or when he was drunk, or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him.

Consideration of proved confession affecting person making it and others jointly under trial for same offence.

30. When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.

Illustrations.

(*a*.) A and B are jointly tried for the murder of C. It is proved that A said,—"B and I murdered C." The Court may consider the effect of this confession as against B.

(*b.*) A is on his trial for the murder of C. There is evidence to show that C was murdered by A and B, and that B said,—"A and I murdered C."

This statement may not be taken into consideration by the Court against A, as B is not being jointly tried.

Admissions not conclusive proof, but may estop.

31. Admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under the provisions hereinafter contained.

STATEMENTS BY PERSONS WHO CANNOT BE CALLED AS WITNESSES.

Cases in which statement of relevant fact by person who is dead or cannot be found, &c., is relevant.

32. Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:—

When it relates to cause of death.

(1.) When the statement is made by a person, as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

or is made in course of business;

(2.) When the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty; or of an acknowledgment written or signed by him of the receipt of money, goods, securities, or property of any kind; or of a document used in commerce written, or signed by him, or of the date of a letter or other document usually dated, written or signed by him.

or against interest of maker;

(3.) When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages.

or gives opinion as to public right or custom or matters of general interest;

(4). When the statement gives the opinion of any such person, as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom, or matter had arisen.

or relates to existence of relationship;

(5.) When the statement relates to the existence of any relationship between persons as to whose relationship the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised.

or is made in will or deed of deceased person;

(6.) When the statement relates to the existence of any relationship between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree, or upon any tombstone, family portrait, or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised.

or relates to transaction mentioned in section 13, clause (*a*);

(7.) When the statement is contained in any deed, will, or other document which relates to any such transaction as is mentioned in section thirteen, clause (*a*).

or is made by several persons, and expresses feelings relevant to matter in question.

(8.) When the statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question.

Illustrations.

(*a.*) The question is, whether A was murdered by B; or

A dies of injuries received in a transaction in the course of which she was ravished. The question is whether she was ravished by B: or

The question is, whether A was killed by B under such circumstances that a suit would lie against B by A's widow.

Statements made by A as to the cause of his or her death, referring respectively to the murder, the rape, and the actionable wrong under consideration, are relevant facts.

(*b.*) The question is as to the date of A's birth.

An entry in the diary of a deceased surgeon, regularly kept in the course of business, stating that, on a given day, he attended A's mother and delivered her of a son, is a relevant fact.

(*c.*) The question is, whether A was in Calcutta on a given day.

A statement in the diary of a deceased solicitor, regularly kept in the course of business, that, on a given day, the solicitor attended A at a place mentioned in Calcutta for the purpose of conferring with him upon specified business, is a relevant fact.

(*d.*) The question is, whether a ship sailed from Bombay harbour on a given day.

A letter written by a deceased member of a merchant's firm, by which she was chartered, to their correspondents in London to whom the cargo was consigned, stating that the ship sailed on a given day from Bombay harbour, is a relevant fact.

(*e.*) The question is, whether rent was paid to A for certain land.

A letter from A's deceased agent to A saying that he had received the rent on A's account and held it at A's orders, is a relevant fact.

(*f.*) The question is, whether A and B were legally married.

The statement of a deceased clergyman that he married them under such circumstances that the celebration would be a crime, is relevant.

(*g.*) The question is, whether A, a person who cannot be found, wrote a letter on a certain day. The fact that a letter written by him is dated on that day, is relevant.

(*h.*) The question is, what was the cause of the wreck of a ship.

A protest made by the captain, whose attendance cannot be procured, is a relevant fact.

(*i.*) The question is, whether a given road is a public way.

A statement by A, a deceased headman of the village, that the road was public, is a relevant fact.

(*j.*) The question is, what was the price of grain on a certain day in a particular market. A statement of the price, made by a deceased bánya in the ordinary course of his business, is a relevant fact.

(*k.*) The question is, whether A, who is dead, was the father of B.

A statement by A that B was his son, is a relevant fact.

(*l.*) The question is, what was the date of the birth of A.

A letter from A's deceased father to a friend, announcing the birth of A on a given day, is a relevant fact.

(*m.*) The question is, whether, and when, A and B were married.

An entry in a memorandum book by C, the deceased father of B, of his daughter's marriage with A at a given date, is a relevant fact.

(*n.*) A sues B for a libel expressed in a painted caricature exposed in a shop window. The question is as to the similarity of the caricature and its libellous character. The remarks of a crowd of spectators on these points may be proved.

Evidence in a former judicial proceeding when relevant.

33. Evidence given by a witness in a judicial proceeding, or before any person authorised by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable :

Provided

that the proceeding was between the same parties or their representatives in interest ;

that the adverse party in the first proceeding had the right and opportunity to cross-examine ;

that the questions in issue were substantially the same in the first as in the second proceeding.

Explanation.—A criminal trial or enquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.

STATEMENTS MADE UNDER SPECIAL CIRCUMSTANCES.

Entries in books of account when relevant.

34. Entries in books of account, regularly kept in the course of business, are relevant whenever they refer to a matter into which the Court has to enquire, but such statements shall not alone be sufficient evidence to charge any person with liability.

Illustration.

A sues B for Rs. 1,000 and shows entries in his account books showing B to be indebted to him to this amount. The entries are relevant, but are not sufficient without other evidence to prove the debt.

Entry in public record, made in performance of duty enjoined by law, when relevant.

35. An entry in any public or other official book, register, or record, stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or record is kept, is itself a relevant fact.

Maps and plans when relevant.

36. Statements of facts in issue or relevant facts, made in published maps or charts generally offered for public sale, or in maps or plans made under the authority of Government, as to matters usually represented or stated in such maps, charts, or plans, are themselves relevant facts.

Statement as to fact of public nature contained in any Act or Notification of Government, when relevant.

37. When the Court has to form an opinion as to the existence of any fact of a public nature, any statement of it, made in a recital contained in any Act of Parliament or in any Act of the Governor-General of India in Council, or of the Governors in Council of Madras or Bombay, or of the Lieutenant-Governor in Council of Bengal, or in a notification of the Government appearing in the *Gazette of India*, or in the Gazette of any Local Government, or in any printed paper purporting to be the *London Gazette* or the Government Gazette of any colony or possession of the Queen, is a relevant fact.

Statements in law-books.

38. When the Court has to form an opinion as to a law of any country, any statement of such law contained in a book purporting to be printed or published under the authority of the Government of such country and to contain any such law, and any report of a ruling of the Courts of such country contained in a book purporting to be a report of such rulings, is relevant.

HOW MUCH OF A STATEMENT IS TO BE PROVED.

What evidence to be given when statement forms part of a conversation, document, book, or series of letters or papers.

39. When any statement of which evidence is given forms part of a longer statement, or of a conversation or part of an isolated document, or is contained in a document which forms part of a book, or of a connected series of letters or papers, evidence shall be given of so much and no more of the statement, conversation, document, book, or series of letters or papers as the Court considers necessary in that particular case to the full understanding of the nature and effect of the statement, and of the circumstances under which it was made.

JUDGMENTS OF COURTS OF JUSTICE WHEN RELEVANT.

Previous judgments relevant to bar a second suit or trial.

40. The existence of any judgment, order or decree which by law prevents any Court from taking cognizance of a suit or holding a trial, is a relevant fact when the question is whether such Court ought to take cognizance of such suit, or to hold such trial.

Judgments in probate, &c., jurisdiction.

41. A final judgment, order or decree of a competent Court, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant.

Such judgment, order, or decree is conclusive proof,

that any legal character, which it confers accrued at the time when such judgment, order, or decree came into operation;

that any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment declares it to have accrued to that person;

that any legal character which it takes away from any such person ceased at the time from which such judgment declared that it had ceased or should cease;

and that any thing to which it declares any person to be so entitled was the property of that person at the time from which such judgment declares that it had been or should be his property.

Judgment, order or decree between third parties when irrelevant and when not.

42. Judgments, orders or decrees, other than those mentioned in section 41, are relevant if they relate to matters of a public nature relevant to the enquiry; but such judgments, orders, or decrees are not conclusive proof of that which they state.

Illustration.

A sues B for trespass on his land. B alleges the existence of a public right of way over the land, which A denies.

The existence of a decree in favor of the defendant, in a suit by A against C for a trespass on the same land, in which C alleged the existence of the same right of way, is relevant, but it is not conclusive proof that the right of way exists.

What judgments, &c., not relevant.

43. Judgments, orders, or decrees, other than those mentioned in sections 40, 41, and 42, are irrelevant, unless the existence of such judgment, order, or decree, is a fact in issue, or is relevant under some other provision of this Act.

Illustrations.

(a) A and B separately sue C for a libel which reflects upon each of them. C in each case says that the matter alleged to be libellous is true, and the circumstances are such that it is probably true in each case, or in neither.

A obtains a decree against C for damages on the ground that C failed to make out his justification. The fact is irrelevant as between B and C.

(b.) A prosecutes B for adultery with C, A's wife.

B denies that C is A's wife, but the Court convicts B of adultery.

Afterwards, C is prosecuted for bigamy in marrying B during A's life-time. C says that she never was B's wife.

The judgment against B is irrelevant as against C.

(c.) A prosecutes B for stealing a cow from him. B is convicted.

A, afterwards, sues C for the cow, which B had sold to him before his conviction. As between A and C, the judgment against B is irrelevant.

(d.) A has obtained a decree for the possession of land against B. C, B's son, murders A in consequence.

The existence of the judgment is relevant, as showing motive for a crime.

Fraud, collusion, and incompetency of Court may be proved.

44. Any party to a suit or other proceeding may show that any judgment, order, or decree which is relevant under section 40, 41, or 42, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion.

OPINIONS OF THIRD PERSONS WHEN RELEVANT.

Opinions of experts.

45. When the Court has to form an opinion upon a point of foreign law, or of science or art, or as to identity of handwriting, the opinions upon that point of persons especially skilled in such foreign law, science, or art, are relevant facts.

Such persons are called experts.

Illustrations.

(a.) The question is, whether the death of A was caused by poison.

The opinions of experts as to the symptoms produced by the poison by which A is supposed to have died, are relevant.

(b.) The question is, whether A, at the time of doing a certain act, was, by reason of unsoundness of mind, incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law.

The opinions of experts upon the question whether the symptoms exhibited by A commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of knowing the nature of the acts which they do, or of knowing that what they do is either wrong or contrary to law, are relevant.

(c.) The question is, whether a certain document was written by A. Another document is produced which is proved or admitted to have been written by A.

The opinions of experts on the question whether the two documents were written by the same person or by different persons, are relevant.

Facts bearing upon opinions of experts.

46. Facts, not otherwise relevant, are relevant if they support or are inconsistent with the opinions of experts, when such opinions are relevant.

Illustrations.

(*a*). The question is, whether A was poisoned by a certain poison.

The fact that other persons, who were poisoned by that poison, exhibited certain symptoms which experts affirm or deny to be the symptoms of that poison, is relevant.

(*b*). The question is, whether an obstruction to a harbour is caused by a certain sea wall.

The fact that other harbours similarly situated in other respects, but where there were no such sea walls, began to be obstructed at about the same time, is relevant.

Opinion as to handwriting.

47. When the Court has to form an opinion as to the persons by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is a relevant fact.

Explanation.—A person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him.

Illustration.

The question is, whether a given letter is in the handwriting of A, a merchant in London.

B is a merchant in Calcutta, who has written letters addressed to A and received letters purporting to be written by him. C is B's clerk, whose duty it was to examine and file B's correspondence. D is B's broker, to whom B habitually submitted the letters purporting to be written by A for the purpose of advising with him thereon.

The opinions of B, C, and D on the question whether the letter is in the handwriting of A are relevant, though neither B, C, nor D ever saw A write.

Opinion as to existence of right or custom, when relevant.

48. When the Court has to form an opinion as to the existence of any general custom or right, the opinions, as to the existence of such custom or right, of persons who would be likely to know of its existence if it existed, are relevant.

Explanation.—The expression 'general custom or right' includes customs or rights common to any considerable class of persons.

Illustration.

The right of the villagers of a particular village to use the water of a particular well is a general right within the meaning of this section.

Opinions as to usages, tenets, &c., when relevant.

49. When the Court has to form an opinion as to—

the usages and tenets of any body of men or family,

the constitution and government of any religious or charitable foundation, or

the meaning of words or terms used in particular districts or by particular classes of people,

the opinions of persons having special means of knowledge thereon, are relevant facts.

Opinion on relationship when relevant.

50. When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact: Provided that such opinion shall not be sufficient to prove a marriage in proceedings under the Indian Divorce Act, or in prosecutions under Section 494, 495, 497, or 498 of the Indian Penal Code.

Illustrations.

(*a.*) The question is, whether A and B were married.

The fact that they were usually received and treated by their friends as husband and wife, is relevant.

(*b.*) The question is, whether A was the legitimate son of B. The fact that A was always treated as such by members of the family, is relevant.

Grounds of opinion when relevant.

51. Whenever the opinion of any living person is relevant, the grounds on which such opinion is based are also relevant.

Illustration.

An expert may give an account of experiments performed by him for the purpose of forming his opinion.

CHARACTER WHEN RELEVANT.

In civil cases, character to prove conduct imputed irrelevant.

52. In civil cases, the fact that the character of any person concerned, is such as to render probable or improbable any conduct imputed to him, is irrelevant, except in so far as such character appears from facts otherwise relevant.

In criminal cases, previous good character relevant.

53. In criminal proceedings, the fact that the person accused is of a good character, is relevant.

Previous conviction in criminal trials relevant, but not previous bad character, except in reply.

54. In criminal proceedings, the fact that the accused person has been previously convicted of any offence is relevant; but the fact that he has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant.

Explanation.—This section does not apply to cases in which the bad character of any person is itself a fact in issue.

Character as affecting damages.

55. In civil cases, the fact that the character of any person is such as to affect the amount of damages which he ought to receive, is relevant.

Explanation.—In Sections 52, 53, 54, and 55, the word 'character' includes both reputation and disposition; but evidence may be given only of general reputation and general disposition, and not of particular acts by which reputation or disposition was shown.

PART II.

ON PROOF.

CHAPTER III.—FACTS WHICH NEED NOT BE PROVED.

No evidence required of fact judicially noticed.

56. No fact of which the Court will take judicial notice need be proved.

Facts of which Court must take judicial notice.

57. The Court shall take judicial notice of the following facts:—

(1.) All laws or rules having the force of law now or heretofore in force or hereafter to be in force in any part of British India:

(2.) All public Acts passed or hereafter to be passed by Parliament, and all local and personal Acts directed by Parliament to be judicially noticed:

(3.) Articles of War for Her Majesty's Army or Navy:

(4.) The course of proceeding of Parliament and of the Councils for the purposes of making Laws and Regulations established under the Indian Councils' Act, or any other law for the time being relating thereto.

Explanation.—The word 'Parliament,' in clauses (2) and (4), includes—

1. The Parliament of the United Kingdom of Great Britain and Ireland;
2. The Parliament of Great Britain;
3. The Parliament of England;
4. The Parliament of Scotland, and
5. The Parliament of Ireland.

(5.) The accession and the sign manual of the Sovereign for the time being of the United Kingdom of Great Britain and Ireland:

(6.) All seals of which English Courts take judicial notice: the seals of all the Courts of British India, and of all Courts out of British India, established by the authority of the Governor-General or any Local Government in Council: the seals of Courts of Admiralty and Maritime Jurisdiction and of Notaries public, and all seals which any person is authorized to use by any Act of Parliament or other Act or Regulation having the force of law in British India:

(7.) The accession to office, names, titles, functions, and signatures of the persons filling for the time being any public office in any part of British India, if the fact of their appointment to such office is notified in the *Gazette of India*, or in the official Gazette of any Local Government:

(8.) The existence, title, and national flag of every State or Sovereign recognized by the British Crown:

(9.) The divisions of time, the geographical divisions of the world, and public festivals, fasts, and holidays notified in the official Gazette:

(10.) The territories under the dominion of the British Crown:

(11.) The commencement, continuance, and termination of hostilities between the British Crown and any other State or body of persons:

(12.) The names of the members and officers of the Court, and of their deputies and subordinate officers and assistants, and also of all officers acting in execution of its process, and of all advocates, attorneys, proctors, vakils, pleaders, and other persons authorized by law to appear or act before it:

(13.) The rule of the road.

In all these cases, and also on all matters of public history, literature, science, or art the Court may resort for its aid to appropriate books or documents of reference.

If the Court is called upon by any person to take judicial notice of any fact, it may refuse to do so, unless and until such person produces any such book or document as it may consider necessary to enable it to do so.

Facts admitted.

58. No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings: Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.

CHAPTER IV.—OF ORAL EVIDENCE.

Proof of facts by oral evidence.

59. All facts, except the contents of documents, may be proved by oral evidence.

Oral evidence must be direct.

60. Oral evidence must, in all cases, whatever, be direct; That is to say—

If it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;

If it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;

If it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;

If it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds.

Provided that the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treatises if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable;

Provided also that, if oral evidence refers to the existence or condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection.

CHAPTER V.—OF DOCUMENTARY EVIDENCE.

Proof of contents of documents.

61. The contents of documents may be proved either by primary or by secondary evidence.

Primary evidence.

62. Primary evidence means the document itself produced for the inspection of the Court.

Explanation 1.—Where a document is executed in several parts, each part is primary evidence of the document:

Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.

Explanation 2.—Where a number of documents are all made by one uniform process, as in the case of printing, lithography, or photography, each is primary evidence of the contents of the rest; but where they are all copies of a common original, they are not primary evidence of the contents of the original.

Illustration.

A person is shown to have been in possession of a number of placards, all printed at one time from one original. Any one of the placards is primary evidence of the contents of any other, but no one of them is primary evidence of the contents of the original.

Secondary evidence.

63. Secondary evidence means and includes,—

(1.) Certified copies given under the provisions hereinafter contained;

(2.) Copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;

(3.) Copies made from or compared with the original;

(4.) Counterparts of documents as against the parties who did not execute them;

(5.) Oral accounts of the contents of a document given by some person who has himself seen it.

Illustrations.

(*a.*) A photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed was the original.

(*b.*) A copy compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter, if it is shown that the copy made by the copying machine was made from the original.

(*c.*) A copy transcribed from a copy, but afterwards compared with the original, is secondary evidence; but the copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original.

(*d.*) Neither an oral account of a copy compared with the original, nor an oral account of a photograph or machine-copy of the original, is secondary evidence of the original.

Proof of documents by primary evidence.

64. Documents must be proved by primary evidence except in the cases hereinafter mentioned.

Cases in which secondary evidence relating to documents may be given.

65. Secondary evidence may be given of the existence, condition, or contents of a document in the following cases:—

(*a*) When the original is shown or appears to be in the possession or power
of the person against whom the document is sought to be proved, or
of any person out of reach of, or not subject to, the process of the Court, or
of any person legally bound to produce it,

and when, after the notice mentioned in section sixty-six, such person does not produce it;

(*b.*) When the existence, condition, or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(*c.*) When the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(*d.*) When the original is of such a nature as not to be easily moveable;

(*e.*) When the original is a public document within the meaning of section seventy-four;

(*f.*) When the original is a document of which a certified copy is permitted by this Act, or by any other law in force in British India, to be given in evidence;

(*g.*) When the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.

In cases (*a*), (*c*), and (*d*), any secondary evidence of the contents of the document is admissible.

In case (*b*), the written admission is admissible.

In case (*e*) or (*f*), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (*g*), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

Rules as to notice to produce.

66. Secondary evidence of the contents of the documents referred to in section sixty-five, clause (*a*), shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, such notice to produce

it as is prescribed by law; and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case:

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it:—

(1.) When the document to be proved is itself a notice;

(2.) When, from the nature of the case, the adverse party must know that he will be required to produce it;

(3.) When it appears or is proved that the adverse party has obtained possession of the original by fraud or force;

(4.) When the adverse party or his agent has the original in Court;

(5.) When the adverse party or his agent has admitted the loss of the document;

(6.) When the person in possession of the document is out of reach of, or not subject to, the process of the Court.

Proof of signature and handwriting of person alleged to have signed or written document produced.

67. If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting.

Proof of execution of document required by law to be attested.

68. If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive and subject to the process of the Court and capable of giving evidence.

Proof where no attesting witness found.

69. If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.

Admission of execution by party to attested document.

70. The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested.

Proof when attesting witness denies the execution.

71. If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence.

Proof of document not required by law to be attested.

72. An attested document not required by law to be attested may be proved as if it was unattested.

Comparison of handwritings.

73. In order to ascertain whether a signature, writing, or seal is that of the person by whom it purports to have been written or made, any signature, writing, or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing, or seal has not been produced or proved for any other purpose.

The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any works or figures alleged to have been written by such person.

PUBLIC DOCUMENTS.

Public documents.

74. The following documents are public documents:—

1. Documents forming the Acts, or records of the Acts—

(i) of the sovereign authority,

(ii) of official bodies and tribunals, and

(iii) of public officers, legislative, judicial, and executive, whether of British India, or of any other part of Her Majesty's dominions, or of a foreign country.

2. Public records kept in British India of private documents.

Private documents.

75. All other documents are private.

Certified copies of public documents.

76. Every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such

document or part thereof as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies.

Explanation.—Any officer who, by the ordinary course of official duty, is authorized to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this section.

Production of such copies.

77. Such certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies.

Proof of other official documents.

78. The following public documents may be proved as follows:—

(1.) Acts, orders, or notifications of the Executive Government of British India in any of its departments, or of any Local Government or any department of any Local Government,

by the records of the departments certified by the heads of those departments respectively,

or by any document purporting to be printed by order of any such Government:

(2.) The proceedings of the Legislatures,

by the journals of those bodies respectively, or by published Acts or abstracts or by copies purporting to be printed by order of Government:

(3.) Proclamations, orders, or regulations issued by Her Majesty or by the Privy Council, or by any department of Her Majesty's Government,

by copies or extracts contained in the *London Gazette*, or purporting to be printed by the Queen's Printer:

(4.) The Acts of the Executive or the proceedings of the Legislature of a foreign country,

by journals published by their authority, or commonly received in that country as such, or by a copy certified under the seal of the country or sovereign, or by a recognition thereof in some public Act of the Governor-General of India in Council:

(5.) The proceedings of a municipal body in British India,

by a copy of such proceedings certified by the legal keeper thereof, or by a printed book purporting to be published by the authority of such body:

(6). Public documents of any other class in a foreign country,

by the original, or by a copy certified by the legal keeper thereof, with a certificate under the seal of a notary public or of a British Consul or diplomatic agent, that the copy is duly certified by the officer having the legal custody of the original, and upon proof of the character of the document according to the law of the foreign country.

PRESUMPTIONS AS TO DOCUMENTS.

Presumption as to genuineness of certified copies.

79. The Court shall presume every document purporting to be a certificate, certified copy, or other document, which is by law declared to be admissible as evidence of any particular fact, and which purports to be duly certified, by any officer in British India, or by any officer in any Native State in alliance with Her Majesty, who is duly authorized thereto by the Governor-General in Council, to be genuine: Provided that such document is substantially in the form and purports to be executed in the manner directed by law in that behalf. The Court shall also presume that any officer, by whom any such document purports to be signed or certified, held, when he signed it, the official character which he claims in such paper.

Presumption on production of record of evidence.

80. Whenever any document is produced before any Court purporting to be a record or memorandum of the evidence or of any part of the evidence given by a witness in a judicial proceeding or before any officer authorised by law to take such evidence, or to be a statement or confession by any prisoner or accused person taken in accordance with law and purporting to be signed by any Judge or Magistrate or by any such officer as aforesaid, the Court shall presume—

that the document is genuine; that any statements, as to the circumstances under which it was taken, purporting to be made by the person signing it, are true, and that such evidence, statement, or confession was duly taken.

Presumption as to Gazettes.

81. The Court shall presume the genuineness of every document purporting to be the *London Gazette*, or the *Gazette of India*, or the Government Gazette of any Local Government, or of any colony, dependency or possession of the British Crown, or to be a newspaper or journal, or to be a copy of a private Act of Parliament printed by the Queen's Printer, and of every document purporting to be a document directed by any law to be kept by any person, if such document is kept substantially in the form required by law and is produced from proper custody.

Presumption as to document admissible in England without proof of seal or signature.

82. When any document is produced to any Court purporting to be a document which, by the law in force for the time being in England or Ireland, would be admissible in proof of any particular in any Court of Justice in England or Ireland without proof of the seal or stamp or signature authenticating it, or of the judicial or official character claimed by the person by whom it purports to be signed, the Court shall presume that such seal, stamp, or signature is genuine, and that the person signing it held, at the time when he signed it, the judicial or official character which he claims,

and the document shall be admissible for the same purpose for which it would be admissible in England or Ireland.

Proof of maps made for purposes of any cause.

83. The Court shall presume that maps or plans purporting to be made by the authority of Government were so made, and are accurate; but maps or plans made for the purposes of any cause must be proved to be accurate.

Presumption as to collections of laws and reports of decisions.

84. The Court shall presume the genuineness of every book purporting to be printed or published under the authority of the Government of any country, and to contain any of the laws of that country,

and of every book purporting to contain reports of decisions of the Courts of such country.

Presumption as to powers of attorney.

85. The Court shall presume that every document purporting to be a power of attorney, and to have been executed before and authenticated by a notary public, or any Court, Judge, Magistrate, British Consul or Vice-Consul, or representative of Her Majesty or of the Government of India, was so executed and authenticated.

Presumption as to certified copies of foreign judicial records.

86. The Court may presume that any document purporting to be a certified copy of any judicial record of any country not forming part of Her Majesty's dominions is genuine and accurate, if the document purports to be certified in any manner which is certified by any representative of Her Majesty or of the Government of India resident in such country to be the manner commonly in use in that country for the certification of copies of judicial records.

Presumption as to books and maps.

87. The Court may presume that any book to which it may refer for information on matters of public or general interest, and that any published map or chart, the statements of which are relevant facts and which is produced for its inspection, was written and published by the person, and at the time and place by whom or at which it purports to have been written or published.

Presumption as to photographs, machine copies and telegraphic messages.

*88. The Court may presume that a message, forwarded from a telegraph office to the person to whom such message purports to be addressed, corresponds with a message delivered for transmission at the office from which the message purports to be sent; but the Court shall not make any presumption as to the person by whom such message was delivered for transmission.

Presumption as to due execution, &c., of documents not produced.

89. The Court shall presume that every document, called for and not produced after notice to produce, was attested, stamped, and executed in the manner required by law.

Documents thirty years old.

90. Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document which purports to be in the handwriting of any particular person is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

Explanation.—Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.

This explanation applies also to section eighty-one.

Illustrations.

(*a.*) A has been in possession of landed property for a long time. He produces from his custody deeds relating to the land showing his titles to it. The custody is proper.

(*b.*) A produces deeds relating to landed property of which he is the mortgagee. The mortgagor is in possession. The custody is proper.

(*c.*) A, a connection of B, produces deeds relating to lands in B's possession, which were deposited with him by B for safe custody. The custody is proper.

CHAPTER VI.—OF THE EXCLUSION OF ORAL BY DOCUMENTARY EVIDENCE.

Evidence of terms of written contract.

91. When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant, or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

Exception 1.—When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.

Exception 2.—Wills under the Indian Succession Act may be proved by the Probate.

Explanation 1.—This section applies equally to cases in which the contracts, grants, or disposition of property referred to are contained in one document, and to cases in which they are contained in more documents than one.

Explanation 2.—Where there are more originals than one, one original only need be proved.

Explanation 3.—The statement in any document whatever of a fact other than the facts referred to in this section, shall not preclude the admission of oral evidence as to the same fact.

Illustrations.

(*a.*) If a contract be contained in several letters, all the letters in which it is contained must be proved.

(*b.*) If a contract is contained in a bill of exchange, the bill of exchange must be proved.

(*c.*) If a bill of exchange is drawn in a set of three, one only need be proved.

(*d.*) A contracts in writing with B for the delivery of indigo upon certain terms. The contract mentions the fact that B had paid A the price of other indigo contracted for verbally on another occasion.

Oral evidence is offered that no payment was made for the other indigo. The evidence is admissible.

(*e.*) A gives B a receipt for money paid by B.

Oral evidence is offered of the payment.

The evidence is admissible.

Exclusion of evidence of oral agreement.

92. When the terms of any such contract, grant, or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms:

Proviso (1).—Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law.

Proviso (2).—The existence of any separate oral agreement as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.

Proviso (3).—The existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant, or disposition of property, may be proved.

Proviso (4).—The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant, or disposition of property, may be proved, except in cases in which such contract, grant, or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

Proviso (5).—Any usage or custom by which incidents, not expressly mentioned in any contract, are usually annexed to contracts of that description, may be proved: Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract.

Proviso (6).—Any fact may be proved which shows in what manner the language of a document is related to existing facts.

Illustrations.

(*a.*) A policy of insurance is effected on goods "in ships from Calcutta to London." The goods are shipped in a particular ship which is lost. The fact that that particular ship was orally excepted from the policy, cannot be proved.

(*b.*) A agrees absolutely in writing to pay B Rs. 1,000 on the 1st March 1873. The fact that at the same time, an oral agreement was made that the money should not be paid till the 31st March cannot be proved.

(*c.*) An estate called 'the Rampore tea estate' is sold by a deed which contains a map of the property sold The fact that land not included in the map had always been regarded as part of the estate and was meant to pass by the deed, cannot be proved.

(*d.*) A enters into a written contract with B to work certain mines, the property of B upon certain terms. A was induced to do so by a misrepresentation of B's as to their value. This fact may be proved.

(*e.*) A institutes a suit against B for the specific performance of a contract and also prays that the contract may be reformed as to one of its provisions, as that provision was inserted in it by mistake A may prove that such a mistake was made as would by law entitle him to have the contract reformed.

(*f.*) A orders goods of B by a letter in which nothing is said as to the time of payment, and accepts the goods on delivery. B sues A for the price. A may show that the goods were supplied on credit for a term still unexpired.

(*g.*) A sells B a horse and verbally warrants him sound. A gives B a paper in these words: 'Bought of A a horse for Rs. 500.' B may prove the verbal warranty.

(*h*.) A hires lodgings of B, and gives B a card on which is written—'Rooms, Rs. 200 a month.' A may prove a verbal agreement that these terms were to include partial board.

A hires lodgings of B for a year, and a regularly stamped agreement drawn up by an attorney is made between them It is silent on the subject of board. A may not prove that board was included in the terms verbally.

(*i.*) A applies to B for a debt due to A by sending a receipt for the money. B keeps the receipt and does not send the money. In a suit for the amount A may prove this.

(*j.*) A and B make a contract in writing to take effect upon the happening of a certain contingency. The writing is left with B, who sues A upon it. A may show the circumstances under which it was delivered.

Exclusion of evidence to explain or amend ambiguous document.

93. When the language used in a document is, on its face, ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects.

Illustrations.

(*a.*) A agrees in writing to sell a horse to B for 'Rs. 1,000 or Rs. 1,500.' Evidence cannot be given to show which price was to be given.

(*b.*) A deed contains blanks. Evidence cannot be given of facts which would show how they were meant to be filled.

Exclusion of evidence against application of document to existing facts.

94. When language used in a document is plain in itself, and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts.

Illustration.

A sells to B by deed 'my estate at Rampore containing 100 beeghas.' A has an estate at Rampore containing 100 bighas. Evidence may not be given of the fact that the estate meant to be sold was one situated at a different place and of a different size.

Evidence as to document unmeaning in reference to existing facts.

95. When language used in a document is plain in itself, but is unmeaning in reference to existing facts, evidence may be given to show that it was used in a peculiar sense.

Illustrations.

A sells to B by deed 'my house in Calcutta.'

A had no house in Calcutta, but it appears that he had a house at Howrah, of which B had been in possession since the execution of the deed.

These facts may be proved to show that the deed related to the house at Howrah.

Evidence as to application of language which can apply to one only of several persons.

96. When the facts are such that the language used might have been meant to apply to any one, and could not have been meant to apply to more than one, of several persons or things, evidence may be given of facts which show which of those persons or things it was intended to apply to.

Illustrations.

(*a.*) A agrees to sell to B for Rs. 1,000 "my white horse." A has two white horses. Evidence may be given of facts which show which of them was meant.

(*b.*) A agrees to accompany B to Hyderabad. Evidence may be given of facts showing whether Hyderabad in the Deccan or Hyderabad in Scind was meant.

Evidence as to application of language to one of two sets of facts to neither of which the whole correctly applies.

97. When the language used applies partly to one set of existing facts, and partly to another set of existing facts, but the whole of it does not apply correctly to either, evidence may be given to show to which of the two it was meant to apply.

Illustration.

A agrees to sell to B 'my land at X' in the occupation of Y. A has land at X, but not in the occupation of Y, and he has land in the occupation of Y, but it is not at X. Evidence may be given of facts showing which he meant to sell.

Evidence as to meaning of illegible characters, &c.

98. Evidence may be given to show the meaning of illegible or not commonly intelligible characters of foreign, obsolete, technical, local, and provincial expressions, of abbreviations, and of words used in a peculiar sense.

Illustration.

A, a sculptor, agrees to sell to B 'all my mods.' A has both models and modelling tools. Evidence may be given to show which he meant to sell.

Who may give evidence of agreement varying terms of document.

99. Persons who are not parties to a document, or their representatives in interest, may give evidence of any facts tending to show a contemporaneous agreement varying the terms of the document.

Illustration.

A and B make a contract in writing that A shall sell B certain cotton, to be paid for on delivery. At the same time they make an oral agreement that three months' credit shall be given to A. This could not be shown as between A and B, but it might be shown by C if it affected his interests.

Saving of provisions of Indian Succession Act relating to wills.

100. Nothing in this Chapter contained shall be taken to affect any of the provisions of the Indian Succession Act (X of 1865) as to the construction of wills.

PART III.

PRODUCTION AND EFFECT OF EVIDENCE.

CHAPTER VII.—OF THE BURDEN OF PROOF.

Burden of proof.

101. Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

Illustrations.

(*a*). A desires a Court to give judgment that B shall be punished for a crime which A says B has committed.

A must prove that B has committed the crime.

(*b*.) A desires a Court to give judgment that he is entitled to certain land in the possession of B by reason of facts which he asserts and which B denies to be true.

A must prove the existence of those facts.

On whom burden of proof lies.

102. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Illustrations.

(*a*.) A sues B for land of which B is in possession, and which, as A asserts, was left to A by the will of C, B's father.

If no evidence were given on either side, B would be entitled to retain his possession.

Therefore the burden of proof is on A.

(*b*.) A sues B for money due on a bond.

The execution of the bond is admitted, but B says that it was obtained by fraud, which A denies.

If no evidence were given on either side, A would succeed, as the bond is not disputed and the fraud is not proved.

Therefore the burden of proof is on B.

Burden of proof as to particular fact.

103. The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Illustration.

(*a*.) A prosecutes B for theft, and wishes the Court to believe that B admitted the theft to C. A must prove the admission.

B wishes the Court to believe that, at the time in question, he was elsewhere. He must prove it.

Burden of proving fact to be proved to make evidence admissible

104. The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.

Illustrations.

(*a*.) A wishes to prove a dying declaration by B. A must prove B's death.

(*b*.) A wishes to prove, by secondary evidence, the contents of a lost document.

A must prove that the document has been lost.

Burden of proving that case of accused comes within exceptions.

105. When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Indian Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.

Illustrations.

(*a*.) A, accused of murder, alleges that, by reason of unsoundness of mind, he did not know the nature of the act.

The burden of proof is on A.

(*b*.) A, accused of murder, alleges that, by grave and sudden provocation, he was deprived of the power of self-control.

The burden of proof is on A.

(*c*.) Section 325 of the Penal Code provides that whoever, except in the case provided for by section 335, voluntarily causes grievous hurt, shall be subject to certain punishments.

A is charged with voluntarily causing grievous hurt under section 325.

The burden of proving the circumstances bringing the case under section 335 lies on A.

Burden of proving fact especially within knowledge.

106. When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

Illustrations.

(*a*.) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(*b.*) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.

Burden of proving death of person known to have been alive within thirty years.

107. When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.

Burden of proving that person is alive who has not been heard of for seven years.

108. When the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is on the person who affirms it.

Burden of proof as to partnership, tenancy, and agency.

109. When the question is whether persons are partners, landlord and tenant, or principal and agent, and it has been shown that they have been acting as such, the burden of proving that they do not stand, or have ceased to stand, to each other in those relationships respectively, is on the person who affirms it.

Burden of proof as to ownership.

110. When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.

Proof of good faith in transactions where one party is in relation of active confidence.

111. Where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence.

Illustrations.

(*a.*) The good faith of a sale by a client to an attorney, is in question in a suit brought by the client. The burden of proving the good faith of the transaction is on the attorney.

(*b.*) The good faith of a sale by a son just come of age to a father is in question in a suit brought by the son. The burden of proving the good faith of the transaction is on the father.

Birth during marriage, conclusive proof of legitimacy.

112. The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

Proof of cession of territory.

113. A notification in the *Gazette of India* that any portion of British territory has been ceded to any Native State, Prince, or Ruler, shall be conclusive proof that a valid cession of such territory took place at the date mentioned in such notification.

Court may presume existence of certain facts.

114. The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business in their relation to the facts of the particular case.

Illustrations.

The Court may presume—

(*a.*) That a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession;

(*b.*) That an accomplice is unworthy of credit, unless he is corroborated in material particulars;

(*c.*) That a bill of exchange, accepted or endorsed, was accepted or endorsed, for good consideration;

(*d.*) That a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or states of things usually cease to exist, is still in existence;

(*e.*) That judicial and official acts have been regularly performed;

(*f.*) That the common course of business has been followed in particular cases;

(*g.*) That evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it;

(*h.*) That if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him;

(*i.*) That when a document creating an obligation is in the hands of the obligor, the obligation has been discharged.

But the Court shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before them :—

As to illustration (*a*)—A shop-keeper has in his till a marked rupee soon after it was stolen, and cannot account for its possession specifically, but is continually receiving rupees in the course of his business :

As to illustration (*b*)—A, a person of the highest character, is tried for causing a man's death by an act of negligence in arranging certain machinery. B, a person of equally good character who also took part in the arrangement, describes precisely what was done, and admits and explains the common carelessness of A and himself :

As to illustration (*b*)—A crime is committed by several persons. A, B, and C, three of the criminals, are captured on the spot and kept apart from each other. Each gives an account of the crime implicating D, and the accounts corroborate each other in such a manner as to render previous concert highly improbable :

As to illustration (*c*)—A, the drawer of a bill of exchange, was a man of business. B, the acceptor, was a young and ignorant person, completely under A's influence :

As to illustration (*d*)—It is proved that a river ran in a certain course five years ago, but it is known that there have been floods since that time which might change its course :

As to illustration (*e*)—A judicial act, the regularity of which is in question, was performed under exceptional circumstances :

As to illustration (*f*)—The question is, whether a letter was received. It is shown to have been posted, but the usual course of the post was interrupted by disturbances :

As to illustration (*g*)—A man refuses to produce a document which would bear on a contract of small importance on which he is sued, but which might also injure the feelings and reputation of his family :

As to illustration (*h*)—A man refuses to answer a question which he is not compelled by law to answer, but the answer to it might cause loss to him in matters unconnected with the matter in relation to which it is asked :

As to illustration (*i*)—A bond is in possession of the obligor, but the circumstances of the case are such that he may have stolen it.

CHAPTER VIII.—ESTOPPEL.

Estoppel.

115. When one person has, by his declaration, act, or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing.

Illustration.

A intentionally and falsely leads B to believe that certain land belongs to A, and thereby induces B to buy and pay for it.

The land afterwards becomes the property of A, and A seeks to set aside the sale on the ground that, at the time of the sale, he had no title. He must not be allowed to prove his want of title.

Estoppel of tenant.

116. No tenant of immoveable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immoveable property, and no person who came upon any immoveable property by the license of the person in possession thereof, shall be permitted to deny that such person had a title to such possession at the time when such license was given.

Estoppel of acceptor of bill of exchange, bailee or licensee.

117. No acceptor of a bill of exchange shall be permitted to deny that the drawer had authority to draw such bill or to endorse it, nor shall any bailee or licensee be permitted to deny that his bailor or licensor had, at the time when the bailment or license commenced, authority to make such bailment or grant such license.

Explanation (1).—The acceptor of a bill of exchange may deny that the bill was really drawn by the person by whom it purports to have been drawn.

Explanation (2).—If a bailee delivers the goods bailed to a person other than the bailor, he may prove that such person had a right to them as against the bailor.

CHAPTER IX.—OF WITNESSES.

Who may testify.

118. All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

Explanation.—A lunatic is not incompetent to testify unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.

Dumb witnesses.

119. A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible as by writing or by signs; but such writing must be written and the signs made in open Court. Evidence so given shall be deemed to be oral evidence.

Married persons in Civil and Criminal Proceedings.

120. In all civil proceedings the parties to the suit, and the husband or wife of any party to the suit shall be competent witnesses. In criminal proceedings against any person, the husband or wife of such person, respectively, shall be a competent witness.

Judges and Magistrates.

121. No Judge or Magistrate shall, except upon the special order of some Court to which he is subordinate, be compelled to answer any questions as to his own conduct in Court as such Judge or Magistrate, or as to anything which came to his knowledge in Court as such Judge or Magistrate; but he may be examined as to other matters which occurred in his presence whilst he was so acting.

Illustrations.

(*a.*) A, on his trial before the Court of Session, says that a deposition was improperly taken by B, the Magistrate. B cannot be compelled to answer questions as to this, except upon the special order of a Superior Court.

(*b.*) A is accused before the Court of Session of having given false evidence before B, a Magistrate. B cannot be asked what A said, except upon the special order of the Superior Court.

(*c.*) A is accused before the Court of Session of attempting to murder a Police officer whilst on his trial before B, a Sessions Judge. B may be examined as to what occurred.

Communications during marriage.

122. No person who is or has been married, shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married; nor shall he be permitted to disclose any such communication, unless the person who made it, or his representative in interest, consents, except in suits between married persons, or proceedings in which one married person is prosecuted for any crime committed against the other.

Evidence as to affairs of State.

123. No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit.

Official communications.

124. No public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interests would suffer by the disclosure.

Information as to commission of offences.

125. No Magistrate or police officer shall be compelled to say whence he got any information as to the commission of any offence.

Professional communications.

126. No barrister, attorney, pleader, or vakíl, shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney, or vakíl by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:

Provided that nothing in this section shall protect from disclosure—

(1) Any such communication made in furtherance of any criminal purpose;

(2) Any fact observed by any barrister, pleader, attorney, or vakíl in the course of his employment as such showing that any crime or fraud has been committed since the commencement of his employment.

It is immaterial whether the attention of such barrister, attorney, or vakíl was or was not directed to such fact by or on behalf of his client.

Explanation.—The obligation stated in this section continues after the employment has ceased.

Illustrations.

(*a.*) A, a client, says to B, an attorney,—'I have committed forgery, and I wish you to defend me.'

As the defence of a man known to be guilty is not a criminal purpose, this communication is protected from disclosure.

(*b.*) A, a client, says to B, an attorney,—'I wish to obtain possession of property by the use of a forged deed on which I request you to sue.'

This communication, being made in furtherance of a criminal purpose, is not protected from disclosure.

(*c.*) A, being charged with embezzlement, retains B, an attorney, to defend him. In the course of the proceedings, B observes that an entry has been made in A's account-book charging A with the sum said to have been embezzled, which entry was not in the book at the commencement of his employment.

This being a fact observed by B in the course of his employment showing that a fraud has been committed since the commencement of the proceedings, it is not protected from disclosure.

Section 126, to apply to interpreters, &c.

127. The provisions of section one hundred and twenty-six shall apply to interpreters, and the clerks or servants of barristers, pleaders, attorneys, and vakíls.

Privilege not waived by volunteering evidence.

128. If any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in section one hundred and twenty-six; and if any party to a suit or proceeding calls any such barrister, attorney, or vakíl as a witness, he shall be deemed to have consented to such disclosure only if he questions such barrister, attorney, or vakíl on matters which, but for such question, he would not be at liberty to disclose.

Confidential communication with legal advisers.

129. No one shall be compelled to disclose to the Court any confidential communication which has taken place between him and his legal professional adviser, unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the Court necessary to be known in order to explain any evidence which he has given, but no others.

Production of witness' title-deeds.

130. No witness who is not a party to a suit shall be compelled to produce his title-deeds to any property, or any document in virtue of which he holds any property as pledgee or mortgagee, or any document the production of which might tend to criminate him, unless he has agreed in writing to produce them with the person seeking the production of such deeds or some person through whom he claims.

Production of documents which another person, having possession, would be entitled to refuse to produce.

131. No one shall be compelled to produce documents in his possession, which any other person would be entitled to refuse to produce if they were in his possession, unless such last-mentioned person consents to their production.

Witness not excused from answering on ground that answer will criminate.

132. A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend, directly or indirectly, to criminate such witness, or that it will expose, or tend, directly or indirectly, to expose such witness to a penalty or forfeiture of any kind:

Proviso.

Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer.

Accomplice.

133. An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

Number of witnesses.

134. No particular number of witnesses shall in any case be required for the proof of any fact.

CHAPTER X—OF THE EXAMINATION OF WITNESSES.

Order of production and examination of witnesses.

135. The order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to Civil and Criminal Procedure respectively, and, in the absence of any such law, by the discretion of the Court.

Judge to decide as to admissibility of evidence.

136. When either party proposes to give evidence of any fact, the Judge may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant, and not otherwise.

If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last-mentioned fact must be proved before evidence is given of the fact first mentioned, unless the party undertakes to give proof of such fact and the Court is satisfied with such undertaking.

If the relevancy of one alleged fact depends upon another alleged fact being first proved, the Judge may in his discretion either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact.

Illustrations.

(*a.*) It is proposed to prove a statement about a relevant fact by a person alleged to be dead which statement is relevant under section thirty-two.

The fact that the person is dead must be proved by the person proposing to prove the statement before evidence is given of the statement.

(*b.*) It is proposed to prove by a copy of the contents of a document said to be lost.

The fact that the original is lost must be proved by the person proposing to produce the copy before the copy is produced.

(*c.*) A is accused of receiving stolen property knowing it to have been stolen.

It is proposed to prove that he denied the possession of the property.

The relevancy of the denial depends on the identity of the property. The Court may in its discretion either require the property to be identified before the denial of the possession is proved, or permit the denial of the possession to be proved before the property is identified.

(*d.*) It is proposed to prove a fact (A) which is said to have been the cause or effect of a fact in issue. There are several intermediate facts (B, C and D) which must be shown to exist before the fact A can be regarded as the cause or effect of the fact in issue. The Court may either permit A to be proved before B, C or D is proved, or may require proof of B, C and D before permitting proof of A.

Examination-in-chief.

137. The examination of a witness by the party who calls him shall be called his examination-in-chief.

Cross-examination.

The examination of a witness by the adverse party shall be called his cross-examination.

Re-examination.

The examination of a witness, subsequent to the cross-examination by the party who called him, shall be called his re-examination.

Order of examinations.
Direction of re-examination.

138. Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.

The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

The re-examination shall be directed to the explanation of matters referred to in cross-examination; and if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.

Cross-examination of person called to produce a document.

139. A person summoned to produce a document does not become a witness by the mere fact that he produces it, and cannot be cross-examined unless and until he is called as a witness.

Witnesses to character.

140. Witnesses to character may be cross-examined and re-examined.

Leading question.

141. Any question suggesting the answer which the person putting it wishes or expects to receive, is called a leading question.

When they must not be asked.

142. Leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief, or in a re-examination, except with the permission of the Court.

The Court shall permit leading questions as to matters which are introductory or undisputed, or which have, in its opinion, been already sufficiently proved.

When they may be asked.

143. Leading questions may be asked in cross-examination.

Evidence as to matters in writing.

144. Any witness may be asked, whilst under examination, whether any contract, grant or other disposition of property, as to which he is giving evidence, was not contained in a document, and if he says that it was, or if he is about to make any statement as to the contents of any document, which, in the opinion of the Court, ought to be produced, the adverse party may object to such evidence being given until such document is produced, or until facts have been proved which entitled the party who called the witness to give secondary evidence of it.

Explanation.—A witness may give oral evidence of statements made by other persons about the contents of documents if such statements are in themselves relevant facts.

Illustration.

The question is, whether A assulted B.

C deposes that he heard A say to D—'B wrote a letter accusing me of theft, and I will be revenged on him.' This statement is relevant as showing A's motive for the assault, and evidence may be given of it, though no other evidence is given about the letter.

Cross-examination as to previous statements in writing.

145. A witness may be cross-examined as to previous statements made by him in writing or reduced into writing and relevant to matters in question without such writing being shown to him, or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

Questions lawful in cross-examination.

146. When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend

(1) to test his veracity ;

(2) to discover who he is and what is his position in life, or

(3) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him, or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.

When witness to be compelled to answer.

147. If any such question relates to a matter relevant to the suit or proceeding, the provisions of section 132 shall apply thereto.

Court to decide when question shall be asked and when witness compelled to answer.

148. If any such question relates to a matter not relevant to the suit or proceeding, except in so far as it affects the credit of the witness by injuring his character, the Court shall decide whether or not the witness shall be compelled to answer it, and may, if it thinks fit, warn the witness that he is not obliged to answer it. In exercising its discretion, the Court shall have regard to the following considerations :—

(1) Such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness on the matter to which he testifies.

(2) Such questions are improper if the imputation which they convey relates to matters so remote in time, or of such a character, that the truth of the imputation would not affect, or would affect in a slight degree, the opinion of the Court as to the credibility of the witness on the matter to which he testifies.

(3) Such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence.

(4) The Court may, if it sees fit draw, from the witnesses' refusal to answer, the inference that the answer if given would be unfavourable.

Question not to be asked without reasonable grounds.

149. No such question as is referred to in section one hundred and forty-eight ought to be asked, unless the person asking it has reasonable grounds for thinking that the imputation which it conveys is well-founded.

Illustrations.

(*a*). A barrister is instructed by an attorney or vakíl that an important witness is a dacoit. This is a reasonable ground for asking the witness whether he is a dacoit.

(*b*). A pleader is informed by a person in Court that an important witness is a dacoit. The informant on being questioned by the pleader gives satisfactory reasons for his statement. This is a reasonable ground for asking the witness whether he is a dacoit.

(*c*). A witness, of whom nothing whatever is known, is asked at random whether he is a dacoit. There are here no reasonable grounds for the question.

(*d*). A witness, of whom nothing whatever is known, being questioned as to his mode of life and means of living, gives unsatisfactory answers. This may be a reasonable ground for asking him if he is a dacoit.

Procedure of Court in case of question being asked without reasonable grounds.

150. If the Court is of opinion that any such question was asked without reasonable grounds, it may, if it was asked by any barrister, pleader, vakíl, or attorney, report the circumstances of the case to the High Court or other authority to which such barrister, pleader, vakíl, or attorney is subject in the exercise of his profession.

Indecent and scandalous questions.

151. The Court may forbid any questions or inquiries which it regards as indecent or scandalous, although such questions or inquiries may have some bearing on the questions before the Court, unless they relate to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed.

Questions intended to insult or annoy.

152. The Court shall forbid any question which appears to it to be intended to insult or annoy, or which, though proper in itself, appears to the Court needlessly offensive in form.

Exclusion of evidence to contradict answers to questions testing veracity.

153. When a witness has been asked and has answered any question which is relevant to the inquiry only in so far as it tends to shake his credit by injuring his character, no evidence shall be given to contradict him; but if he answers falsely, he may afterwards be charged with giving false evidence.

Exception 1.—If a witness is asked whether he has been previously convicted of any crime and denies it, evidence may be given of his previous conviction.

Exception 2.—If a witness is asked any question tending to impeach his impartiality and answers it by denying the facts suggested, he may be contradicted.

Illustrations.

(*a*). A claim against an underwriter is resisted on the ground of fraud.

The claimant is asked whether, in a former transaction, he had not made a fraudulent claim. He denies it.

Evidence is offered to show that he did make such a claim.

The evidence is inadmissible.

(*b*). A witness is asked whether he was not dismissed from a situation for dishonesty. He denies it.

Evidence is offered to show that he was dismissed for dishonesty.

The evidence is not admissible.

(*c*). A affirms that on a certain day he saw B at Lahore.

A is asked whether he himself was not on that day at Calcutta. He denies it.

Evidence is offered to show that A was on that day at Calcutta.

The evidence is admissible, not as contradicting A on a fact which affects his credit, but as contradicting the alleged fact that B was seen on the day in question in Lahore.

In each of these cases the witness might, if his denial was false, be charged with giving false evidence.

(*d*). A is asked whether his family has not had a blood feud with the family of B against whom he gives evidence.

He denies it. He may be contradicted on the ground that the question tends to impeach his impartiality.

Question by party to his own witness.

154. The Court may in its discretion permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party.

Impeaching credit of witness.

155. The credit of a witness may be impeached in the following ways by the adverse party, or with the consent of the Court by the party who calls him:—

(1.) By the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit;

(2.) By proof that the witness has been bribed or has had the offer of a bribe, or has received any other corrupt inducement to give his evidence;

(3.) By proof of former statements inconsistent with any part of his evidence which is liable to be contradicted;

(4.) When a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.

Explanation.—A witness declaring another witness to be unworthy of credit may not, upon his examination-in-chief, give reasons for his belief, but he may be asked his reasons in cross-examination, and the answers which he gives cannot be contradicted, though, if they are false, he may afterwards be charged with giving false evidence.

Illustrations.

(*a*.) A sues B for the price of goods sold and delivered to B. C says that he delivered the goods to B.

Evidence is offered to show that, on a previous occasion, he said that he had not delivered the goods to B.

The evidence is admissible.

(b.) A is indicted for the murder of B.

C says that B, when dying, declared that A had given B the wound of which he died.

Evidence is offered to show that, on a previous occasion, C said that the wound was not given by A or in his presence.

The evidence is admissible.

Questions tending to corroborate evidence of relevant fact, admissible.

156. When a witness whom it is intended to corroborate gives evidence of any relevant fact, he may be questioned as to any other circumstances which he observed at or near to the time or place at which such relevant fact occurred, if the Court is of opinion that such circumstances, if proved, would corroborate the testimony of the witness as to the relevant fact which he testifies.

Illustration.

A, an accomplice, gives an account of a robbery in which he took part. He describes various incidents unconnected with the robbery which occurred on his way to and from the place where it was committed.

Independent evidence of these facts may be given in order to corroborate his evidence as to the robbery itself.

Former statements of witness may be proved to corroborate later testimony as to same fact.

157. In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.

What matters may be proved in connection with proved statement relevant under section 32 or 33.

158. Whenever any statement, relevant under section thirty-two or thirty-three, is proved, all matters may be proved, either in order to contradict or to corroborate it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness and had denied upon cross-examination the truth of the matter suggested.

Refreshing memory.

159. A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory.

The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct.

When witness may use copy of document to refresh memory.

Whenever a witness may refresh his memory by reference to any document, he may, with the permission of the Court, refer to a copy of such document: Provided the Court be satisfied that there is sufficient reason for the non-production of the original.

An expert may refresh his memory by reference to professional treatises.

Testimony to facts stated in document mentioned in section 159.

160. A witness may also testify to facts mentioned in any such document as is mentioned in section one hundred and fifty-nine, although he has no specific recollection of the facts themselves, if he is sure that the facts were correctly recorded in the document.

Illustration.

A book-keeper may testify to facts recorded by him in books regularly kept in the course of business, if he knows that the books were correctly kept, although he has forgotten the particular transactions entered.

Right of adverse party as to writing used to refresh memory.

161. Any writing referred to under the provisions of the two last preceding sections must be produced and shown to the adverse party if he requires it; such party may, if he pleases, cross-examine the witness thereupon.

Production of documents.

162. A witness summoned to produce a document shall, if it is in his possession or power, bring it to Court, notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the Court.

The Court, if it sees fit, may inspect the document, unless it refers to matters of State, or take other evidence to enable it to determine on its admissibility.

Translation of documents.

If for such a purpose it is necessary to cause any document to be translated, the Court may, if it thinks fit, direct the translator to keep the contents secret, unless the document is to be given in evidence: and if the interpreter disobeys such direction, he shall be held to have committed an offence under section one hundred and sixty-six of the Indian Penal Code.

Giving as evidence document called for and produced on notice.

163. When a party calls for a document which he has given the other party notice to produce, and such document is produced and inspected by the party calling for its production, he is bound to give it as evidence if the party producing it requires him to do so.

Using as evidence document production of which was refused on notice.

164. When a party refuses to produce a document which he has had notice to produce, he cannot afterwards use the document as evidence without the consent of the other party or the order of the Court.

Illustration.

A sues B on an agreement and gives B notice to produce it. At the trial, A calls for the document and B refuses to produce it. A gives secondary evidence of its contents. B seeks to produce the document itself to contradict the secondary evidence given by A, or in order to show that the agreement is not stamped. He cannot do so.

Judge's power to put questions or order production.

165. The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing: and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question:

Provided that the judgment must be based upon facts declared by this Act to be relevant, and duly proved.

Provided also that this section shall not authorise any Judge to compel any witness to answer any question, or to produce any document which such witness would be entitled to refuse to answer or produce under sections one hundred and twenty-one to one hundred and thirty-one both inclusive, if the question were asked or the document were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under sections one hundred and thirty-eight or one hundred and forty-nine; nor shall he dispense with primary evidence of any document except in the cases hereinbefore excepted.

Power of jury or assessors to put questions.

166. In cases tried by jury or with assessors, the jury or assessors may put any questions to witnesses, through or by leave of the Judge, which the Judge himself might put and which he considers proper.

CHAPTER XI.—OF IMPROPER ADMISSION AND REJECTION OF EVIDENCE.

No new trial for rejection or improper reception of evidence.

167. The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court, before which such objection is raised, that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.

SCHEDULE.

Number and Year.	TITLE.	Extent of Repeal.
Stat. 26 Geo. III, c. 57 ...	For the further regulation of the trial of persons accused of certain offences committed in the East Indies; for repealing so much of an Act, made in the twenty-fourth year of the reign of his present Majesty (intituled, An Act for the better regulation and management of the affairs of the East India Company, and of the British possessions in India, and for establishing a court of judicature for the more speedy and effectual trial of persons accused of offences committed in the East Indies), as requires the servants of the East India Company to deliver inventories of their estates and effects; for rendering the laws more effectual against persons unlawfully resorting to the East Indies; and for the more easy proof, in certain cases, of deeds and writings executed in Great Britain or India.	Section thirty-eight so far as it relates to Courts of Justice in the East Indies.
Stat. 14 & 15 Vic., c. 99 ...	To amend the Law of Evidence.	Section eleven and so much of section nineteen as relates to British India.
Act XV of 1852...	To amend the Law of Evidence.	So much as has not been heretofore repealed.
Act XIX of 1853	To amend the Law of Evidence in the Civil Courts of the East India Company in the Bengal Presidency.	Section nineteen.
Act II of 1855 ...	For the further improvement of the Law of Evidence.	So much as has not been heretofore repealed.
Act XXV of 1861	For simplifying the Procedure of the Courts of Criminal Judicature not established by Royal Charter.	Section two hundred and thirty-seven.
Act I of 1868 ...	The General Clauses Act, 1868.	Sections seven and eight.

THE INDIAN EVIDENCE ACT, 1872.

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ACT NO. II OF 1872.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

(Received the assent of the Governor-General on the 22nd March 1872.)

An Act to revive and continue the operation of Act XV of 1867 *(to make better provision for the appointment of Municipal Committees in the Punjab, and for other purposes).*

Preamble.

WHEREAS the term for which Act XV of 1867 was enacted to be in force has expired, and it is expedient to revive and continue the operation of the said Act; It is hereby enacted as follows :—

Revival and continuance of Act XV of 1867.

1. Act XV of 1867 shall be deemed to be and to have been in force throughout the territories subject to the control of the Lieutenant Governor of the Punjab from the last day of February 1872, and shall continue in force in the said territories until the first day of March 1873.

ACT NO. III OF 1872.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

(Received the assent of the Governor-General on the 22nd March 1872.*)*

An Act to provide a form of Marriage in certain cases.

Preamble.

WHEREAS it is expedient to provide a form of marriage for persons who do not profess the Christian, Jewish, Hindoo, Mahomedan, Parsee, Buddhist, Sikh, or Jaina religion, and to legalize certain marriages the validity of which is doubtful; It is hereby enacted as follows:—

Local extent. Commencement.

1. This Act extends to the whole of British India, and shall come into force on the passing thereof.

Conditions upon which marriages under Act may be celebrated.

2. Marriages may be celebrated under this Act between persons neither of whom professes the Christian or the Jewish or the Hindoo or the Mahomedan, or the Parsee or the Buddhist, or the Sikh, or the Jaina religion, upon the following conditions:—

(1).—Neither party must, at the time of the marriage, have a husband or wife living:

(2).—The man must have completed his age of eighteen years, and the woman her age of fourteen years, according to the Gregorian calendar:

(3).—Each party must, if he or she has not completed the age of twenty-one years, have obtained the consent of his or her father or guardian to the marriage:

(4).—The parties must not be related to each other in any degree of consanguinity or affinity which would, according to any law to which either of them is subject, render a marriage between them illegal.

1st Proviso.—No such law or custom, other than one relating to consanguinity or affinity, shall prevent them from marrying.

2nd Proviso.—No law or custom as to consanguinity shall prevent them from marrying, unless a relationship can be traced between the parties through some common ancestor, who stands to each of them in a nearer relationship than that of great-great-grand-father or great-great-grand-mother, or unless one of the parties is the lineal ancestor, or the brother or sister of some lineal ancestor, of the other.

Appointment of Marriage Registrars.

3. The Local Government may appoint one or more Registrars under this Act, either by name or as holding any office for the time being, for any portion of the territory subject to its administration. The officer so appointed shall be called 'Registrar of Marriages under Act III of 1872,' and is hereinafter referred to as 'the Registrar.' The portion of territory for which any such officer is appointed shall be deemed his district.

One of the parties to intended marriage to give notice to Registrar.

4. When a marriage is intended to be solemnized under this Act, one of the parties must give notice in writing to the Registrar before whom it is to be solemnized.

The Registrar to whom such notice is given must be the Registrar of a district within which one at least of the parties to the marriage has resided for fourteen days before such notice is given.

Such notice may be in the form given in the first schedule to this Act.

Notice to be filed and copy entered in the Marriage Notice Book.

5. The Registrar shall file all such notices and keep them with the records of his office and shall also forthwith enter a true copy of every such notice in a book to be for that purpose furnished to him by the Government, to be called the "Marriage Notice Book under Act III of 1872," and such book shall be open at all reasonable times, without fee, to all persons desirous of inspecting the same.

Objection to marriage.

6. Fourteen days after notice of an intended marriage has been given under section four, such marriage may be solemnized, unless it has been previously objected to in the manner hereinafter mentioned.

Any person may object to any such marriage on the ground that it would contravene some one or more of the conditions prescribed in clauses (1), (2), (3), or (4) of section two.

The nature of the objection made shall be recorded in writing by the Registrar in the register, and shall, if necessary, be read over and explained to the person making the objection, and shall be signed by him or on his behalf.

Procedure on receipt of objection.

7. On receipt of such notice of objection the Registrar shall not proceed to solemnize the marriage until the lapse of fourteen days from the receipt of such objection, if there be a Court of competent jurisdiction open at the time, or, if there be no such Court open at the time, until the lapse of fourteen days from the opening of such Court.

Objector may file suit.

The person objecting to the intended marriage may file a suit in any Civil Court having local jurisdiction (other than a Court of Small Causes) for a declaratory decree, declaring that such marriage would contravene some one or more of the conditions prescribed in clauses (1), (2), (3), or (4) of section two.

Certificate of filing of suit to be lodged with Registrar.

8. The officer before whom such suit is filed shall thereupon give the person presenting it a certificate to the effect that such suit has been filed. If such certificate be lodged with the Registrar within fourteen days from the receipt of notice of objection, if there be a Court of competent jurisdiction open at the time, or, if there be no such Court open at the time, within fourteen days of the opening of such Court, the marriage shall not be solemnized till the decision of such Court has been given and the period allowed by law for appeals from such decision has elapsed; or, if there be an appeal from such decision, till the decision of the Appellate Court has been given.

If such certificate be not lodged in the manner and within the period prescribed in the last preceding paragraph, or if the decision of the Court be that such marriage would not contravene any one or more of the conditions prescribed in clauses (1), (2), (3), or (4) of section two, such marriage may be solemnized.

If the decision of such Court be that the marriage in question would contravene any one or more of the conditions prescribed in clauses (1), (2), (3), or (4) of section two, the marriage shall not be solemnized.

Court may fine when objection not reasonable.

9. Any Court, in which any such suit as is referred to in section seven is filed, may, if it shall appear to it that the objection was not reasonable and *bonâ fide*, inflict a fine, not exceeding one thousand rupees, on the person objecting, and award it, or any part of it, to the parties to the intended marriage.

Declaration by parties and witnesses.

10. Before the marriage is solemnized, the parties and three witnesses shall, in the presence of the Registrar, sign a declaration in the form contained in the second schedule to this Act. If either party has not completed the age of twenty-one years, the declaration shall also be signed by his or her father or guardian, except in the case of a widow, and, in every case, it shall be countersigned by the Registrar.

Marriage how to be solemnized.

11. The marriage shall be solemnized in the presence of the Registrar and of the three witnesses who signed the declaration. It may be solemnized in any form, provided that each party says to the other, in the presence and hearing of the Registrar and witnesses, 'I [*A*] take thee [*B*] to be my lawful wife (*or* husband).'

Place where marriage may be solemnized.

12. The marriage may be celebrated either at the office of the Registrar or at such other place, within reasonable distance of the office of the Registrar, as the parties desire. Provided that the Local Government may prescribe the conditions under which such marriages may be solemnized at places other than the Registrar's office, and the additional fees to be paid thereupon.

Form of certificate.

13. When the marriage has been solemnized, the Registrar shall enter a certificate thereof in a book to be kept by him for that purpose and to be called the 'Marriage Certificate Book under Act III of 1872,' in the form given in the third schedule to this Act, and such certificate shall be signed by the parties to the marriage and the three witnesses.

Fees.

14. The Local Government shall prescribe the fees to be paid to the Registrar for the duties to be discharged by him under this Act.

The Registrar may, if he think fit, demand payment of any such fee before solemnization of the marriage or performance of any other duty in respect of which it is payable.

The said Marriage Certificate Book shall at all reasonable times be open for inspection, and shall be admissible as evidence of the truth of the statements therein contained. Certified extracts therefrom shall on application be given by the Registrar on the payment to him by the applicant of a fee to be fixed by the Local Government for each such extract.

Penalty on married person marrying again under Act.

15. Every person who, being at the time married, procures a marriage of himself to be solemnized under this Act, shall be deemed to have committed an offence under section four hundred and ninety-four or section four hundred and ninety-five of the Indian Penal Code, as the case may be; and the marriage solemnized is void.

Punishment of bigamy.

16. Every person married under this Act who, during the life-time of his or her wife or husband, contracts any other marriage, shall be subject to the penalties provided in sections four hundred and ninety-four and four hundred and ninety-five of the Indian Penal Code for the offence of marrying again during the life-time of a husband or wife, whatever may be the religion which he or she professed at the time of such second marriage.

Indian Divorce Act to apply.

17. The Indian Divorce Act shall apply to all marriages contracted under this Act, and any such marriage may be declared null or dissolved in the manner therein provided, and for the causes therein mentioned, or on the ground that it contravenes some one or more of the conditions prescribed in clauses (1), (2), (3), or (4) of section two of this Act.

Law to apply to issue of marriages under Act.

18. The issue of marriages solemnized under this Act shall, if they marry under this Act, be deemed to be subject to the law to which their fathers were subject as to the prohibition of marriages by reason of consanguinity and affinity, and the provisoes to section two of this Act shall apply to them.

Saving of marriages solemnized otherwise than under Act.

19. Nothing in this Act contained shall affect the validity of any marriage not solemnized under its provisions; nor shall this Act be deemed directly or indirectly to affect the validity of any mode of contracting marriage; but if the validity of any such mode shall hereafter come into question before any Court, such question shall be decided as if this Act had not been passed.

Registry of marriages contracted before passing of Act.

20. All persons who have heretofore contracted marriages in the presence of at least two witnesses, according to any form whatever, may at any time, previous to the first day of January 1873, have such marriages registered under this Act, and such marriages shall thereupon be deemed to be and to have been as valid as if they had been contracted and solemnized under this Act: Provided that persons who have such marriages registered under this section must, on such registry, sign a declaration in the form given in the fourth schedule to this Act.

No marriage shall be registered under this section unless conditions (1), (3), and (4) of section two were complied with; and no such marriage shall be registered under this section if, during its continuance, either party has contracted a subsequent marriage.

Penalty for signing declarations or certificates containing false statements.

21. Every person making, signing, or attesting, any declaration or certificate prescribed by this Act, containing a statement which is false, and which he either knows or believes to be false or does not believe to be true, shall be deemed guilty of the offence described in section one hundred and ninety-nine of the Indian Penal Code.

FIRST SCHEDULE.

(*See Section* 4.)

NOTICE OF MARRIAGE.

To a Registrar of Marriages under Act III of 1872 for the District.

I hereby give you notice that a marriage under Act III of 1872, is intended to be had, within three calendar months from the date hereof, between me and the other party herein named and described (that is to say) :—

Names.	Condition.	Rank or Profession.	Age.	Dwelling place.	Length of Residence.
A B	*Unmarried.* *Widower.*	*Landowner.*	*Of full age.*	....	*23 days.*
C D	*Spinster,*	....	*Minor.*	....	....

Witness my hand, this day of 187 .

(*Signed*) *A B.*

SECOND SCHEDULE.

(*See Section* 10.)

Declaration to be made by the Bridegroom.

I, *A B*, hereby declare as follows :—

1. I am at the present time unmarried :

2. I do not profess the Christian, Jewish, Hindoo, Mahomedan, Parsee, Buddhist, Sikh, or Jaina religion :

3. I have completed my age of eighteen years :

4. I am not related to *C D* [*the bride*] in any degree of consanguinity or affinity which would, according to the law to which I am subject, or to which the said *C D* is subject, and subject to the provisoes of clause (4) of section two of Act III of 1872, render a marriage between us illegal :

[*And when the bridegroom has not completed his age of twenty-one years :*

5. The consent of my father [*or guardian, as the case may be*] has been given to a marriage between myself and *C D*, and has not been revoked.]

6. I am aware that, if any statement in this declaration is false, and if in making such statement I either know or believe it to be false, or do not believe it to be true, I am liable to imprisonment, and also to fine.

(*Signed*) *A B* (*the bridegroom.*)

Declaration to be made by the Bride.

I, *C D*, hereby declare as follows :—

1. I am at the present time unmarried :

2. I do not profess the Christian, Jewish, Hindoo, Mahomedan, Parsee, Buddhist, Sikh, or Jaina religion :

3. I have completed my age of fourteen years :

4. I am not related to *A B* [*the bridegroom*] in any degree of consanguinity or affinity which would, according to the law to which I am subject, or to which the said *A B* is subject, and subject to the provisoes of clause (4) of section two of Act III of 1872, render a marriage between us illegal.

[*And when the bride has not completed her age of twenty-one years, unless she is a widow :*

5. The consent of *M N* my father [*or* guardian, *as the case may be*], has been given to a marriage between myself and *A B*, and has not been revoked.] ,

6. I am aware that, if any statement in this declaration is false, and if in making such statement I either know or believe it to be false, or do not believe it to be true, I am liable to imprisonment, and also to fine.

Signed in our presence by the abovenamed *A B* and *C D :*

G H,
I J, (*three witnesses*).
K L,

[*And when the bridegroom or bride has not completed the age of twenty-one years, except in the case of a widow :*

Signed in my presence and with my consent by the above *A B* and *C D :*

M N, the father [*or* guardian] of the abovenamed *A B or C D, as the case may be.*]

(Countersigned) *E F*,

Registrar of Marriages under Act III of 1872 *for the District of*

Dated the day of 18 .

THIRD SCHEDULE.

(*See Section* 18.)

Registrar's Certificate.

I, *E F*, certify that, on the of 18 appeared before me *A B* and *C D*, each of whom in my presence and in the presence of three credible witnesses, whose names are signed hereunder, made the declarations required by Act III of 1872, and that a marriage under the said Act was solemnized between them in my presence.

(Signed) *E F*,

Registrar of Marriages under Act III of 1872 *for the District of*

(Signed) *A B*,
C D,

G H,
I J, (*three witnesses.*)
K L,

Dated the day of 18 .

FOURTH SCHEDULE.

(*See Section* 20.)

Declaration to be made by the Husband.

I, *A B*, hereby declare as follows :—

1. I was married to *C D* at (*place*), on or about (*date*) in the presence of (*two witnesses*) :

2. I was, at the time of my marriage to my wife, *C D*, unmarried :

3. I did not at such time profess the Christian, Jewish, Hindoo, Mahomedan, Parsee, Buddhist, Sikh, or Jaina religion :

4. I have not contracted any subsequent marriage :

5. I am not related to *C D* [*the wife*] in any degree of consanguinity or affinity which would, according to the law to which I am subject, or to which the said *C D* is subject, and subject to the provisoes of clause (4) of section two of Act III of 1872, render a marriage between us illegal :

[*And when the bridegroom had not completed his age of twenty-one years :*

6. The consent of my father [*or* guardian, *as the case may be*], had been given to a marriage between myself and *C D*, and had not been revoked.]

7. I am aware that, if any statement in this declaration is false, and if in making such statement I either know or believe it to be false, or do not believe it to be true, I am liable to imprisonment, and also to fine.

(*Signed*) *A B* (*the husband.*)

Declaration to be made by the Wife.

I, *C D*, hereby declare as follows :—

1. I was married to *A B* at (*place*), on or about (*date*) in the presence of (*two witnesses :*

2. I was, at the time of my marriage to my husband, *A B*, unmarried.

3. I did not at such time profess the Christian, Jewish, Hindoo, Mahomedan, Parsee, Buddhist, Sikh, or Jaina religion :

4. I have not contracted any subsequent marriage :

5. I am not related to *A B* [*the husband*] in any degree of consanguinity or affinity which would, according to the law to which I am subject, or to which the said *A B* is subject, and subject to the provisoes of clause (4) of section two of Act III of 1872, render a marriage between us illegal.

[*And when the bride had not, at the time of her marriage, completed her age of twenty-one years, unless she was then a widow :*

6. The consent of *M N* my father [*or* guardian, *as the case may be*] had at such time been given to a marriage between myself and *A B*, and had not been revoked :]

7. I am aware that, if any statement in this declaration is false, and if in making such statement I either know or believe it to be false, or do not believe it to be true, I am liable to imprisonment, and also to fine.

Signed in our presence by the abovenamed *A B* and *C D* :

G H, } (*two witnesses*).
I J, }

(Countersigned) *E F*,
Registrar of Marriages under Act III
of 1872 *for the District of* .

Dated the *day of* 18 .

THE PUNJAB LAWS ACT, 1872.

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ACT NO. IV OF 1872.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

(*Received the Assent of the Governor-General on the 28th March* 1872).

The Punjab Laws Act, 1872.

An Act for declaring which of certain rules, laws, and regulations have the force of law in the Punjab, and for other purposes.

Preamble.

WHEREAS certain rules, laws, and regulations, made heretofore for the Punjab, acquired the force of law under the provisions of section twenty-five of the "Indian Councils' Act, 1861;" and whereas it is expedient to declare which of the said rules, laws, and regulations shall henceforth be in force in the Punjab, and to amend, consolidate, or repeal others of the said rules, orders, and regulations; It is hereby enacted as follows:—

Short title.

1. This Act may be called "The Punjab Laws Act, 1872."

Local extent.

2. It extends to the territories now under the administration of the Lieutenant-Governor of the Punjab, but not so as to alter the effect of any regulations made for any parts of the said territories under the Statute 33 Vic., c. 3, s. 1;

Commencement.

And it shall come into force on the first day of June 1872.

Enactments in force.

3. The Regulations, Acts, and orders specified in the first schedule hereto annexed are in force in the Punjab to the extent specified in the third column of the said schedule.

Enactments repealed.

4. The Regulations, Acts, and orders specified in the second schedule hereto annexed are repealed to the extent specified in the third column thereof.

CIVIL JUDICATURE.

Decisions in certain cases to be according to Native law.

5. In questions regarding inheritance, special property of females, betrothal, marriage, dower, adoption, guardianship, minority, bastardy, family relations, wills, legacies, gifts, partition, or any religious usage or institution,

the rule of decision shall be—

(1) any custom of any body or class of persons, which is not contrary to justice, equity, and good conscience, and has not been declared to be void by any competent authority,

(2) the Mahomedan law, in cases where the parties are Mahomedans, and the Hindoo law, in cases where the parties are Hindoos, except in so far as such law has been altered or abolished by legislative enactment, or is opposed to the provisions of this Act, or has been modified by any such custom as is referred to in the preceding clause of this section.

Decisions in cases not specially provided for.

6. In cases not otherwise specially provided for, the Judges shall decide according to justice, equity, and good conscience.

Local customs and mercantile usages when valid.

7. All local customs and mercantile usages shall be regarded as valid, unless they are contrary to justice, equity, or good conscience, or have, before the passing of this Act, been declared to be void by any competent authority.

DESCENT OF JAGHEERS.

Rule of descent in family of assignee of land-revenue.

8. In all cases in which Government has declared any rule of descent to prevail in any family or families of assignees of land-revenue, such rule of descent shall be held to prevail, and to have prevailed, amongst them from the time when the declaration was made.

PRE-EMPTION.

Right of pre-emption defined.

9. The right of pre-emption is a right on the part of certain persons to purchase immoveable property in certain cases in preference to all other persons.

To what transactions it extends.

10. The right of pre-emption extends to all permanent dispositions of property, including sales under a decree of Court and foreclosures of mortgages; but it does not affect transfers made in good faith by way of gift, nor temporary dispositions of property.

Presumption of its existence in village communities.

11. The right of pre-emption shall be presumed to exist, whether recorded in the list of customs at settlement or not, in all village communities however constituted, unless the existence of any custom or contract to the contrary can be proved. It shall be presumed to extend to the village site, to the houses built upon it, to all lands and shares of lands within the village boundary, and to all transferable rights of occupancy affecting such lands.

Its existence in towns to be proved.

12. The right of pre-emption shall not be presumed, but may be shown, to exist in any town or city or any sub-division thereof.

Notice to persons concerned, by vendor or mortgagee of property subject to right.

13. When any person proposes to sell any property, or to foreclose a mortgage upon any property which is subject to the custom of pre-emption, he must give notice to the persons concerned of the price at which he offers to sell such property, or of the amount due in respect of such mortgage, as the case may be.

Devolution of right when property to be sold is part of a village.

14. If the property to be sold is situated within, or is a share of, a village, the right to accept such offer or to redeem such mortgage belongs, in the absence of custom to the contrary,

First, to co-sharers in the village in order of relationship to the vendor or mortgagor;

Secondly, if no relation of the vendor or mortgagor claim pre-emption, to the land-owners of the puttee or other sub-division of the village in which the property is situated, jointly;

Thirdly, to any member of the village community;

Fourthly, to tenants with rights of occupancy in the village, if any.

Share of certain immoveable property to be offered to co-sharers.

15. If the property to be sold is a share in joint undivided immoveable property, other than land, the offer to sell must be made to the co-sharers.

Decision of questions between persons claiming right in respect of immoveable property in towns.

16. When any question arises between persons claiming a right of pre-emption over any immoveable property situated in any town or city, such questions shall, in the absence of custom to the contrary, be decided according to vicinity, relationship, or the merits of the case.

Suit against vendor or purchaser by person claiming right, to whom no *bonâ fide* offer of the property sold was made.

17. Any person who claims a right of pre-emption over any property, may bring a suit against the vendor or purchaser on the ground, either that no previous offer of the property sold was made to him, or that any such offer to sell made to him was not made in good faith; and if the Court is of opinion that the plaintiff has a right of pre-emption over such property, and that no such offer was made or that the offer was not made in good faith, it shall make a decree directing the defendant to sell such property to the plaintiff at such a price as appears to the Court to be the fair market-value of the property.

Decree what to contain. Effect of non-payment of purchase-money on date fixed by decree.

18. The decree shall specify a day on or before which the purchase-money shall be paid. If the purchase-money is not paid before sunset on that day, the decree shall become void, and the plaintiff shall lose his right of pre-emption over the property to which it relates.

Party to sale by joint owners cannot withdraw his share and claim pre-emption as to rest.

19. In case of sale by joint owners, no person who has been a party can withdraw his own share and claim a right of pre-emption as to the rest.

Preferential right of co-sharers in well where chowkeedaree tenure prevails.

20. In villages in which the chowkeedaree tenure prevails, the co-sharers in a well have a right of pre-emption as to shares in such well in preference to a general proprietor in any such village, having no share in the well but merely receiving a huq zemindaree from the "chowkeedars."

DECREES CONCERNING LAND.

Copy of decrees affecting land to be forwarded to Deputy Commissioner.

21. Every Judge of a Civil Court in which a decree affecting the proprietary right in or possession of land is passed, shall cause a certified copy of such decree to be forwarded to the Deputy Commissioner of the district within a month from the making of such decree.

INSOLVENCY.

Power to invest Courts with insolvency jurisdiction.

22. The Local Government may invest any Court or any class of Courts with insolvency jurisdiction in any specified local area.

Petition to Court for adjudication of insolvency.

23. Any debtor, whose debts amount to Rupees five hundred or upwards, and any creditor or creditors, to whom an aggregate sum of not less than rupees five hundred is due from any such debtor, may petition the Court having local inslovency jurisdiction that the debtor be adjudicated an insolvent.

Procedure of Court thereupon.

24. If it appear that the debtor's liabilities amount to more than Rupees five hundred, the Court may—

(1) call upon the debtor to make a statement of his assets and liabilities ;
(2) invite by proclamation or otherwise the appearance of persons to record claims against the debtor ;
(3) register all claims so recorded :
(4) call upon the debtor to give reasonable security for his appearance, or, on default of reasonable security, order his confinement in the civil jail.
(5) attach all the debtor's property in the Punjab, moveable or immoveable ;
(6) pass an order exempting the person and property of the debtor from further legal process, pending inquiry and the final orders of the Court.

Insolvent defined.

A debtor on whom the order referred to in clause six of the last preceding section is passed, is deemed an insolvent.

Insolvent guilty of misconduct may be imprisoned.

25. The Court shall make full enquiry into the origin, nature, and circumstances of the debts, and the conduct of the debtor in relation thereto ; and if the insolvent be shown to have been guilty of concealment, fraud, recklessness, or other gross misconduct in reference to the debts, and if his discharge, for that reason, is opposed by any of the creditors, the Court may, at its discretion, award a term of imprisonment in the civil jail not exceeding one year.

Fraudulent transfers in expectation of insolvency may be annulled.

26. If it appear that the debtor, after becoming unable to meet his liabilities, or in expectation of becoming so, has transferred his property, or any part thereof, with a view to defrauding his creditors, or to giving one or more creditors a fraudulent preference over the others, the Court shall annul such transfer, and treat the property transferred as the other property of the debtor.

Power of Court to sell or administer insolvent's estate.

27. The property of the insolvent shall be sold or administered, under the direction of the Court, either through the agency of its own officers or of assignees to be appointed by the Court, in the manner most conducive to the interest of the creditors, and the proceeds shall be divided rateably amongst them.

Power to give effect to compositions.

28. The Court shall give effect to any composition or arrangement agreed upon between the debtor and the majority of the creditors : Provided that no injustice or injury appears to be inflicted by such composition or arrangement on any of the parties concerned, and that no fraud nor collusion is suspected. If any creditor objects to such arrangement, the Court shall decide as to the reasonableness of the objection.

When Court may order discharge of insolvent.

Effect of order.

29. When the sale or administration of the insolvent's property is complete, the Court may order the insolvent to be discharged, on his signing an agreement to liquidate, from any property which he may subsequently acquire, such portion of his debts as remains unpaid. Such order of discharge shall preclude any creditor whose claim is registered from suing the debtor in respect of such claim, unless it be shown that the debtor has acquired property, since the order of discharge, out of which the claim might have been defrayed.

Foregoing rules not to apply to persons admitted to benefit of insolvency law in presidency towns.

30. Nothing in the preceding sections shall apply to persons who may have been admitted to the benefit of any insolvency law at a presidency town; nor shall any order passed under the preceding sections affect the remedy of any creditor against his debtor in respect of property which, at the time of the insolvency of such debtor, was not in the Punjab.

Chief Court empowered to frame rules.

31. The Chief Court of the Punjab may, with the sanction of the Local Government, from time to time, frame and issue rules, conformable to the provisions hereinbefore contained, for the better administration of insolvent estates, and may with the like sanction alter any such rules.

Power to exclude any class from operation of such rules.

32. The Local Government may at any time, with the previous sanction of the Governor-General in Council, exclude any particular class or race from the operation of these rules.

Saving of previous insolvency proceedings.

33. No proceedings of any Court in the exercise of insolvency jurisdiction, had before the passing of this Act, shall be held to have been invalid solely on the ground that such Court did not possess such jurisdiction; all cases pending in any Court of Insolvency when this Act comes into force, shall be subsequently conducted, so far as may be, in conformity with the rules now prescribed.

MINORS AND THE COURT OF WARDS.

Deputy Commissioners to be Courts of Wards.

34. Deputy Commissioners shall be Courts of Wards within their respective districts, but shall exercise the functions of such Courts subject to the control of the Commissioner and Financial Commissioner.

Jurisdiction of Court of Wards.

35. The Court of Wards may, at its discretion, take charge of and administer the estates of all females, all minors under the age of eighteen, and idiots or lunatics, who may inherit any beneficial interest in any estate for which a settlement was made with their ancestor, or in respect of which they would have been entitled to be settled with, if they had been competent to make an agreement for the payment of revenue, or who are entitled by inheritance to any assignment of land-revenue.

Bar of jurisdiction in certain cases.

Provided that the Court of Wards shall not take charge of or administer any beneficial interest in an estate, in which more persons than one have a joint undivided interest, unless all such persons are so circumstanced as to be subject to the Court of Wards.

Deputy Commissioner may enquire into circumstances affecting jurisdiction.

36. The Deputy Commissioner may make an enquiry into the minority, lunacy, or idiocy of any person, who, he has reason to believe, would, if found to be a minor, lunatic, or idiot, be subject to the jurisdiction of the Court of Wards, and into the circumstances and property of any such person, and may make an order declaring such person to be subject to the jurisdiction of the Court of Wards.

Appeal to Commissioner against order under section 36.

37. Any such person may appeal to the Commissioner of the Division against any such order on the ground that he is not, or has ceased to be, a minor, or that he is not, or has ceased to be, a lunatic or idiot, and the decision of the Commissioner shall be certified to the Court of Wards, and shall be final.

Extent of jurisdiction.

38. The jurisdiction of the Court of Wards shall extend to the care and education, and to the management of the property, of the persons subject thereto; and the Local Government shall make rules as to the manner in which, and the agents by whom, such jurisdiction shall be exercised.

CRIMINAL JUDICATURE.

Indian Penal Code to apply to offences committed previous to first January 1862.

39. The provisions of the Indian Penal Code with the exception of Chapter VI, shall be applicable to all offences committed before first January 1862, in territory which was, at the time of the commission of such offence, subject to the Government of the Punjab.

Saving of privileges conferred on certain Chiefs.

Provided that nothing contained in this Section shall affect any privilege conferred on certain Chiefs in the Punjab by the Governor-General in Council, or by the Board of Administration for the affairs of the Punjab, nor any indemnity or pardon granted by competent authority.

HONORARY POLICE OFFICERS.

Local Government may invest any person with powers of Police officer.

40. The Local Government may, if it thinks fit, confer on any person any of the powers which may be exercised by a Police-officer under any Act for the time being in force.

TRACK LAW.

Trackers may call for assistance in carrying on tracks.

41. When an offence is, has been, or may reasonably be supposed to have been, committed, and the tracks of the persons who may reasonably be supposed to have committed such offence, or of any animal or other property reasonably supposed to be connected with such offence, are followed to a spot within the immediate vicinity of a village, the person following such tracks may call upon any Headman or Village Watchman in such village to assist in carrying on the tracks.

Penalty for withholding assistance or conniving at offence or escape.

42. If such Headman or Watchman do not forthwith give such assistance, or if the inhabitants of such village do not afford full opportunity for search in their houses for the offenders, or if, from the circumstances of the case, there shall appear good reason to believe that the inhabitants of such village, or any of them, were conniving at the offence or at the escape of the offenders, and such offenders cannot be traced beyond the village, the Magistrate of the District may, with the previous sanction of the Commissioner of the Division, inflict a fine upon such village not exceeding five hundred rupees, except in the case of stolen property over five hundred rupees in value, in which case the fine shall not exceed the value of such property.

Limit to fine.

Appeal to Chief Court.

An appeal against all convictions under this section shall lie to the Chief Court.

Fine may be awarded to injured parties, and fee to tracker.

The Magistrate may direct that the fine imposed under this section or any part thereof, shall be awarded to any persons injured by such offence in compensation for such injury; and, in the case of stolen property recovered through the agency of a tracker, may direct that such property be not restored to its owner until he has paid to such tracker such fee, not exceeding one-fourth part of the value of the stolen property, as to the said Magistrate seems fit.

SLAUGHTER OF KINE.

Control of slaughter of kine and sale of beef.

43. The slaughter of kine and the sale of beef shall not take place, except with the consent and subject to rules to be from time to time, either generally or in any particular instance, prescribed by the Local Government.

ARMED MEN AND FOREIGN VAGRANTS.

Control of entry into towns of bands of armed men.

44. No band of armed men shall enter into any city or town, except with the consent and subject to rules to be from time to time, either generally or in any particular instance, prescribed by the Local Government.

Powers of Magistrate of District as to foreign vagrants.

45. The Magistrate of the District may, if he considers that any band of foreign vagrants is likely to occasion a breach of the peace or to commit any offence under the Indian Penal Code, prohibit such band from entering his district; or, if they are already in his district, may require them within a given time to leave it.

Surveillance, &c., of band failing to comply with Magistrate's order.

46. If any such band fail to comply with the orders of the said Magistrate within the prescribed period, he shall report the matter to the Local Government, and the Local Government may give such directions for the surveillance, control, or deportation of such band, as to it seems fit.

MISCELLANEOUS.

Regulation of crossing of streams on buoys or skins;

47. No person shall cross any river or stream on a buoy or inflated skin, nor shall have in his possession or custody any buoy or skin for the purpose of being used in crossing any river or stream, except with the consent and subject to rules to be from time to time, either generally or in any particular instance, prescribed by the Local Government.

of use of pasturage or natural product of Government land;

48. No person shall make use of the pasturage or other natural product of any land being the property of the Government, except with the consent and subject to rules to be from time to time, either generally or in any particular instance, prescribed by the Local Government.

and of growing, selling, or keeping opium.

49. No person shall grow, sell, or keep in his possession any opium, except with the consent and subject to rules to be from time to time, either generally or in any particular instance, prescribed by the Local Government.

Local Government to make rules.

50. The Local Government may issue rules as to the matters mentioned in sections forty-three to forty-nine inclusive, and may, from time to time, cancel or alter any such rules.

Penalty for breach of rules.

Any person who breaks any rule made by the Local Government under this Act, shall be punishable with a fine not exceeding rupees fifty, or imprisonment not exceeding a period of six months, or with both :

Provided—

(1) that such rules be not inconsistent with the provisions of this or any Act or law for the time being in force in the Punjab ;

(2) that, previous to notification, they be sanctioned by the Governor-General in Council ;

(3) that they be notified in the Local Gazette.

Existing rules confirmed.

Existing rules upon the subjects hereinbefore mentioned shall, until otherwise directed by the Local Government, be deemed to have been issued under, and in conformity to, this section.

Re-publication of rules and orders.

51. All rules which the Local Government is empowered to issue under this Act, and all circulars issued by the Chief Court, shall, with the previous sanction of the Governor-General in Council, be re-published once at least in every year; and, upon such re-publication, shall be arranged in the order of their subject-matter; and all such alterations or amendments as may have been made in the course of the preceding year, or may have become necessary or advisable, shall be embodied therewith; and upon such re-publication all such rules and circulars, previously issued, shall be repealed.

SCHEDULE I.

Enactments declared to be in force.

Explanation.—This Schedule does not refer to any Act which is in its terms applicable to the Punjab, or which has been extended to the Punjab by competent authority.

Number and Year.	Title.	Extent to which the Enactment is in force.
Reg. I of 1798	A Regulation to prevent Fraud and Injustice in conditional Sales of Land under Deeds of Bye-bil-wuffa, or other Deeds of the same nature.	The whole, except such parts as relate to interest.
Reg X of 1804	A Regulation for declaring the Powers of the Governor-General in Council to provide for the immediate Punishment of certain Offences against the State by the sentence of Courts Martial.	The whole, so far it is not modified by Act V of 1841.
Reg. XVII of 1806 ...	A Regulation for extending to the Province of Benares the Rates of Interest on future Loans, and Provisions relative thereto, contained in Regulation XV, 1793; also for a general extension of the period fixed by Regulations I, 1798; and XXXIV, 1803, for the Redemption of Mortgages and Conditional Sales of Land, under Deeds of Bye-bil-wufla, Kutcubaleh, or other similar designation.	Sections seven and eight.
Reg. V of 1817	A Regulation for declaring the Rights of Government and of Individuals with respect to hidden Treasure, and for prescribing the Rules to be observed on the Discovery of such Treasure.	The whole.
Reg. III of 1818	A Regulation for the Confinement of State Prisoners.	The whole.
Reg. XI of 1825	A Regulation for declaring the Rules to be observed in determining Claims to Lands gained by alluvion, or by dereliction of a river or the sea.	The whole.
Reg. XX of 1825	A Regulation for declaring the jurisdiction of the Military Courts Martial and Courts of Requests, constituted by a recent Act of Parliament, and for modifying some parts of the existing Regulations in conformity thereto.	Sections two and four.
Act XL of 1858	An Act for making better provision for the care of the persons and property of minors in the Presidency of Fort William in Bengal.	The whole.
Act XVII of 1861 ...	An Act to amend Act XIV of 1843 (for regulating the Customs Duties in the North-Western Provinces).	The whole, the word "Punjab" being substituted for the words "North-Western Provinces."

SCHEDULE I.—*(Continued.)*

Number and Year.	Title.	Extent to which the Enactment is in force.
	"Rules for the conservancy of Forests and Jungles in the Hill Districts of the Punjab Territories," sanctioned by the Governor-General in Council, in letter of the Secretary to the Government of India, No. 1789, 21st May 1855.	The whole.

SCHEDULE II.

Enactments repealed.

Number and Year.	Title.	Extent of Repeal.
	All Bengal Regulations now in force in the Punjab, except those specified in schedule 1.	The whole.
	All rules, laws and regulations made for the Punjab and its Dependencies or for any part thereof, by the Governor-General of India, or the Governor-General of India in Council, or the Lieutenant-Governor of the Punjab otherwise than at meetings for making laws and regulations in conformity with the provisions of the Acts of the 3rd and 4th years of King William the fourth, Chapter eighty-five, and of the 16th and 17th years of Her Majesty, Chapter ninety-five, or other Act in force for the time being, except those specified in schedule I.	The whole.
Act VI of 1846	An Act for the more convenient administration of the government of the country called the Bhuttee Territory.	The whole
Act I of 1847	An Act for the establishment and maintenance of Boundary-marks in the North-Western Provinces of Bengal.	The whole, so far as it affects the Punjab.
Act III of 1870	An Act to remove the Agror Valley from the jurisdiction of the tribunals established under the general Regulations and Acts, and for other purposes.	The whole, so far as it is unrepealed.

ACT NO. V OF 1872.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

(Received the assent of the Governor-General on the 28th March 1872.)

An Act to remove doubts as to the Jurisdiction of the High Court of Bombay over the Province of Sind.

Preamble.

WHEREAS it is expedient to remove doubts which have arisen as to the jurisdiction of the High Court of Bombay over the Province of Sind; It is hereby enacted as follows:—

Bar of jurisdiction in Sind of Bombay High Court.

1. The High Court of Bombay has not, and shall be deemed never to have had, jurisdiction over the Province of Sind.

ACT NO. VI OF 1872.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

(*Received the assent of the Governor-General on the 5th April* 1872.)

An Act to amend the law relating to Oaths and Affirmations.

Preamble.

WHEREAS it is expedient to amend the law relating to oaths and affirmations; It is enacted as follows:—

Short title.

1. This Act may be called "The Oaths Act, 1872."

Extent.
Commencement.

2. It extends to British India, applies to all oaths or affirmations taken or made by or administered to British subjects in Native Indian States, and it shall come into force on the passing thereof.

Persons liable to be sworn may, if they object to oath, make simple affirmation.

3. Every person who may by law be sworn or called upon to make a solemn affirmation, in any capacity whatever, may, if he objects to such oath or solemn affirmation, make in place thereof a simple affirmation to the same effect, omitting the words 'So help me God,' 'In the presence of Almighty God,' or other expressions of the same nature.

Powers of Court as to certain oaths when tendered by parties or witnesses.

4. If any party to, or witness in, any judicial proceeding offers to give evidence on oath in any form common amongst, or held binding by, persons of the race or persuasion to which he belongs, and not repugnant to justice or decency, and not purporting to affect any third person, the Court may, if it thinks fit, tender such oath to him.

If any party to any proceeding offers to be bound by any such oath as is mentioned in the first paragraph of this section, if such oath is taken by the other party to, or by any witness in, such proceeding, the Court may, if it thinks fit, ask such party or witness whether he will take the oath or not.

If such party or witness accepts such oath, the Court may proceed to administer it, or if it is of such a nature that it may be more conveniently taken out of Court, the Court may issue a Commission to any person to administer it, and authorise such person to take the evidence of the person to be sworn ~~and return it~~ to the Court.

The evidence so given shall, as against the person who offered to be bound by it, be conclusive proof of the matter stated.

If the party or witness refuses to take the oath, he shall not be compelled to take it, but the Court shall record, as part of the proceedings, the nature of the oath proposed, the facts that he was asked whether he would take it, and that he refused it, together with any reason which he may assign for his refusal.

Proceedings and evidence not invalidated by omission of oath or irregularity.

5. No omission to take any oath or to make any solemn or simple affirmation, no substitution of any one for any other of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever, in or in respect of which such omission, substitution, or irregularity took place.

Saving of certain oaths and affirmations.

6. Nothing in this Act shall apply to oaths or affirmations prescribed by any law which, under the provisions of the Indian Councils' Act, 1861, the Governor-General in Council has not the power to repeal.

ACT NO. VII OF 1872.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

(*Received the assent of the Governor-General on the 5th April* 1872.)

An Act to consolidate and amend the Law relating to the Courts in British Burmah.

Preamble.

WHEREAS it is expedient to consolidate and amend the law relating to the Courts in British Burmah; It is hereby enacted as follows:—

PART I.

CHAPTER I.

PRELIMINARY.

Short title.

1. This Act may be called "The Burmah Courts Act, 1872;"

Extent.

It extends to all the territories under the Chief Commissioner of British Burmah;

Commencement.

and shall come into force on the passing thereof.

Pending suits to be disposed of by Courts in which instituted.

2. All suits, appeals, applications, or proceedings, instituted previous to the passing of this Act in any Court, other than the Courts of the Chief Commissioner and the Recorders of Rangoon and Maulmain, respectively, shall be heard and disposed of by the Courts in which they were instituted.

Abolition of certain Courts.

3. From the date of the passing of this Act the Court of the Chief Commissioner and the Courts of the Recorders of Rangoon and Maulmain, as established by Act XXI of 1863, shall cease to exist.

Transfer of suits pending in Courts of Chief Commissioner and Recorder.

4. All suits, appeals, applications, or proceedings pending in the Court of the Chief Commissioner, shall be transferred to the Court of the Judicial Commissioner; those pending in the Court of the present Recorder of Rangoon shall be transferred to the Court of the Recorder of Rangoon to be established under this Act; and those pending in the Court of the Recorder of Maulmain shall, if they are of a civil nature, be transferred to the Court of the Judge of the Town of Maulmain, and if they are of a criminal nature, to the Court which has jurisdiction under this Act.

Repeal of Act.

5. The Acts mentioned in the schedule hereto annexed are hereby repealed to the extent mentioned in the third column thereof.

CHAPTER II.

LAW TO BE ADMINISTERED.

Certain decisions to be according to Native law.

6. Where, in any suit or proceeding, it is necessary for any Court under this Act to decide any question regarding succession, inheritance, marriage, or caste, or any religious usage or institution,

the Buddhist law in cases where the parties are Buddhists,

the Mahomedan law in cases where the parties are Mahomedans, and

the Hindoo law in cases where the parties are Hindoos,

shall form the rule of decision, except in so far as such law has, by legislative enactment, been altered or abolished, or is opposed to any custom having the force of law in British Burmah.

In cases not provided for by the former part of this section or by any other law for the time being in force, the Court shall act according to justice, equity, and good conscience.

Law to be administered in Court of Recorder of Rangoon.

7. Except as provided in section six all questions of fact, law, and equity arising in suits before the Recorder of Rangoon shall be dealt with and determined according to the law administered by the High Court at Fort William in Bengal, in the exercise of its ordinary original civil jurisdiction.

CHAPTER III.

CONSTITUTION AND POWERS OF COURTS.

Civil Jurisdiction of Courts.

8. The Courts mentioned in the first column of the subjoined table shall ordinarily have such civil jurisdiction respectively, in the adjudication of suits arising within their local jurisdiction, as is specified in the second column thereof :

Name of Court.	Extent of Jurisdiction.
(1.) The Court of the Extra Assistant Commissioner of the third class.	Powers of a Civil Court where the amount or value of the subject-matter of the suit does not exceed rupees five hundred.
(2.) The Court of the Extra Assistant Commissioner of the second and first class, and the Assistant Commissioner.	Powers of a Civil Court where the amount or value of the subject-matter of the suit does not exceed rupees three thousand.
(3.) The Court of the Deputy Commissioner.	Powers of a Civil Court in all suits, whatever be the value or the amount of the subject-matter thereof. Powers of a District Judge. Power to hear appeals from decrees and orders in original suits and proceedings of the Courts of grades (1) and (2), where such appeal is allowed by law. Power to direct the business in the Courts of grades (1) and (2) to be distributed among such Courts in such way as he thinks fit.
(4.) The Court of the Judge of the Town of Maulmain.	Powers of a District Judge. Powers of a Civil Court, whatever be the amount or value of the subject-matter of the suit. Powers of a Court of Small Causes, where the amount or value of the subject-matter of the suit does not exceed rupees one thousand.
(5.) The Court of the Commissioner.	Power to withdraw any suit or appeal instituted in any Court within the local limits of his jurisdiction, except a Court of Small Causes, or the Court of the Judge of the Town of Maulmain, and try such suit or appeal himself or refer it for trial to any Subordinate Court of competent jurisdiction as to the amount or value of the subject-matter thereof. Power to hear appeals from decrees and orders in original suits and proceedings of the Court of grade (3), where such appeal is allowed by law.

Name of Court.	Extent of Jurisdiction.
(6.) The Court of the Judicial Commissioner.	Powers of a High Court, in relation to all Courts in British Burmah, including Small Cause Courts, except the Court of the Recorder of Rangoon, and the Court of Small Causes of Rangoon. Power to remove and try any suit, appeal, or other proceeding instituted in any Subordinate Court, except a Court of Small Causes, or to refer it to any Court of competent jurisdiction as to the value or amount of the subject-matter thereof. Power to hear appeals from decrees and orders, in original suits and proceedings, of the Court of the Commissioner, where such appeal is allowed by law.

Provided that, where a Small Cause Court is established within the local limits of the jurisdiction of the Courts (1), (2), and (3), the said Courts shall not take cognizance of any suit cognizable by such Court of Small Causes.

Powers of Judicial Commissioner in criminal matters;

9. The Judicial Commissioner shall be deemed to have and to have had the powers of a High Court in criminal matters in relation to all Courts in Burmah, except that of the Recorder of Rangoon, and of Magistrates within the local limits of the ordinary civil jurisdiction of the said Recorder:

of Commissioner,

The Commissioner shall be deemed to have and to have had the powers of a Sessions Judge:

and of Judge of Maulmain.

The Judge of the Town of Maulmain shall have the powers of a Sessions Judge.

Power to fix number of Courts.

10. The Governor-General in Council shall fix, and may from time to time vary, the number of Courts of each grade to be established under this Act.

Chief Commissioner to fix local jurisdiction of Courts.

11. The Chief Commissioner shall, with the previous sanction of the Governor-General in Council, fix, and may with the like sanction from time to time vary, the local limits of the jurisdiction of any Court mentioned in section eight.

Confirmation of existing Courts and presiding officers.

12. All existing Courts, corresponding to the Courts mentioned in section eight, and the presiding officers and the local limits thereof, shall be deemed to have been respectively established, appointed, and fixed under this Act.

13. Every Court mentioned in section eight shall—

Seal to be used.

(1) use a seal of such form and dimensions as are for the time being prescribed by the Chief Commissioner;

Place for holding Court.

(2) be held at such place or places as may from time to time be directed by the Chief Commissioner; or, in the absence of any such direction, at any place within the local jurisdiction of the Court which the presiding officer thinks fit.

Superintendence over Courts.

14. The general superintendence over all the Courts of the first five grades mentioned in section eight is vested in, and the said Courts shall be subordinate to, the Judicial Commissioner; and, subject to such general superintendence, the Commissioner shall have control over the Courts of the Deputy Commissioners within his Division: and the Deputy Commissioner over all the Courts of the first and second grades within his district.

List of holidays.

15. Subject to the orders of the Chief Commissioner, the Judicial Commissioner shall prepare a list of days to be observed in each year as close holidays in his Court and the Courts subordinate to him.

Special Jurisdiction.

Chief Commissioner may give special jurisdiction.

16. The Chief Commissioner may invest any Assistant Commissioner, or Extra Assistant Commissioner of the first or second class, with power to try suits of which the amount or value does not exceed five thousand rupees.

Chief Commissioner may invest certain Courts with powers of Judge of Small Causes.

17. The Chief Commissioner may invest any presiding officer of the Courts of grades (2) and (3) mentioned in section eight with the powers of a Judge of a Court of Small Causes, to hear and determine suits of a nature cognizable by a Court of Small Causes, and of such value or amount as he thinks fit, not exceeding five hundred rupees.

Any Court so invested, shall, in the exercise of the powers so conferred, be governed by the provisions of the law for the time being in force regulating the procedure of Courts of Small Causes.

Exercise by Chief Commissioner of powers of Local Government.

18. The Chief Commissioner may exercise the powers conferred on the Local Government by section seven of Act XI of 1865.

Exercise by one Court within limits of another of same grade, of powers of latter.

19. The Chief Commissioner may empower the presiding officer of any Court mentioned in section eight to exercise the powers, which might be exercised by the presiding officer of any other Court of the same grade, within the local limits of the jurisdiction of the latter Court.

Procedure.

Procedure when subject-matter of suit is situate within jurisdiction of different Courts.

20. Where a suit is brought for immoveable property situate within the local jurisdiction of different Courts included in the same Division, application for authority to proceed with the same shall be made to the Commissioner of the Division:

If the said Courts belong to different Divisions, the application shall be made to the Judicial Commissioner, through the Commissioner of the Division in which the Court wherein the suit was instituted is included:

If either of the said Courts is the Court of the Recorder of Rangoon, the application shall be made to the Chief Commissioner.

Presiding officer of Court not to try suit or appeal in which he is interested;

21. No presiding officer of any Court mentioned in section eight shall, unless with the consent of the parties, or the direction of the Chief Commissioner, try any suit or appeal in which he is a party or personally interested, or any appeal against a decree or order passed by himself; or shall adjudicate upon any proceeding connected with, or arising out of, such suit or appeal:

but to transfer to Superior Court;

When any such suit, appeal, or proceeding comes before any such presiding officer, he shall forthwith, unless the parties apply that he proceed with the case himself, transmit the record to the Court to which he is immediately subordinate, with a report of the circumstances attending the reference:

which may try or transfer to other Court.

The Superior Court shall thereupon try the case itself, or transfer it for trial to any Subordinate Court of competent jurisdiction as to the amount or value of the subject-matter of the suit.

Trial of appeal from order of Judicial Commissioner in other capacity or in which he is interested.

In the event of an appeal being preferred to the Judicial Commissioner from a judgment or order passed by him in any other capacity, or in which he has any personal interest, he shall, unless the parties apply that he proceed with the case himself, report the fact to the Chief Commissioner, who shall either direct the Judicial Commissioner to try the case himself or transfer it to the Court of the Recorder of Rangoon.

Appointment and removal.

Appointment of officers.

22. The presiding officers of all the Courts except that of the Extra Assistant Commissioner of the third class shall be appointed by the Governor-General in Council.

The Extra Assistant Commissioner of the third class shall be appointed and may be removed by the Chief Commissioner.

Suspension and removal of presiding officers.

23. The presiding officer of any Court under this Act may, for any misconduct, be suspended or removed by the Governor-General in Council.

The presiding officer of any Court except the Courts of the Judicial Commissioner and the Recorder of Rangoon may, for any misconduct, be suspended by the Chief Commissioner, but shall not be removed without the sanction of the Governor-General in Council.

Appointment of ministerial officers of Courts (1) and (2) mentioned in section 8.

24. The ministerial officers of the Courts of grades (1) and (2) mentioned in section eight shall be appointed by the Deputy Commissioner within whose local jurisdiction such Courts are situate.

The ministerial officers of all other Courts shall be appointed by the presiding officers thereof;

provided that the appointment of every ministerial officer of a Court subordinate to the Judicial Commissioner, whose monthly salary exceeds fifty rupees, shall be subject to the sanction of the Judicial Commissioner.

Power to fine, suspend, or remove such officers.

25. Every Court of the grades (1) and (2) mentioned in section eight may fine in an amount not exceeding one month's salary any of its ministerial officers who is guilty of misconduct or neglect in the performance of the duties of his office.

The Deputy Commissioner, subject to the general control of the Commissioner, may on appeal or otherwise reverse or modify any such order; and may of his own motion remove, suspend from office, or fine up to the amount of one month's salary, any ministerial officer of a Court subordinate to him.

The presiding officer of any of the Courts of grades (4), (5), and (6) mentioned in section eight and of any Court of Small Causes, may remove or suspend the ministerial officers of his Court, or fine them in an amount not exceeding one month's salary; but every such removal or suspension of an officer whose salary exceeds fifty rupees per month shall be subject to the review of the Judicial Commissioner.

Recovery of fines.

26. Any fine imposed under this chapter shall, if the order imposing it so directs, be recovered from the offender's salary.

General control of Chief Commissioner over appointments and removals of ministerial officers.

27. The Chief Commissioner shall have a power of general control over all appointments and removals of ministerial officers under this Act.

Civil Appeals.

Time allowed for presenting appeals to Commissioner.

28. The memorandum of appeal must, when the appeal lies to the Commissioner, be presented within six weeks, the period being reckoned from and exclusive of the day on which the decision or order appealed against was passed, and also exclusive of such time as may be requisite for obtaining a copy of such decision or order.

Transfer of civil appellate jurisdiction to Judicial Commissioner.

29. The Chief Commissioner may direct that the civil appellate jurisdiction of any Commissioner shall be transferred to the Judicial Commissioner either wholly or in respect of a particular suit or class of suits and either for a specified time or until further orders. The Chief Commissioner may also at any time direct that any appellate jurisdiction which has been so transferred to the Judicial Commissioner shall revert to the Commissioner, from whom it was so transferred.

Confirmation of decision of Lower Court without summoning respondent.

30. The Appellate Court may confirm the decision of the Lower Court, without summoning the respondent, if, upon perusal of the judgment of the Lower Court and of the petition of appeal in the presence of the appellant or his pleader, there appear to the Appellate Court to be no reason to alter the decision appealed from.

Reference to Judicial Commissioner.

31. When in the trial of any civil appeal the Appellate Court entertains a doubt in regard to a question of law or usage having the force of law, or as to the construction of a document, or as to the admissibility of any evidence affecting the merits of the case, such Court may draw up a statement of the point, as to which it is in doubt, and refer it, with the Court's own opinion, for the decision of the Judicial Commissioner.

Procedure on such reference.

32. The Judicial Commissioner shall, after considering the point so referred, send a ruling thereon to the Court by which the reference was made; and such Court shall, on the receipt of such ruling, proceed to dispose of the case in conformity therewith.

Costs of reference.

The costs, if any, consequent on any such reference to the Judicial Commissioner, shall be costs in the appeal out of which the reference arose.

When Judicial Commissioner may receive second appeal.

33. If in any suit the decision of the Deputy Commissioner or of the Commissioner, passed in appeal, reverse or modify the decision of the Court of original jurisdiction, the Judicial Commissioner may receive a second appeal, if, on a perusal of the grounds of appeal and of copies of the judgments of the Subordinate Courts, a further consideration of the case appears to him to be requisite for the ends of justice.

When decision of first Appellate Court to be final.

34. If the Court of first appeal confirms the decision of the Court of original jurisdiction on a matter of fact, such decision shall be final.

Reference to Judicial Commissioner when decision of Lower Court confirmed on certain points.

35. If the Court of first appeal confirms the decision of the Court of original jurisdiction on a question of law or custom having the force of law, or the construction of any document, or the admissibility of any evidence affecting the merits of the case, the party aggrieved by such decision may apply to such Court to draw up a statement of the point as to which he considers such Court to have made an incorrect ruling and to submit it to the Judicial Commissioner.

Such application shall not be admitted, unless it is made within the period and after payment of the fee prescribed by law for petitions of appeal.

If the Court consider that there is a question of law or custom having the force of law, or as to the construction of a document or admissibility of evidence affecting the merits of the case, it shall make a statement of the same and of such facts only of the case as are necessary to explain it, and shall submit such statement, together with the record of the case, to the Judicial Commissioner.

If the Court refuses to make such statement, it shall record in writing its reasons for so refusing.

Procedure of Judicial Commissioner thereupon.

36. The Judicial Commissioner shall, with as little delay as possible, proceed to try the case referred, as if it were an appeal instituted in his Court, except that it shall not be necessary for the parties to be present: the Judicial Commissioner shall send a copy of his judgment to the Court by which the case was submitted, and the said Court shall dispose of the case in conformity with such judgment.

Reference by Judicial Commissioner to High Court.

37. When the Judicial Commissioner entertains any doubt as to the decision to be passed on any appeal made or case referred under this Act, he may make a reference to the High Court of Fort William in Bengal and shall send the record of the said appeal or case and all the proceedings connected therewith to the said Court.

Procedure thereupon.

The procedure prescribed by section thirty-six shall as nearly as possible be followed by the High Court in the disposal of reference made under this section.

Provisions as to costs to apply.

38. The provisions of section thirty-two as to the adjustment of costs, shall apply to cases referred under sections thirty-five and thirty-seven.

PART II.

CHAPTER IV.

COURT OF THE RECORDER OF RANGOON.

The Court of the Recorder of Rangoon.

39. There shall be a Court, to be called the Court of the Recorder of Rangoon.

Appointment of Recorder.

The Recorder shall be appointed by the Governor-General in Council, and shall be a Barrister of not less than five years' standing, and shall hold his office during the pleasure of the Governor-General in Council.

Place of holding Court.

He shall hold his Court ordinarily in the Town of Rangoon; but the Chief Commissioner may direct him on any particular occasion to hold his Court either at Akyab or Maulmain for the trial of Civil suits or appeals transferred to him, or Criminal cases in which European British subjects are concerned.

Seal to be used.

He shall use a seal of such form and dimensions as are for the time prescribed by the Chief Commissioner.

Civil Jurisdiction.

Local limits of ordinary civil jurisdiction of Recorder.

40. The present local limits of the jurisdiction of the Recorder of Rangoon shall be the local limits of the ordinary civil jurisdiction of the Recorder appointed under this Act; but the Chief Commissioner may from time to time, with the previous sanction of the Governor-General in Council, vary such limits.

Civil jurisdiction of Recorder.

41. The Court of the Recorder shall have jurisdiction in the adjudication of suits of every description, except those which are cognizable by a Court of Small Causes, if, in the case of immoveable property, the subject-matter of the suit is situate, or if, in all other cases, the defendant at the time of the commencement of the suit dwells or carries on business or personally works for gain, within the limits mentioned or referred to in section forty. Where such immoveable property is situate partly within the local jurisdiction of the Recorder and partly within the jurisdiction of some other Court, the Chief Commissioner shall determine by what Court the suit shall be tried.

No appeal from Recorder's Court in certain cases.

42. There shall be no appeal from the decree or order of the Recorder, passed in any original suit or proceeding, where the amount or value of the subject-matter thereof does not exceed three thousand rupees.

When appeal to lie to High Court.

Where such amount or value exceeds three thousand rupees, and is less than the amount for which an appeal will lie to Her Majesty in Council under the law for the time being in force regulating such appeals, an appeal shall lie to the High Court of Judicature at Fort William in Bengal.

Assessors in civil suits.

43. For the trial of civil suits under this Act, the Recorder may constitute one or more persons assessor or assessors of the Court. Such person or persons shall attend during the trial of the suit, and shall deliver his or their opinion or opinions in writing, to be recorded on the proceedings. But the decision of the case shall rest with the Recorder. No officer of the Recorder's Court shall be appointed an assessor under this section.

Remuneration to assessor appointed at desire of suitor.

If any such assessor is appointed at the desire of the parties to a suit or either of them, such parties or party shall deposit such sum as the Recorder decides to be reasonable compensation to such assessor for his time and trouble. Such sum shall be recoverable as costs in the case.

Miscellaneous jurisdiction.

44. The Recorder shall, within the local limits of his ordinary civil jurisdiction, exercise the powers of a District Judge; and he shall also exercise the powers of a District Judge under Act IV of 1869 (*The Indian Divorce Act*) throughout British Burmah.

Recorder's powers in respect of Small Cause Court, Rangoon.

45. The Recorder shall in respect of the Court of Small Causes in Rangoon, exercise the powers of a High Court.

Grant of new trial on application within given time.

46. The Recorder may, if he thinks fit, grant a new trial in any suit tried by him, if, in suits relating to land or other immoveable property, such new trial be applied for within three months from the date of the decision, and, in all other cases, if it be applied for within thirty days from the date of the decision. Provided that nothing hereinbefore contained shall interfere with the power of the Recorder to allow a review of judgment, under the Code of Civil Procedure, if such review be applied for within the period allowed by the said Code for making such applications. Provided also that, in any case in which the Recorder thinks it necessary to do so, he may, before granting a new trial or a review, require the party applying for the same to give sufficient security for the due compliance with the terms of the decree or order which it is sought to set aside or review.

And review of judgment.

Security from applicant for either.

In case of doubt as to certain questions, statement of case may be submitted for decision of High Court.

47. If in any suit any question of law or usage having the force of law, or the construction of a document affecting the merits of the decision, arises, on which the Recorder entertains any doubt, the Recorder may, either of his own motion, or on the application of the parties to the suit or either of them, draw up a statement of the case, and submit such statement, with his own opinion, for the decision of the High Court of Judicature at Fort William in Bengal,

And decree may be passed contingent thereon: but, pending receipt, execution not to issue.

48. The Recorder may proceed in the case, notwithstanding a reference to the said High Court, and may pass a decree contingent upon the opinion of the High Court on the point referred; but no execution shall be issued in any case, in which a reference has been made to the High Court, until the receipt of the order of that Court.

Full bench to deal with cases referred.

49. Cases referred under section forty-seven for the opinion of the High Court shall be dealt with by a bench of two or more Judges of that Court.

And parties may appear in person, or by advocate, &c. Transmission of judgment of High Court, and proceeding thereupon.

50. The parties to the case may appear and be heard in the High Court in person, or by an Advocate or Pleader; but they shall not be bound so to appear; and the High Court, when it has heard and considered the case, shall transmit a copy of its judgment, under the seal of the Court and the signature of the proper officer of the Court, to the Recorder, who shall, on the receipt thereof, proceed to dispose of the case conformably to the decision of the High Court.

Costs of reference to High Court.

Costs, if any, consequent on the reference of a case for the opinion of the High Court, shall be costs in the suit.

Transfer of suits to Recorder's Court.

51. The Chief Commissioner may direct the transfer to the Recorder's Court of any suit or appeal which may have been instituted in any Court in British Burmah other than the said Recorder's Court.

Trial of such suits.

Every case so transferred shall be tried and determined by the Recorder in the same manner as if he had originally had jurisdiction in such case and it had been instituted in his Court.

Disposal of suit where Recorder is interested.

52. When any suit or proceeding comes before the Recorder of Rangoon, in which he is a party or personally interested, he shall, unless the parties apply that he proceed with the case himself, report the fact to the Chief Commissioner, who shall either direct the Recorder to try the case himself, or transfer it to the Court of the Judicial Commissioner.

Jurisdiction of Judicial Commissioner in cases transferred.

The Judicial Commissioner shall have the same jurisdiction, in the adjudication of cases so transferred, as the Recorder has in suits and proceedings cognizable by him under this Act, and the provisions of sections forty-six to fifty inclusive shall apply to such cases.

Criminal Jurisdiction.

Recorder to exercise powers of Session Court within his civil jurisdiction.

53. The Recorder shall exercise the powers of a Court of Session, as defined in the Code of Criminal Procedure, within the local limits of his ordinary civil jurisdiction. Provided that sentences of death passed by him as a Court of Session, shall be subject to the confirmation of the Special Court.

And powers of revision of High Court as to proceedings of Magistrates.

54. The Recorder shall exercise the powers exercisable by a High Court as a Court of Revision, in respect of the proceedings of Magistrates within the local limits of his ordinary civil jurisdiction.

And powers of High Court as to European British subjects.

55. The Recorder shall exercise the powers of a High Court for the trial of European British subjects; and all commitments of European British subjects on charges of offences committed within British Burmah, which would, according to the law for the time being relating to Criminal Procedure, be made to a High Court, shall be made to his Court.

Proceedings to be regulated by Code of Criminal Procedure.

56. The proceedings on trials held by the Recorder for the trial of European British subjects, shall be regulated by the Code of Criminal Procedure.

Liability of Military officers to serve as jurors.

Provided that European officers in the Military Service, Commissioned and Non-Commissioned, resident within ten miles of the place of sitting of the Court, shall be liable to serve as jurors for the trial of European British subjects.

List of officers liable to serve.

The Officer Commanding the Station where the Court of Session is about to be held shall, when required, send in to the Court a list containing the names of all officers liable to serve.

Officer summoned not excusable except for urgent military duty.

The summons to any such officer to serve as a juror shall be sent through the officer Commanding the Station; but no officer shall be excused from attendance, unless the officer Commanding the Station shall certify in writing to the Court that the presence of the officer summoned is required elsewhere on urgent military duty: and in such certificate the Commanding Officer shall supply the name of some other officer for service upon the jury.

Sentence of death to be referred to High Court.

57. Sentences of death passed in the exercise of the powers conferred by section fifty-five shall not be carried out without the confirmation of the High Court at Fort William in Bengal, to whom such sentences shall be referred.

Advocates.

Licensing of Advocates, and rules regarding qualifications and admission.

Saving of agent for Secretary of State, &c.

And of Advocates, &c., of High Courts.

58. No person shall be permitted to appear or act as the Advocate of any suitor in the Court of the Recorder, unless such person has been licensed thereto by the Recorder, either generally or specially; and the Recorder may make rules for the qualification and admission of proper persons to act as Advocates in his Court, and may from time to time cancel, vary, or add to, any such rules. Provided that nothing in this section contained shall be deemed to prevent any person from appearing or acting as the agent for the Secretary of State for India in Council, or to prevent any suitor from appearing, pleading, or acting on his own behalf or on behalf of a co-suitor. Provided also that any person, who for the time being is an Advocate, Vakeel, or Attorney-at-law of any of the High Courts of Judicature in India, shall be entitled, without any such license, to act as an Advocate for any suitor in the Court of the Recorder.

License may be suspended or withdrawn.

The Recorder may, for any sufficient reason, suspend or withdraw any license granted under this section. Any person aggrieved by such suspension or withdrawal may appeal to the High Court of Judicature at Fort William in Bengal.

Fees of Advocates, &c., subject to taxation.

59. The fees to be received by any Advocate, whether generally or specially licensed by the Recorder, or entitled to act in his Court as an Advocate for another person without a license, under section fifty-eight of this Act, shall at all times be subject to the control and taxation of the said Recorder, and no fees shall be recoverable by any Advocate except such fees as shall have been allowed by the Recorder on taxation.

Rules of the Court.

Provision for discharge of duties of Recorder in case of vacancy in his office.

60. Upon the occurrence of any vacancy in the office of Recorder of Rangoon and during any absence of the Recorder, the Chief Commissioner may direct the Judicial Commissioner or any Commissioner to perform the duties of the Recorder; and the Judicial Commissioner or the Commissioner so directed shall thereupon be authorized to preside in the Court of the Recorder, and to exercise the jurisdiction of the Recorder until some person shall have been appointed by the Governor-General in Council to fill or officiate in the office of the Recorder, and shall have entered upon the discharge of the duties of such office, or until the Recorder shall have returned from such absence.

Appointment and removal of ministerial officers.

61. The ministerial officers of the Court of the Recorder of Rangoon shall be appointed by the Recorder, who may also remove or suspend them, or fine them in an amount not exceeding one month's salary; but the suspension or removal of any officer drawing a salary of one hundred rupees or upwards shall be subject to the orders of the Chief Commissioner.

Registers, &c., to be kept, and returns to be submitted, by Recorder.

62. The Recorder shall keep such registers and books and accounts, and submit to the Chief Commissioner such statements and returns as may, subject to the approval of the Governor-General in Council, be prescribed by the Chief Commissioner. The said Recorder shall also comply with such requisitions for information as are made by the Chief Commissioner, and generally, in matters not judicial, shall be subject to the control of the Chief Commissioner.

Power to make rules of practice.

63. The Recorder may make and issue general rules for regulating the practice and procedure of his Court, and may prescribe forms for every proceeding therein for which he thinks that a form should be provided, and may from time to time alter any such rule or form; and the rules so made, and the forms so framed, shall be published in the local official Gazette, and after being so published shall be observed and used in the said Court: Provided that such rules and forms shall not be inconsistent with the Codes of Civil or Criminal Procedure or any other law for the time being in force, and shall, before they are published, have received the sanction of the Chief Commissioner.

Rules for service and execution of process, and table of fees for same.

Publication of same.

64. The Recorder may, with the previous sanction of the Chief Commissioner, make, and may from time to time alter, rules to regulate the service and execution of the processes of his Court within the local limits of his jurisdiction; and may settle a table of fees to be allowed to the persons employed in such service or execution. All such rules and tables shall be published in the local official Gazette, and shall thenceforth have the force of law.

Holidays and vacations.

65. The Recorder shall, at the commencement of each year, draw up a list of holidays and vacations to be observed in his Court, and shall submit the same for the sanction of the Chief Commissioner.

Rules before made to be in force until others made under this Act.

Rules heretofore made to regulate the service and execution of process under Act XXI of 1863, or Act III of 1866, shall be deemed to be in force until superseded by rules made under this Act.

CHAPTER V.

SPECIAL COURT.

Constitution of Special Court.

66. The Special Court under this Act shall ordinarily be constituted by the Judicial Commissioner and the Recorder of Rangoon sitting together; but the Chief Commissioner may direct any Commissioner to sit in the Court as an additional Judge. Such Commissioner shall record his opinion in the case, and in case of a difference of opinion, the opinion of the majority shall be the decision of the Court.

Precedence in Special Court.

67. When the Judicial Commissioner and Recorder sit together as a Special Court, the senior officer, according to priority of appointment, shall have the precedence in the Court so formed.

Use of Seal.

The Special Court shall use a seal of such form and dimensions as the Chief Commissioner from time to time directs.

Rules for Special Court.

68. The Judicial Commissioner and the Recorder of Rangoon may, in concurrence, and subject to the sanction of the Chief Commissioner, frame rules of practice for regulating the times and places of the sittings of the Special Court.

Appeals from Judge of Maulmain.

69. Appeals from orders and decrees passed by the Judge of the town of Maulmain in civil suits and proceedings shall, where an appeal is allowed by law, be heard and determined by the Special Court. Such appeals shall be presented in the Court of the Judicial Commissioner.

Judicial Commissioner and Recorder may sit as Special Court at the request of either.

70. If, in any civil suit or appeal, or in any criminal case or appeal, pending in the Court of the Judicial Commissioner or of the Recorder of Rangoon, the one Court wishes to obtain the opinion of the other on any question of fact or law, or usage having the force of law, or the construction of a document, or wishes to obtain the assistance of the other for the determination of the case pending before it, such Court shall record a memorandum to that effect; and after the receipt of a copy of such memorandum by the other Court, the Judicial Commissioner and the Recorder of Rangoon shall sit together as soon as may be convenient and shall form a Special Court for the disposal of the said question or for the determination of the case.

Chief Commissioner may direct cases to be tried by Special Court.

71. The Chief Commissioner may direct that any civil suit or appeal, or any criminal case or appeal, pending in the Court of the Judicial Commissioner or of the Recorder of Rangoon, shall be tried before the Special Court.

Decree of Special Court to be deemed a decree of original Court.

72. Any decree or sentence passed by a Special Court as above constituted on a reference made under section seventy or in a case tried under section seventy-one shall issue as, and be deemed to be, a decree or sentence of the Court from which the case was referred to the Special Court.

Appeals from Recorder of Rangoon in criminal cases.

73. Any person convicted on a trial held by the Recorder of Rangoon as a Court of Session, may, where an appeal is allowed by law, appeal to the Special Court. Such appeal shall be presented in the Court of the said Recorder.

Powers of Court of Reference exercisable by Special Court.

74. The Special Court shall exercise the powers exercisable by a High Court as a Court of reference, in respect of sentences of death passed by the Recorder of Rangoon, in cases tried by him as a Court of Session.

Rules as to finding of Special Court in case of difference of opinion arising.

75. Whenever, in cases tried by the Judicial Commissioner and Recorder of Rangoon sitting together as a Special Court without a Commissioner, a difference of opinion arises in such Court, the following rules shall be observed :—

(1.) If the difference of opinion arise in a civil appeal, and if either the judicial Commissioner or Recorder of Rangoon concur in the ruling of the Court from whose decision the appeal has been made, such ruling shall be upheld. If the difference of opinion arise as to some point of law, or custom having the force of law, or the admissibility of evidence or construction of a document affecting the merits of the case, and if either the Judicial Commissioner or the Recorder of Rangoon be of opinion that the point should be referred to the High Court of Judicature at Fort William in Bengal, they shall state the point as to which they differ, and forward the statement with their respective opinions thereon to the High Court.

(2.) In all other cases, the point shall be referred to the High Court with a similar statement of opinions.

Decree may be passed contingent on opinion of High Court, but execution not to issue.

76. Where such reference is in a civil suit, the Special Court may proceed in the case notwithstanding such reference, and may determine the suit contingently on the opinion of the said High Court on the point referred; but no final execution shall be issued in any civil case in which a reference is made, until the receipt of such opinion.

Procedure of High Court on reference.

77. The High Court shall proceed to determine the point referred, as if it were an appeal instituted in such Court, except that it shall not be necessary for the parties to appear either personally or by agent. A copy of the determination of the High Court shall be sent to the Court from which the case was referred to the Special Court, and such Court shall dispose of the case accordingly.

Costs of reference.

The costs, if any, consequent on the reference of the case for the opinion of the High Court, shall be costs in the suit or appeal.

CHAPTER VI.

MISCELLANEOUS.

Amendment of section 7, Act XV of 1869.

78. Instead of the last paragraph of section seven of Act XV of 1869, the following shall be read :—

"For the purposes of this Act every jail in British Burmah shall be deemed to be situate within the local limits of the Appellate Jurisdiction of the Judicial Commissioner; and the Recorder of Rangoon may issue orders, under this section or sections three or four, and may also issue commissions under Part III of this Act, in any town in British Burmah.

Saving of trials by Commissioner of Akyab as a Court of Session.

79. No trial heretofore had by the Commissioner of Akyab as a Court of Session shall be deemed to have been invalid merely on the ground that such trial was not by jury.

SCHEDULE.

No. and Year.	Title.	Extent of Repeal.
VIII of 1859 ...	An Act for simplifying the Procedure of the Courts of Civil Judicature not established by Royal Charter.	Sections three hundred and seventy-two, three hundred and seventy-three, and three hundred and seventy-four, so far as they relate to British Burmah.
XXIII of 1861 ...	An Act to amend Act VIII of 1859 *(for simplifying the Procedure of the Courts of Civil Judicature not established by Royal Charter).*	Section twenty-three, section twenty-five and sections twenty-seven to thirty-four, both inclusive, so far as they relate to British Burmah.
I of 1863 ...	An Act to define the jurisdiction and to regulate the procedure of the Courts of Civil Judicature in British Burmah, and to provide for the extension of certain Acts to the said Territory.	The whole.
XXI of 1863 ...	An Act to constitute Recorders' Courts for the Towns of Akyab, Rangoon and Maulmain in British Burmah, and to establish Courts of Small Causes in the said Towns.	The whole.
XXIV of 1863 ...	An Act to amend Act I of 1863 *(to define the jurisdiction and to regulate the procedure of the Courts of Civil Judicature in British Burmah, and to provide for the extension of certain Acts to the said territory).*	The whole.
III of 1866 ..	An Act to confer certain increased powers on the Registrars of the Recorders' Courts in British Burmah, and for other purposes.	The whole.

THE INDIAN INCOME TAX ACT, 1872.

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ACT NO. VIII OF 1872.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

(*Received the assent of the Governor-General on the* 19*th April* 1872).

An Act for imposing Duties on Income.

Preamble.

FOR the purpose of imposing duties on income arising from offices, property, professions, and trades; It is hereby enacted as follows:—

PART I.

PRELIMINARY.

Short title.

1. This Act may be called "The Indian Income Tax Act:"

Local extent.

It extends to the whole of British India;

Commencement and continuance of Act.

It shall be deemed to have come into force on the first day of April 1872, and it shall cease to be in force on the thirty-first day of March 1873, except as to taxes payable in respect of the period previous to the said thirty-first day of March 1873 and as to penalties incurred under this Act.

The references made in the Court Fees Act, schedule II, to the Indian Income Tax Act shall be deemed to be made to this Act.

Interpretation-clause.

2. In this Act—unless there be something repugnant in the subject or context—

"Income."

"Income" means income and profits accruing and arising in British India:

"Magistrate."

"Magistrate" means,

till the 1st day of September 1872,

any person exercising the powers of a Magistrate, or of a Subordinate Magistrate of the First Class,

and after the said day,

any Magistrate of the First or Second Class; and it includes a Magistrate of Police and a Justice of the Peace:

"Company."

"Company" means an Association, carrying on business in British India, whose stock or funds is or are divided into shares and transferable, whether such Company be incorporated or not, and whether its principal place of business be situate in British India or not:

"Person."

"Person" includes a firm and a Hindoo undivided family:

"Defaulter."

"Defaulter" includes a Company or firm making default under this Act:

"Collector."

In the case of any firm or of any Company or Municipal or other public Body or Association not being a Company, "Collector" means the Collector of Land Revenue of the place or district at or in which its principal place of business in British India is situate. And, in the case of any person or Hindoo undivided family chargeable under this Act, "Collector" means the Collector of Land Revenue of the place or district at or in which such person or family resides.

Exemptions from Act.

3. Nothing in this Act applies to the pay and allowances of officers, warrant officers, non-commissioned officers, and privates of Her Majesty's Forces or of Her Majesty's Indian Forces, who are not in Civil employment, when such pay and allowances do not exceed five hundred rupees per mensem ;

or to any moveable or immoveable property solely employed for religious or charitable public purposes.

And no member of a firm or of a Hindoo undivided family, which is for the time being chargeable under this Act, shall, as such, be chargeable under this Act.

Power to exempt from Act.

4. The Governor-General in Council may from time to time, by order, wholly exempt from the operation of this Act the whole or any part of the income of any tribe or class of persons in British India.

The Governor-General in Council may revoke any such order.

All orders and revocations made under this section shall be published in the *Gazette of India.*

PART II.

Duties on Offices.

Duties on offices.

5. A duty of two pies for every rupee shall be levied in respect of every office or employment of profit in British India under Government or under a Company or a Municipal or other public Body or Association not being a Company,

and upon every salary, annuity or pension, paid in British India by Government or by a Company or by a Municipal or other public Body or Association not being a Company to any person, residing in British India, or serving on board a ship plying to and from British Indian ports, whether on account of himself or another person.

Exemption of incomes less than Rs. 83-5-4 per mensem.

6. No income amounting to less than eighty-three rupees, five annas and four pies per mensem shall be chargeable under this Part.

Deduction in case of Government officials and pensioners.

7. In the case of every person holding any paid office, employment, or commission under Her Majesty or under the Government of India, or under any Local Government, or receiving any annuity or pension from Her Majesty or any such Government,

the duty, to which he is liable under this Part, shall be deducted from his pay, annuity, or pension at the time of payment by the Examiner of Claims or other proper officer, and shall be deemed to be a tax paid under this Act.

Deductions in case of servants and pensioners of Companies and Municipalities.

8. In the case of every person holding a paid employment under, or receiving any annuity or pension from, any Company or any Municipal or other public Body or Association not being a Company, the duty to which he is liable under this Part shall be deducted from his pay, annuity, or pension at the time of payment by the Treasurer or other officer whose duty it is to make such payments, and shall be deemed to be a tax payable under this Act.

Payment to Government.

Every such Treasurer or other officer shall, as soon as may be after making such deductions, pay to the credit of the Government of India, or as such Government from time to time directs, the amount of such deductions, and shall be answerable to such Government for such payment.

Indemnity.

Every Company, public Body, or Association, Treasurer, or other officer as aforesaid is hereby indemnified for all deductions and payments made in pursuance of this Part.

Annual return by Treasurer, &c.

The Treasurer, Secretary, or principal Agent or Manager of every such Company and public Body or Association shall prepare, and, on or before the fifteenth day of May next, deliver to the Collector, in such form as may be prescribed by the Governor-General in Council, a return in writing showing the names of every person, holding at the date of the said return a paid employment under, or receiving a pension or annuity from, such Company or Body or Association, whose pay or pension or annuity as such amounts to eighty-three rupees, five annas, and four pies per mensem or upwards, together with the salaries, annuities, or pensions payable by the Company or public Body or Association to all such persons respectively.

Subsequent deduction of duty omitted to be levied.

9. Whenever the duty, leviable under this Part in any month, is not deducted at the time of payment in that month from the pay, annuity, or pension chargeable therewith, it shall be deducted from such pay, annuity or pension at some subsequent time of payment.

PART III.

Duties on Profits of Companies.

Shipping Companies.

10. The Treasurer, Secretary, or principal Agent or Manager in India of every Company shall, in the case of a Shipping Company trading between British India and any other country, pay to Government in respect of one moiety of the nett profits made by each of the ships of such Company engaged in such trade, during the year ending on the day on which the Company's accounts shall have been last made up, the duty of two pies in the rupee:

Other Companies.

and, in the case of every other Company, pay to Government in respect of the whole of the nett profits made in British India by such Company during the year ending on the day on which the Company's accounts shall have been last made up, the duty of two pies for every rupee,

Statement of result of accounts.

and shall prepare, and, on or before the fifteenth day of May next, deliver to the Collector a statement in writing signed by him showing the result of such accounts.

Annual return of nett profits.

11. If in the case of any Company no such accounts have been made up within the year ending on the thirty-first day of March 1872, the Treasurer, Secretary, or principal Agent or Manager of such Company shall prepare, and, on or before the fifteenth day of May next, deliver to the Collector a return in writing, signed by him and stating the nett profits made by such ships or by the Company (as the case may be) during the year ending on the said thirty-first day of March.

Power to require officers of Companies to attend and produce accounts.

12. Whenever the Collector has reason to believe that any statement or return mentioned in section ten or section eleven is incorrect or incomplete, he may cause a notice to be served on the Treasurer, Secretary, Agent or Manager by whom such statement or return was delivered, requiring him, on or before a day to be mentioned in the notice, to attend at the Collector's office and to produce for the inspection of the Collector such of the accounts of the Company as refer to the year mentioned in section ten or section eleven, as the case may be, and as are in the possession or power of such Treasurer, Secretary, Agent or Manager.

The Collector shall thereupon make an order, determining the amount at which the Company shall be assessed under this Part and the day on which such amount shall be paid; and, subject to the provisions hereinafter contained, such sum shall be payable accordingly.

Indemnity.

13. Every such Treasurer, Secretary, Agent or Manager is hereby indemnified for all payments made in pursuance of section ten or section twelve.

PART IV.

Duties on Interest on Government Securities.

Duty on interest.

14. A yearly duty of two pies for every rupee shall be levied upon all interest on securities of the Government of India becoming due on or after the first day of April 1872.

Deduction of duty.

15. Every person empowered to pay such interest shall deduct the duty at the place where the interest is paid, and shall, as soon as may be after making such deduction, pay the same to the credit of the Government of India, or as such Government from time to time directs:

Proviso.

Provided that no such duty shall be deducted from the interest on any such security, where the owner thereof produces a certificate signed by the Collector that his annual income, including such interest, is less than one thousand rupees.

PART V.

DUTIES ON ALL OTHER INCOME.

Duty on income not charged under Parts II, III, IV.

16. A yearly duty of two pies for every rupee shall be levied upon all incomes of one thousand rupees per annum or upwards not chargeable under Part II, Part III, or Part IV of this Act.

Trustees, guardians, and committees of incapacitated persons to be charged.

17. The trustee, guardian, curator or committee of any infant, married woman subject to the law of England, lunatic, or idiot, and having the control of the property of such infant, married woman, lunatic, or idiot, whether such infant, married woman, lunatic, or idiot resides in British India or not, shall, if the infant, married woman, lunatic, or idiot be chargeable under this Part, be chargeable with the said duty in like manner and to the same amount as would be charged to such infant if of full age, or to such married woman if she were sole, or to such lunatic or idiot if he were capable of acting for himself.

Non-residents charged in names of their agents.

Any person not resident in British India, whether a subject of Her Majesty or not, being in receipt, through an agent, of any income chargeable under this Part, shall be chargeable in the name of such agent in the like manner and to the like amount as he would be charged if resident in British India and in actual receipt of such income.

Trustees or agents of persons incapacitated or non-resident to furnish statements of income.

18. Every trustee, guardian, curator, committee, or agent shall, when required by the Collector, deliver a statement signed by him, of the amount of the income, in respect whereof he is chargeable on account of such infant, married woman, lunatic, idiot, or non-resident, together with a declaration of the truth of the statement.

The Collector shall have power to serve a notice upon any person, whom he has reason to believe to be a trustee, guardian, curator, committee, or agent requiring him to deliver, on or before a day to be specified in the notice, a statement, signed by him, of the names of the persons for or of whom he is trustee, guardian, curator, committee, or agent.

Receivers, Managers, Courts of Wards, Administrators-General and Official Trustees.

19. Receivers or Managers appointed by any Court in India, the Courts of Wards, the Administrators-General of Bengal, Madras, and Bombay, and the Official Trustees, shall be chargeable under this Act in respect of all income officially in their possession or under their control.

Power to retain duties charged on trustees, &c.

20. When any trustee, guardian, curator, committee, or agent is assessed under this Act in such capacity;

or when any Receiver or Manager appointed by any Court, any Court of Wards, Administrator-General, or Official Trustee is assessed under this Act in respect of the income and profits officially received by him;

every person and Court so assessed may, from time to time out of the money coming to his or its possession as such trustee, guardian, curator, committee, or agent, or as such Receiver, Manager, Court of Wards, Administrator-General, or Official Trustee, retain so much as shall be sufficient to pay the amount of the assessment.

Indemnity.

Every such person and Court is hereby indemnified for every retention and payment made in pursuance of this Act.

Owners of lands or houses occupying them.

21. Owners of lands or houses, occupying the same, shall be chargeable in respect of the annual value thereof at nine-tenths of the full rent at which such lands or houses are worth to be let for the year.

Rules for assessing income from land.

The Local Government may, with the sanction of the Governor-General in Council, prescribe for the whole or any part of the territories subject to such Local Government, special rules for the assessment of incomes derived from land, at an amount bearing a fixed proportion to the revenue assessed thereon.

All such rules shall de published in the local official Gazette and shall thereupon have the force of law.

Persons assessed under Part V of Act XII of 1871, on incomes of 1,000 rupees and upwards to be assessed at same amount.

22. Every person, chargeable under this Part, shall, if he was assessed under Part V of Act XII of 1871 on an income of rupees 1,000 or upwards, be assessed at the same amount as that at which he was assessed under the said Act; but any such person may apply under the provision of Part VI to have such assessment reduced or cancelled.

Notice requiring returns.

In the case of every person chargeable under this Part, to whom the provisions of the last preceding paragraph do not apply, and whose annual income is, in the Collector's opinion, four thousand rupees or upwards, the Collector shall,

and in the case of every such person whose annual income is, in the Collector's opinion, less than four thousand rupees, the Collector may,

cause a notice to be served on him, requiring him to fill in a return of his income during one year, ending on the day of the year immediately preceding the year of assessment on which his accounts have been usually made up, or on the thirty-first day of March 1872, and to state in such return the period during which such income has actually accrued.

Such notice shall be in the form to be prescribed by the Governor-General in Council, and shall specify the day by which the return is to be made, and the place of the Collector's office at which the return is to be made.

Every such notice shall be signed by the Collector.

The form of the return shall accompany the notice.

Return how made.

23. Every person, on whom such notice is served, shall send to or deliver at the Collector's office the return duly filled and signed by him.

A declaration shall be added by such person at the foot of the return, (*a*) that the income stated therein is truly estimated on all the sources therein mentioned, (*b*) that it has actually accrued within the period therein stated, and (*c*) that he has no other source of income.

List of lodgers and employees.

24. Every person, when required so to do by a notice in the form to be prescribed by the Governor-General in Council, shall, within the period mentioned in such notice, prepare and deliver to the Collector a list containing, to the best of his belief, the name of every lodger or inmate resident in his dwelling-house, and of any other persons receiving salary or emoluments amounting to eighty-three rupees, five annas and four pies per mensem or upwards, employed in his service, whether resident in such dwelling-house or not, and the place of residence of such of them as are not resident in such dwelling-house, and also of any such lodger or inmate, who has any ordinary place of residence elsewhere, at which he is liable under this Act to be assessed, and who desires to be so assessed at such place.

Such list shall be signed by the persons respectively delivering the same, and shall be prepared in the form to be prescribed as aforesaid.

Collector to determine persons chargeable.

25. The Collector shall from time to time determine what persons are chargeable under this Part, and the amount at which every such person shall be assessed;

and in making such assessment income exempted under section six shall be treated as chargeable under this Part.

Assessment to be made on past year's income.

26. Every such assessment shall be made upon the full amount of such person's income during the year ending on the day of the year next before the year of assessment on which his accounts have been usually made up, or on the thirty-first day of March 1872.

Assessment when assessee becomes chargeable within year.

In the case of a person for the first time becoming chargeable under this Part within the year of assessment, or within the year next before such year, the assessment shall be made according to an average of his income for such period as the Collector, under the circumstances, directs.

Notice to persons chargeable.

27. The Collector shall cause a notice to be served on every person chargeable under this Part, stating—

(1.)—The name and the profession, trade, or other source of the income of such person, or in respect of which he is chargeable;

(2.)—The year or portion of the year for which the duty is to be paid;

(3.)—The place or places, district or districts, where such income accrues; and

(4.)—The amount to be paid;

and requiring him within fifteen days from the date of the service either to pay such amount or to apply to the Collector to have the assessment reduced or cancelled.

Officer to give receipts.

28. Such amount shall be paid to the Collector, who shall give a receipt for such payment to the person making the same:

Provided that, if such income accrues at or in more than one place or district, the receipt shall be granted and payment made by and to the Collector for the place or district at or in which the person mentioned in the notice resides, or (in the case of a firm) at or in which its principal place of business in British India is situate.

Every such receipt shall be signed by the Collector granting it, or by such other officer as he shall from time to time empower in this behalf, and such signature shall be judicially noticed.

Contents of receipt.

29. Every such receipt shall specify—

(1.)—The name and source or sources of the income of the person by or on whose behalf the duty is paid;

(2.)—The year or portion of the year for which the duty is paid;

(3.)—The amount paid, and the date of payment; and

(4.)—The place or places, district or districts, where the income accrues;

and shall be admissible as evidence of all matters contained therein.

PART VI.

PETITIONS AND APPEALS AGAINST ASSESSMENTS.

Petition against assessment under Part V.

30. Any person objecting to the amount at which he is assessed, or denying his liability to be assessed under Part V, may apply by petition to the Collector in order to establish his right to have the assessment reduced or cancelled:

Such petition shall ordinarily be presented within fifteen days from the date of the service of the notice mentioned in section twenty-seven. But if the Collector is satisfied that the objector has not received such notice, the petition may be presented within fifteen days from the day on which in the Collector's opinion he became aware of the assessment:

Proviso.

Provided that no person, served with a notice under section twenty-two, shall be entitled to apply by petition under this section, unless he has made the return required in such notice on or before the day therein mentioned, or unless he satisfies the Collector that he had a sufficient excuse for not making such return.

Form and verification of petition.

The petition shall be in the form contained in the schedule hereto annexed, or as near thereto as circumstances admit; and the statements therein contained shall be verified by the petitioner or some other competent person in the manner required by law for the verification of plaints.

Hearing of petition.

31. The Collector shall fix a day and place for the hearing of the petition, and, on the day and at the place so fixed, or on the day and at the place (if any) to which he has adjourned such hearing, shall hear such petition and pass his order thereon.

Such order may be in favour of the petitioner, or it may simply reject the petition, or it may reject the petition and enhance the petitioner's assessment to an amount to be specified in the order.

If the order be in favour of the petitioner, the Collector shall at once refund the fee on the petition.

If the order simply reject the petition, or reject the petition and enhance the petitioner's assessment, the petitioner shall within fifteen days from the passing of the order pay the amount mentioned in the said notice or in the order of enhancement, as the case may be.

Appeal to Commissioner from order under section 12 or section 31.

32. Any person, dissatisfied with any order under section twelve or section thirty-one, may, within fifteen days from the date thereof, on payment of the sum payable under such order, present a petition of appeal to the Commissioner of Revenue of the Division, whose order upon such appeal shall be final.

The time requisite for obtaining a copy of the order shall be excluded in computing the said period of fifteen days.

The order of such Commissioner shall be final. It may be in favour of the petitioner, or it may simply reject the petition, or it may reject the petition and enhance the assessment to an amount to be specified in the decision.

If the order rejects the petition and enhances the assessment, the petitioner shall, within one week from the passing of the order, pay the amount mentioned in the order of enhancement.

Documents to accompany appeal.

Every petition presented under this section shall be accompanied by a copy of the petition to the Collector, and a copy of the Collector's order thereon, and a list of the documents, if any, on which the appellant relies.

Copies of petition and order exempt from fees.

Neither of such copies shall be chargeable under the Court Fees Act.

Return of fees and excess.

When the decision on such appeal is in favour of the petitioner, the value of the fee on his petition of appeal, and (where he has presented a petition to the Collector) the fee on such petition, together with the excess paid by him, or (when the decision is that the petitioner, or the Company which he represents, is not chargeable under this Act) the whole sum so paid, shall at once be refunded.

Power to summon persons to give necessary information.

33. The Collector or Commissioner may summon any person, whom he thinks able to give evidence for the purpose of enabling him to determine how the petitioner, or the Company which he represents, should be assessed; and may examine on oath the person so summoned and the petitioner; and may require each of them to produce any documents in his possession or power relating to the sources of the income in question.

Power to issue fresh notice.

34. Whenever the Collector has reason to believe that, in assessing any person under this Act, any source of income, not specified in the receipt granted to him under section twenty-eight, has been overlooked, which source, if it had then been known to exist, would have increased the assessment, the Collector may cause a further notice to be served on such person, stating the amount to be paid in respect of such source.

The provisions contained in sections twenty-seven to thirty-three (both inclusive) shall apply to such notice and regulate the procedure thereunder.

PART VII.

PAYMENT AND RECOVERY OF DUTIES.

Tax when payable.

35. All duties under this Act, except when they are deducted under section seven, section eight, or section fifteen shall be payable on the first day of May 1872:

Payment by instalments.

Provided that the amount so payable may be paid by two equal instalments: the first instalment to be paid on some day not later than fifteen days after service of the notice mentioned in section twenty-seven upon the person paying the same, and the second instalment on the first day of October next.

Recovery under revenue law.

36. In any case of default under this Act, the Collector may, if a notice has been served on the defaulter requiring him to pay, within fifteen days from the date of the service, the amount of the duty or instalment due by him under this Act, either recover a sum not exceeding double the amount as if it were an arrear of land-revenue,

or pass an order that a sum, not exceeding double the amount of such duty or instalment, shall be recovered from such defaulter.

Every such order shall have the force of a decree of a Civil Court in a suit in which the Government is the plaintiff and the defaulter is the defendant; and such order may be enforced in manner provided by the Code of Civil Procedure for the enforcement of decrees for money; and the procedure under the said Code in respect of the following matters:—

(a) sales in execution of decrees:
(b) arrests in execution of decrees for money:
(c) execution of decrees by imprisonment:
(d) claims to attached property; and
(e) execution of decrees out of the jurisdiction of the Courts by which they were passed,

shall apply to every execution issued for levying the moneys mentioned in such order; save that all the powers and duties conferred and imposed by the said Code upon the Court shall be executed by the Collector, by whom such order has been made or to whom a copy thereof has been transmitted for execution according to the provisions of the said Code, section two hundred and eighty-six:

Provided that, where any person has presented a petition under section thirty, such sum shall not be recoverable from him unless, within fifteen days from the passing of the order thereon, he fails to pay the amount, if any, required by such order.

On the recovery of such sum from the defaulter, the Collector shall grant him a receipt without any further payment.

Every such receipt shall bear date from the recovery of the amount, and save as aforesaid, the provisions of this Act relating to receipts shall apply to receipts granted under this section.

Amendment of assessment.

37. If, during or within two months from the end of the year for which any assessment under Part V has been made, the Company or person assessed proves to the satisfaction of the Collector, that the nett profits or income of such Company or person during such year fell short of the sum so assessed, the Collector may cause the assessment made for such year to be amended, as the case requires, and if the sum assessed has been paid, may refund the sum overpaid.

In case any Company or person, assessed under Part III or Part V, ceases to carry on the trade or business, in respect whereof such assessment was made; or if any such person dies or becomes insolvent before the end of the year for which the assessment was made; or if any such Company or person is, from any other specific cause, deprived of or loses the income on which the assessment was made,

such Company or person or its or his representative in interest may apply to the Collector within three months after the end of such year, and on proof thereof to his satisfaction, the Collector shall amend the assessment as the case may require, and give such relief to the Company or person charged as is just, and in cases requiring it, the Collector shall refund such sum as has been overpaid on the assessment amended or vacated.

PART VIII.

PENALTIES.

Treasurers, &c., failing to make payments or deliver returns.

38. Every Treasurer, Secretary, Agent, Manager, or other person, failing to make any payment or deduction, or to prepare and deliver in due time any statement or return, or to produce any accounts, required by section eight, ten, eleven, or twelve,

Trustees, &c., failing to deliver statements or declarations.

and every trustee, guardian, curator, committee, or agent, failing to deliver any statement or declaration required by section eighteen,

shall for every day during which such default continues, be fined, on conviction before a Magistrate, ten rupees.

The Commissioner of the Division shall have power to remit wholly or in part any penalty imposed under this section.

False statement in declaration, list, or petition.

39. Whoever makes a statement in any declaration or list made or delivered under section twenty-three or twenty-four, which is false, and which he either knows or believes to be false or does not believe to be true, shall be deemed to have committed the offence described in section one hundred and seventy-seven of the Indian Penal Code.

Whoever makes a statement in any petition, presented under section thirty, which is false, and which he either knows or believes to be false, or does not believe to be true, shall be deemed to have intentionally given false evidence in a stage of a judicial proceeding.

Prosecution to be at instance of Collector.

40. No person shall be proceeded against for any offence under section thirty-eight or section thirty-nine except at the instance of the Collector.

Sections 193 and 228 of Penal Code to apply to proceedings.

41. In sections one hundred and ninety-three and two hundred and twenty-eight of the Indian Penal Code, the words "judicial proceeding" shall be taken to include any proceeding under this Act.

PART IX.

MISCELLANEOUS.

Bar of suits in Civil Court.

42. No suit shall lie in any Civil Court to set aside or modify any assessment made under this Act.

Exercise of powers of Collector and Commissioner.

43. All or any of the powers and duties, conferred and imposed by this Act on a Collector and on a Commissioner of Revenue, may be exercised and performed by such other officers or persons as the Local Government from time to time appoints in this behalf.

Service of notices.

44. Service of any notice under this Act shall be made by delivering or tendering a copy thereof under the signature of the Collector.

Whenever it may be practicable, the service of the notice shall be on the person therein named, or, in the case of a firm or a Hindoo undivided family, on some member thereof.

When such person or member cannot be found, the service may be made on any adult male member of his family residing with him; and if no such adult male member can be found, the serving officer shall fix the copy of the notice on the outer door of the house in which the person or firm therein named ordinarily dwells or carries on business.

Power to declare principal place of business.

45. When any Company or firm has several places of business in the territories subject to different Local Governments, the Governor-General in Council shall have power to declare which of such places shall, for the purposes of this Act, be deemed to be the principal place of business, and, when any Company has several Agents or Managers, which of them shall, for the purposes of this Act, be deemed to be the principal Agent or Manager.

When any Company or firm has several places of business in the territories subject to a single Local Government, such Government shall have power to declare which of them shall, for the purposes of this Act, be deemed to be the principal place of business.

Power to declare residence.

When any person has several places of residence in the territories subject to different Local Governments, the Governor-General in Council shall have power to declare which of such places shall, for the purposes of this Act, be deemed to be his residence; and when any person has several places of residence in the territories subject to a single Local Government, such Government shall have power to declare which of such places shall, for the purposes of this Act, be deemed to be his residence.

The powers given by this section may be delegated to and exercised by such officers as the Governor-General in Council or the Local Government, as the case may be, from time to time appoints in this behalf.

Power to prescribe forms and make rules.

46. The Governor-General in Council may from time to time

(*a*) prescribe forms for the returns, notices, and lists hereinbefore mentioned,

(*b*) make rules consistent with this Act for the guidance of officers in matters connected with its enforcement, and

(*c*) delegate to any Local Government the powers given by this section, clause (*b*), so far as regards the territories subject to such Government.

SCHEDULE.

Form of Petition under section 30.

Stamp
eight annas.

To the Collector of

The *day of* 187 .

The petition of *A. B.* of

Sheweth—

1.—That, under the Indian Income Tax Act, your petitioner has been assessed in the sum of ***twenty-seven*** rupees for the year commencing the first day of April 1872.

2.—That your petitioner's income and profits accruing and arising from [*here specify petitioner's trade or other source or sources of income or profits, and the place or places at which such income or profits accrues or arise*] for the year ending the thirty-first day of March last were rupees , as will appear from the documents of which a list is presented herewith.

3.—That such income and profits actually accrued and arose during a period of months and days [*Here state the exact number of months and days in which the income and profits accrued and arose.*]

4.—That during the said year your petitioner had no other income or profits.

Your petitioner therefore prays that he may be assessed accordingly, and that the value of the fee on this petition may be refunded [*or* that he may be declared not to be chargeable under the said Act, and that the value of the fee on this petition may be refunded].

(Signed) *A. B.*

Form of Verification.

I, *A. B.*, the petitioner named in the above petition, do declare that what is stated therein is true to the best of my information and belief.

(Signed) *A. B*

ACT NO. IX OF 1872.

Passed by the Governor-General of India in Council.

(Received the assent of the Governor-General on the 25th April 1872.*)*

The Indian Contract Act.

Preamble.

Whereas it is expedient to define and amend certain parts of the law relating to contracts; It is hereby enacted as follows:—

PRELIMINARY.

Short title.

1. This Act may be called "The Indian Contract Act, 1872."

Extent.
Commencement.

It extends to the whole of British India, and it shall come into force on the first day of September 1872.

Enactments repealed.

The enactments mentioned in the schedule hereto are repealed to the extent specified in the third column thereof; but nothing herein contained shall affect the provisions of any Statute, Act, or Regulation not hereby expressly repealed, nor any usage or custom of trade, nor any incident of any contract, not inconsistent with the provisions of this Act.

Interpretation-clause.

2. In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:—

"Proposal."

(*a*.)—When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal.

"Promise."

(*b*.)— When the person, to whom the proposal is made, signifies his assent thereto, the proposal is said to be accepted. A proposal when accepted, becomes a promise:

"Promisor" and "promisee."

(*c*.)—The person making the proposal is called the 'promisor,' and the person accepting the proposal is called the 'promisee:'

"Consideration."

(*d*.)—When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise:

"Agreement."

(*e*.)—Every promise and every set of promises, forming the consideration for each other, is an agreement:

"Reciprocal promises."

(*f*.)—Promises which form the consideration or part of the consideration for each other, are called reciprocal promises:

"Void agreement."

(*g*.)—An agreement not enforceable by law is said to be void:

"Contract."

(*h*.)—An agreement enforceable by law is a contract:

"Voidable contract."

(*i*.)—An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract:

"Void contract."

(*j*.)—A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable.

CHAPTER I.

OF THE COMMUNICATION, ACCEPTANCE, AND REVOCATION OF PROPOSALS.

Communication, acceptance, and revocation of proposals.

3. The communication of proposals, the acceptance of proposals, and the revocation of proposals and acceptances, respectively, are deemed to be made by any act or omission of the party proposing, accepting, or revoking, by which he intends to communicate such proposal, acceptance, or revocation, or which has the effect of communicating it.

Communication when complete.

4. The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.

The communication of an acceptance is complete,

as against the proposer, when it is put in a course of transmission to him so as to be out of the power of the acceptor;

as against the acceptor, when it comes to the knowledge of the proposer.

The communication of a revocation is complete,

as against the person who makes it when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it;

as against the person to whom it is made, when it comes to his knowledge.

Illustrations.

(*a.*) A proposes, by letter, to sell a house to B at a certain price.

The communication of the proposal is complete when B receives the letter.

(*b.*) B accepts A's proposal by a letter sent by post.

The communication of the acceptance is complete,

as against A, when the letter is posted;

as against B, when the letter is received by A.

(*c.*) A revokes his proposal by telegram.

The revocation is complete as against A when the telegram is despatched. It is complete as against B when B receives it.

B revokes his acceptance by telegram. B's revocation is complete as against B when the telegram is despatched, and as against A when it reaches him.

Revocation of proposals and acceptances.

5. A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards.

An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards.

Illustration.

A proposes, by a letter sent by post, to sell his house to B.

B accepts the proposal by a letter sent by post.

A may revoke his proposal at any time before or at the moment when B posts his letter of acceptance, but not afterwards.

B may revoke his acceptance at any time before or at the moment when the letter communicating it reaches A, but not afterwards.

Revocation how made.

6. A proposal is revoked—

(1) by the communication of notice of revocation by the proposer to the other party;

(2) by the lapse of the time prescribed in such proposal for its acceptance, or, if no time is so prescribed, by the lapse of a reasonable time, without communication of the acceptance;

(3) by the failure of the acceptor to fulfil a condition precedent to acceptance; or

(4) by the death or insanity of the proposer, if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance.

Acceptance must be absolute.

7. In order to convert a proposal into a promise the acceptance must—

(1) be absolute and unqualified;

(2) be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise; but if he fails to do so, he accepts the acceptance.

Acceptance by performing conditions on receiving consideration.

8. Performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal.

Promises, express and implied.

9. In so far as the proposal or acceptance of any promise is made in words, the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied.

CHAPTER II.

OF CONTRACTS, VOIDABLE CONTRACTS, AND VOID AGREEMENTS.

What agreements are contracts.

10. All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

Nothing herein contained shall affect any law in force in British India, and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents.

Who are competent to contract.

11. Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.

What is a sound mind for the purposes of contracting.

12. A person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests.

A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind.

A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.

Illustrations.

(a.) A patient in a lunatic asylum, who is at intervals of sound mind, may contract during those intervals.

(b.) A sane man, who is delirious from fever, or who is so drunk that he cannot understand the terms of a contract, or form a rational judgment as to its effect on his interests, cannot contract whilst such delirium or drunkenness lasts.

"Consent" defined.

13. Two or more persons are said to consent when they agree upon the same thing in the same sense.

"Free consent" defined.

14. Consent is said to be free when it is not caused by—

(1) coercion, as defined in section fifteen, or

(2) undue influence, as defined in section sixteen, or

(3) fraud, as defined in section seventeen, or

(4) misrepresentation, as defined in section eighteen, or

(5) mistake, subject to the provisions of sections twenty, twenty-one, and twenty-two.

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation, or mistake.

"Coercion" defined.

15. Coercion is the committing, or threatening to commit, any act forbidden by the Indian Penal Code, or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.

Explanation.—It is immaterial whether the Indian Penal Code is or is not in force in the place where the coercion is employed.

Illustration.

A, on board an English ship on the high seas, causes B to enter into an agreement by an act amounting to criminal intimidation under the Indian Penal Code;

A afterwards sues B for breach of contract at Calcutta.

A has employed coercion, although his act is not an offence by the law of England, and although section 506 of the Indian Penal Code was not in force at the time when or place where the act was done.

"Undue influence" defined.

16. Undue influence is said to be employed in the following cases :—

(1.)—When a person in whom confidence is reposed by another, or who holds a real or apparent authority over that other, makes use of such confidence or authority for the purpose of obtaining an advantage over that other, which, but for such confidence or authority, he could not have obtained :

(2.)—When a person whose mind is enfeebled by old age, illness, or mental or bodily distress, is so treated as to make him consent to that, to which, but for such treatment, he would not have consented, although such treatment may not amount to coercion.

"Fraud" defined.

17. Fraud means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract :—

(1.)—The suggestion, as a fact, of that which is not true, by one who does not believe it to be true ;

(2.)—The active concealment of a fact by one having knowledge or belief of the fact ;

(3.)—A promise made without any intention of performing it ;

(4.)—Any other act fitted to deceive ;

(5.)—Any such act or omission as the law specially declares to be fraudulent.

Explanation.—Mere silence as to facts, likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is in itself equivalent to speech.

Illustrations.

(*a.*) A sells by auction to B a horse which A knows to be unsound. A says nothing to B about the horse's unsoundness. This is not fraud in A.

(*b.*) B is A's daughter and has just come of age. Here, the relation between the parties would make it A's duty to tell B if the horse is unsound.

(*c.*) B says to A, "If you do not deny it, I shall assume that the horse is sound;" A says nothing. Here A's silence is equivalent to speech.

(*d.*) A and B, being traders, enter upon a contract. A has private information of a change in prices which would affect B's willingness to proceed with the contract. A is not bound to inform B.

"Misrepresentation" defined.

18. Misrepresentation means and includes—

(1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true ;

(2) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him ;

(3) causing, however innocently, a party to an agreement, to make a mistake as to the substance of the thing, which is the subject of the agreement.

Voidability of agreements without free consent.

19. When consent to an agreement is caused by coercion, undue influence, fraud, or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed and that he shall be put in the position in which he would have been if the representations made had been true.

Exception.—If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of section seventeen, the contract nevertheless, is not voidable, if the party, whose consent was so caused, had the means of discovering the truth with ordinary diligence.

Explanation.—A fraud or misrepresentation which did not cause the consent to a contract of the party, on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable.

Illustrations.

(*a.*) A, intending to deceive B, falsely represents that five hundred maunds of indigo are made annually at A's factory, and thereby induces B to buy the factory. The contract is voidable at the option of B.

(*b.*) A, by a misrepresentation, leads B erroneously to believe that five hundred maunds of indigo are made annually at A's factory. B examines the accounts of the factory, which show that only four hundred maunds of indigo have been made. After this B buys the factory. The contract is not voidable on account of A's misrepresentation.

(*c.*) A fraudulently informs B that A's estate is free from incumbrance. B thereupon buys the estate. The estate is subject to a mortgage. B may either avoid the contract, or may insist on its being carried out and the mortgage-debt redeemed.

(*d.*) B, having discovered a vein of ore on the estate of A, adopts means to conceal, and does conceal, the existence of the ore from A. Through A's ignorance B is enabled to buy the estate at an under-value. The contract is voidable at the option of A.

(*e.*) A is entitled to succeed to an estate at the death of B; B dies: C, having received intelligence of B's death, prevents the intelligence reaching A, and thus induces A to sell him his interest in the estate. The sale is voidable at the option of A.

Agreement void where both parties are under mistake as to matter of fact.

20. Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

Explanation.—An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement, is not to be deemed a mistake as to a matter of fact.

Illustrations.

(*a.*) A agrees to sell to B a specific cargo of goods supposed to be on its way from England to Bombay. It turns out that, before the day of the bargain, the ship conveying the cargo had been cast away and the goods lost. Neither party was aware of these facts. The agreement is void.

(*b.*) A agrees to buy from B a certain horse. It turns out that the horse was dead at the time of the bargain, though neither party was aware of the fact. The agreement is void.

(*c.*) A, being entitled to an estate for the life of B, agrees to sell it to C. B was dead at the time of the agreement, but both parties were ignorant of the fact. The agreement is void.

Effect of mistakes as to law.

21. A contract is not voidable because it was caused by a mistake as to any law in force in British India; but a mistake as to a law not in force in British India has the same effect as a mistake of fact.

Illustrations.

A and B make a contract grounded on the erroneous belief that a particular debt is barred by the Indian Law of Limitation: the contract is not voidable.

A and B make a contract grounded on an erroneous belief as to the law regulating bills of exchange in France: the contract is voidable.

Contract not voidable merely because of mistake of one party as to matter of fact.

22. A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact.

What considerations and objects are lawful and what not.

23. The consideration or object of an agreement is lawful unless—

it is forbidden by law; or

is of such a nature that, if permitted, it would defeat the provisions of any law; or

is fraudulent; or

involves or implies injury to the person or property of another; or

the Court regards it as immoral or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful, is void.

Illustrations.

(*a.*) A agrees to sell his house to B for 10,000 rupees. Here, B's promise to pay the sum of 10,000 rupees is the consideration for A's promise to sell the house, and A's promise to sell the house is the consideration for B's promise to pay the 10,000 rupees. These are lawful considerations.

(*b.*) A promises to pay B 1,000 rupees at the end of six months, if C, who owes that sum to B, fails to pay it. B promises to grant time to C accordingly. Here, the promise of each party is the consideration for the promise of the other party, and they are lawful considerations.

(c.) A promises, for a certain sum paid to him by B, to make good to B the value of his ship if it is wrecked on a certain voyage. Here, A's promise is the consideration for B's payment, and B's payment is the consideration for A's promise, and these are lawful considerations.

(d.) A promises to maintain B's child, and B promises to pay A 1,000 rupees yearly for the purpose. Here, the promise of each party is the consideration for the promise of the other party. They are lawful considerations.

(e.) A, B, and C enter into an agreement for the division among them of gains acquired, or to be acquired, by them by fraud. The agreement is void, as its object is unlawful.

(f.) A promises to obtain for B an employment in the public service, and B promises to pay 1,000 rupees to A. The agreement is void, as the consideration for it is unlawful.

(g.) A, being agent for a landed proprietor, agrees for money without the knowledge of his principal, to obtain for B a lease of land belonging to his principal. The agreement between A and B is void, as it implies a fraud by concealment by A on his principal.

(h.) A promises B to drop a prosecution which he has instituted against B for robbery, and B promises to restore the value of the things taken. The agreement is void, as its object is unlawful.

(i.) A's estate is sold for arrears of revenue under the provisions of an Act of the Legislature, by which the defaulter is prohibited from purchasing the estate. B, upon an understanding with A, becomes the purchaser, and agrees to convey the estate to A upon receiving from him the price which B has paid. The agreement is void, as it renders the transaction in effect a purchase by the defaulter and would so defeat the object of the law.

(j.) A, who is B's mookhtear, promises to exercise his influence, as such, with B in favor of C, and C promises to pay 1,000 rupees to A. The agreement is void, because it is immoral.

(k.) A agrees to let her daughter to hire to B for concubinage. The agreement is void, because it is immoral, though the letting may not be punishable under the Indian Penal Code.

VOID AGREEMENTS.

Agreements void of considerations and objects unlawful in part.

24. If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void.

Illustration.

A promises to superintend, on behalf of B, a legal manufacture of indigo and an illegal traffic in other articles. B promises to pay to A a salary of 10,000 rupees a year. The agreement is void, the object of A's promise, and the consideration for B's promise, being in part unlawful.

Agreement without consideration void—

25. An agreement made without consideration is void unless

unless it is in writing and registered.

(1) it is expressed in writing and registered under the law for the time being in force for the registration of assurances and is made on account of natural love and affection between parties standing in a near relation to each other; or unless

or is a promise to compensate for something done.

(2) it is a promise to compensate wholly or in part a person who has already voluntarily done something for the promisor or something which the promisor was legally compellable to do; or unless

or is a promise to pay a debt barred by limitation law.

(3) it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorised in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.

In any of these cases, such an agreement is a contract.

Explanation 1.—Nothing in this section shall affect the validity, as between the donor and donee, of any gift actually made.

Explanation 2.—An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given.

Illustrations.

(a.) A promises for no consideration to give to B Rs. 1,000. This is a void agreement.

(b.) A, for natural love and affection, promises to give his son, B, Rs. 1,000; A puts his promise to B into writing and registers it. This is a contract.

(c.) A finds B's purse and gives it to him. B promises to give A Rs. 50. This is a contract.

(*d.*) A supports B's infant son. B promises to pay A's expenses in so doing. This is a contract.

(*e.*) A owes B Rs. 1,000, but the debt is barred by the Limitation Act. A signs a written promise to pay B Rs. 500 on account of the debt. This is a contract.

(*f.*) A agrees to sell a horse worth Rs. 1,000 for Rs. 10. A's consent to the agreement was freely given. The agreement is a contract notwithstanding the inadequacy of the consideration.

(*g.*) A agrees to sell a horse worth Rs. 1,000 for Rs. 10. A denies that his consent to the agreement was freely given. The inadequacy of the consideration is a fact which the Court should take into account in considering whether or not A's consent was freely given.

Agreement in restraint of marriage void.

26. Every agreement in restraint of the marriage of any person, other than a minor, is void.

Agreement in restraint of trade void.

27. Every agreement by which any one is restrained from exercising a lawful profession, trade, or business of any kind, is to that extent void.

Saving of agreement not to carry on business of which good-will is sold;

Exception 1.—One who sells the good-will of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the good-will from him, carries on a like business therein, provided that such limits appear to the Court reasonable, regard being had to the nature of the business.

of agreement between partners prior to dissolution;

Exception 2.—Partners may, upon or in anticipation of a dissolution of the partnership, agree that some or all of them will not carry on a business similar to that of the partnership, within such local limits as are referred to in the last preceding exception.

or during continuance of partnership.

Exception 3.—Partners may agree that some one or all of them will not carry on any business other than that of the partnership, during the continuance of the partnership.

Agreements in restraint of legal proceedings void.

28. Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

Saving of contract to refer to arbitration dispute that may arise.

Exception 1.—This section shall not render illegal a contract, by which two or more persons agree that any dispute, which may arise between them in respect of any subject or class of subjects, shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

Suits barred by such contracts.

When such a contract has been made, a suit may be brought for its specific performance; and if a suit, other than for such specific performance, or for the recovery of the amount so awarded, is brought by one party to such contract against any other such party, in respect of any subject which they have so agreed to refer, the existence of such contract shall be a bar to the suit.

Saving of contract to refer questions that have already arisen.

Exception 2.—Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.

Agreements void for uncertainty.

29. Agreements, the meaning of which is not certain, or capable of being made certain, are void.

Illustrations.

(*a.*) A agrees to sell to B 'a hundred tons of oil.' There is nothing whatever to show what kind of oil was intended. The agreement is void for uncertainty.

(*b.*) A agrees to sell to B one hundred tons of oil of a specified description known as an article of commerce. There is no uncertainty here to make the agreement void.

(*c.*) A, who is a dealer in cocoanut-oil only, agrees to sell to B 'one hundred tons of oil.' The nature of A's trade affords an indication of the meaning of the words, and A has entered into a contract for the sale of one hundred tons of cocoanut-oil.

(*d.*) A agrees to sell to B 'all the grain in my granary at Rámnagar.' There is no uncertainty here to make the agreement void.

(*e.*) A agrees to sell to B 'one thousand maunds of rice at a price to be fixed by C.' As the price is capable of being made certain, there is no uncertainty here to make the agreement void.

(*f.*) A agrees to sell to B 'my white horse for rupees five hundred or rupees one thousand.' There is nothing to show which of the two prices was to be given. The agreement is void.

Agreements by way of wager void.

30. Agreements by way of wager are void, and no suit shall be brought for recovering anything alleged to be won on any wager or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made.

Exception in favor of certain prizes for horse-racing.

This section shall not be deemed to render unlawful a subscription or contribution, or agreement to subscribe or contribute, made or entered into for or toward any plate, prize, or sum of money, of the value or amount of five hundred rupees or upwards, to be awarded to the winner or winners of any horse-race.

Section 294A of the Indian Penal Code not to be affected.

Nothing in this section shall be deemed to legalise any transaction connected with horse-racing, to which the provisions of section 294A of the Indian Penal Code apply.

CHAPTER III.

OF CONTINGENT CONTRACTS.

"Contingent contract" defined.

31. A contingent contract is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen.

Illustration.

A contracts to pay B Rs. 10,000 if B's house is burnt. This is a contingent contract.

Enforcement of contracts contingent on an event happening.

32. Contingent contracts to do or not to do anything if an uncertain future event happens, cannot be enforced by law unless and until that event has happened.

If the event becomes impossible, such contracts become void.

Illustrations.

(*a.*) A makes a contract with B to buy B's horse if A survives C. This contract cannot be enforced by law unless and until C dies in A's lifetime.

(*b.*) A makes a contract with B to sell a horse to B at a specified price, if C, to whom the horse has been offered, refuses to buy him. The contract cannot be enforced by law unless and until C refuses to buy the horse.

(*c.*) A contracts to pay B a sum of money when B marries C. C dies without being married to B. The contract becomes void.

Enforcement of contracts contingent on an event not happening.

33. Contingent contracts to do or not to do anything if an uncertain future event does not happen, can be enforced when the happening of that event becomes impossible, and not before.

Illustration.

A agrees to pay B a sum of money if a certain ship does not return. The ship is sunk. The contract can be enforced when the ship sinks.

When event on which contract is contingent to be deemed impossible if it is the future conduct of a living person.

34. If the future event on which a contract is contingent is the way in which a person will act at an unspecified time, the event shall be considered to become impossible when such person does anything which renders it impossible that he should so act within any definite time, or otherwise than under further contingencies.

Illustration.

A agrees to pay B a sum of money if B marries C.

C marries D. The marriage of B to C must now be considered impossible, although it is possible that D may die, and that C may afterwards marry B.

When contracts become void which are contingent on happening of specified event within fixed time.

35. Contingent contracts to do or not to do anything if a specified uncertain event happens within a fixed time, become void if, at the expiration of the time fixed, such event has not happened, or if, before the time fixed, such event becomes impossible.

When contracts may be enforced which are contingent on specified event not happening within fixed time.

Contingent contracts to do or not to do anything, if a specified uncertain event does not happen within a fixed time, may be enforced by law when the time fixed has expired and such event has not happened, or, before the time fixed has expired, if it becomes certain that such event will not happen.

Illustrations.

(*a.*) A promises to pay B a sum of money if a certain ship returns within a year. The contract may be enforced if the ship returns within the year; and becomes void if the ship is burnt within the year.

(*b.*) A promises to pay B a sum of money if a certain ship does not return within a year. The contract may be enforced if the ship does not return within the year, or is burnt within the year.

Agreements contingent on impossible events void.

36. Contingent agreements to do or not to do anything, if an impossible event happens, are void, whether the impossibility of the event is known or not to the parties to the agreement at the time when it is made.

Illustrations.

(*a.*) A agrees to pay B 1,000 rupees if two straight lines should enclose a space. The agreement is void.

(*b.*) A agrees to pay B 1,000 rupees if B will marry A's daughter C. C was dead at the time of the agreement. The agreement is void.

CHAPTER IV.

OF THE PERFORMANCE OF CONTRACTS.

CONTRACTS WHICH MUST BE PERFORMED.

Obligation of parties to contracts.

37. The parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law.

Promises bind the representatives of the promisors in case of the death of such promisors before performance, unless a contrary intention appears from the contract.

Illustrations.

(*a.*) A promises to deliver goods to B on a certain day on payment of Rs. 1,000. A dies before that day. A's representatives are bound to deliver the goods to B, and B is bound to pay the Rs. 1,000 to A's representatives.

(*b.*) A promises to paint a picture for B by a certain day at a certain price. A dies before the day. The contract cannot be enforced either by A's representatives or by B.

Effect of refusal to accept offer of performance.

38. Where a promisor has made an offer of performance to the promisee and the offer has not been accepted, the promisor is not responsible for non-performance, nor does he thereby lose his rights under the contract.

Every such offer must fulfil the following conditions:—

1. It must be unconditional:

2. It must be made at a proper time and place and under such circumstances that the person, to whom it is made, may have a reasonable opportunity of ascertaining that the person, by whom it is made, is able and willing there and then to do the whole of what he is bound by his promise to do:

3. If the offer is an offer to deliver anything to the promisee, the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver.

An offer to one of several joint promisees has the same legal consequences as an offer to all of them.

Illustration.

A contracts to deliver to B at his warehouse, on the 1st March 1873, 100 bales of cotton of a particular quality. In order to make an offer of performance with the effect stated in this section, A must bring the cotton to B's warehouse, on the appointed day, under such circumstances that B may have a reasonable opportunity of satisfying himself that the thing offered is cotton of the quality contracted for, and that there are 100 bales.

Effect of refusal of party to perform promise wholly.

39. When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

Illustrations.

(*a.*) A, a singer, enters into a contract with B, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and B engages to pay her 100 rupees for each night's performance. On the sixth night A wilfully absents herself from the theatre. B is at liberty to put an end to the contract.

(*b.*) A, a singer, enters into a contract with B, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and B engages to pay her at the rate of 100 rupees for each night. On the sixth night, A wilfully absents herself. With the assent of B, A sings on the seventh night. B has signified his acquiescence in the continuance of the contract, and cannot now put an end to it, but is entitled to compensation for the damage sustained by him through A's failure to sing on the sixth night.

BY WHOM CONTRACTS MUST BE PERFORMED.

Person by whom promise is to be performed.

40. If it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it should be performed by the promisor himself, such promise must be performed by the promisor. In other cases, the promisor or his representatives may employ a competent person to perform it.

Illustrations.

(*a.*) A promises to pay B a sum of money. A may perform this promise, either by personally paying the money to B, or by causing it to be paid to B by another; and, if A dies before the time appointed for payment, his representatives must perform the promise, or employ some proper person to do so.

(*b.*) A promises to paint a picture for B. A must perform this promise personally.

Effect of accepting performance from third person.

41. When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor.

Devolution of joint liabilities.

42. When two or more persons have made a joint promise, then, unless a contrary intention appears by the contract, all such persons, during their joint lives, and, after the death of any of them, his representative jointly with the survivor or survivors, and, after the death of the last survivor, the representatives of all jointly, must fulfil the promise.

Any one of joint promisors may be compelled to perform.

43. When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any one of such joint promisors to perform the whole of the promise.

Each promisor may compel contribution.

Each of two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract.

Sharing of loss by default in contribution.

If any one of two or more joint promisors makes default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares.

Explanation.—Nothing in this section shall prevent a surety from recovering from his principal payments made by the surety on behalf of the principal, or entitle the principal to recover anything from the surety on account of payments made by the principal.

Illustrations.

(*a.*) A, B, and C jointly promise to pay D 3,000 rupees. D may compel either A or B or C to pay him 3,000 rupees.

(*b.*) A, B, and C jointly promise to pay D the sum of 3,000 rupees. C is compelled to pay the whole. A is insolvent, but his assets are sufficient to pay one-half of his debts. C is entitled to receive 500 rupees from A's estate, and 1,250 rupees from B.

(*c.*) A, B, and C are under a joint promise to pay D 3,000 rupees. C is unable to pay anything, and A is compelled to pay the whole. A is entitled to receive 1,500 rupees from B.

(*d.*) A, B, and C are under a joint promise to pay D 3,000 rupees. A and B being only sureties for C. C fails to pay. A and B are compelled to pay the whole sum. They are entitled to recover it from C.

Effect of release of one joint contractor.

44. Where two or more persons have made a joint promise a release of one of such joint promisors by the promisee does not discharge the other joint promisor or joint promisors; neither does it free the joint promisor so released from responsibility to the other joint promisor or joint promisors.

Devolution of joint rights.

45. When a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives, and, after the death of any of them, with the representatives of such deceased person jointly with the survivor or survivors, and, after the death of the last survivor, with the representatives of all jointly.

Illustration.

A, in consideration of 5,000 rupees lent to him by B and C, promises B and C jointly to repay them that sum with interest on a day specified. B dies. The right to claim performance rests with B's representative jointly with C during C's life, and, after the death of C, with the representatives of B and C jointly.

TIME AND PLACE FOR PERFORMANCE.

Time for performance of promise where no time is specified and no application to be made.

46. Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time.

Explanation.—The question, 'What is a reasonable time' is, in each particular case, a question of fact.

Time and place for performance of promise where time is specified and no application to be made.

47. When a promise is to be performed on a certain day, and the promisor has undertaken to perform it without application by the promisee, the promisor may perform it at any time during the usual hours of business on such day and at the place at which the promise ought to be performed.

Illustration.

A promises to deliver goods at B's warehouse on the first January. On that day A brings the goods to B's warehouse, but after the usual hour for closing it; and they are not received. A has not performed his promise.

Application for performance to be at proper time and place.

48. When a promise is to be performed on a certain day, and the promisor has not undertaken to perform it without application by the promisee, it is the duty of the promisee to apply for performance at a proper place and within the usual hours of business.

Explanation.—The question 'What is a proper time and place' is, in each particular case, a question of fact.

Place for performance of engagement where no application to be made and no place fixed.

49. When a promise is to be performed without application by the promisee, and no place is fixed for the performance of it, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise, and to perform it at such place.

Illustration.

A undertakes to deliver a thousand maunds of jute to B on a fixed day. A must apply to B to appoint a reasonable place for the purpose of receiving it, and must deliver it to him at such place.

Performance in manner or at time prescribed or sanctioned by promisee.

50. The performance of any promise may be made in any manner or at any time which the promisee prescribes or sanctions.

Illustrations.

(*a.*) B owes A 2,000 rupees. A desires B to pay the amount to A's account with C, a banker. B, who also banks with C, orders the amount to be transferred from his account to A's credit, and this is done by C. Afterwards, and before A knows of the transfer, C fails. There has been a good payment by B.

(b.) A and B are mutually indebted. A and B settle an account by setting off one item against another, and B pays A the balance found to be due from him upon such settlement. This amounts to a payment by A and B, respectively, of the sums which they owed to each other.

(c) A owes B 2,000 rupees. B accepts some of A's goods in reduction of the debt. The delivery of the goods operates as a part payment.

(d.) A desires B, who owes him Rs. 100, to send him a note for Rs. 100 by post. The debt is discharged as soon as B puts into the post a letter containing the note duly addressed to A.

PERFORMANCE OF RECIPROCAL PROMISES.

Promisor not bound to perform unless reciprocal promisee ready and willing to perform.

51. When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

Illustrations.

(a.) A and B contract that A shall deliver goods to B to be paid for by B on delivery.

A need not deliver the goods, unless B is ready and willing to pay for the goods on delivery.

B need not pay for the goods, unless A is ready and willing to deliver them on payment.

(b.) A and B contract that A shall deliver goods to B at a price to be paid by instalments, the first instalment to be paid on delivery.

A need not deliver, unless B is ready and willing to pay the first instalment on delivery.

B need not pay the first instalment, unless A is ready and willing to deliver the goods on payment of the first instalment.

Order of performance of reciprocal promises.

52. Where the order, in which reciprocal promises are to be performed, is expressly fixed by the contract, they shall be performed in that order; and where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.

Illustrations.

(a.) A and B contract that A shall build a house for B at a fixed price. A's promise to build the house must be performed before B's promise to pay for it.

(b.) A and B contract that A shall make over his stock-in-trade to B at a fixed price, and B promises to give security for the payment of the money. A's promise need not be performed until the security is given, for the nature of the transaction required that A should have security before he delivers up his stock.

Liability of party preventing event on which contract is to take effect.

53. When a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented; and he is entitled to compensation from the other party for any loss which he may sustain in consequence of the non-performance of the contract.

Illustration.

A and B contract that B shall execute certain work for A for a thousand rupees. B is ready and willing to execute the work accordingly, but A prevents him from doing so. The contract is voidable at the option of B; and if he elects to rescind it, he is entitled to recover from A compensation for any loss which he has incurred by its non-performance.

Effect of default as to that promise which should be first performed in contract consisting of reciprocal promises.

54. When a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed, till the other has been performed, and the promisor of the promise last mentioned fails to perform it, such promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract.

Illustrations.

(a.) A hires B's ship to take in and convey from Calcutta to the Mauritius a cargo to be provided by A, B receiving a certain freight for its conveyance. A does not provide any cargo for the ship. A cannot claim the performance of B's promise, and must make compensation to B for the loss which B sustains by the non-performance of the contract.

ACT NO. I OF 1872.

PASSED BY THE LIEUTENANT-GOVERNOR OF BENGAL IN COUNCIL.

(Received the assent of the Lieutenant-Governor on the 1st February 1872, and of the Governor-General on the 7th March 1872.)

An Act to extend the borrowing powers of the Justices of the Peace for the Town of Calcutta, and to provide for the repayment of Municipal Debt.

Preamble.

WHEREAS it is expedient to increase the amount which the Justices are authorized to borrow, by way of debentures or otherwise, under the provisions of Section 9 of Act IX of 1867, passed by the Lieutenant-Governor of Bengal in Council, and whereas it is expedient to provide for the repayment of municipal debentures and loans; It is hereby enacted as follows:—

Justices not to borrow more than 85 lakhs.

1. In the said section, for the words "sum of fifty-five lakhs of rupees," wherever such words occur, shall be substituted the words "sum of eighty-five lakhs of rupees;" and the said section shall be hereafter read and construed as if the words hereby directed to be substituted were inserted in place of the words for which they are hereby directed to be substituted.

Borrowing powers thereafter to cease.

2. So soon as the aggregate sums from time to time borrowed by the Justices by way of debenture or otherwise, exclusive of any sums now due by them to the Secretary of State for India in Council, shall amount to the said sum of eighty-five lakhs of rupees, the borrowing powers of the Justices shall thereupon cease and determine, save so far as they are hereinafter expressly reserved.

Establishment of reserve fund.

3. The Justices shall be bound to set aside yearly out of their annual income, before making any disbursements in respect thereof, a sum of not less than two per cent. on the total sum borrowed by the Justices, exclusive of the sum now due by them to the Secretary of State for India in Council, and shall appropriate the same, so far as it is required or will extend, to repay the amount (if any) of such loans or debentures issued by them as shall fall due in the course of the year. And they shall invest the surplus (if any) of the said sum after repayment as aforesaid; or in case there has not been any amount due or paid in respect of such loans or debentures during the year, then they shall invest the whole of the said sum in Government securities or in any securities guaranteed by Government, or in Calcutta Municipal debentures in the names of the Secretary to the Government of Bengal in the Revenue Department and the Accountant-General of the Government of Bengal, respectively for the time being, to be by them held as Trustees for the purpose of repaying at due date from time to time the several loans contracted or debentures issued by the Justices. And all moneys and securities now held by any Trustees appointed by the said Justices for the purpose of paying off any portion of the said fifty-five lakhs shall be forthwith transferred to the Trustees under this Act, and invested in their names and held by them upon the trusts hereinbefore declared. All interest accruing due to the Trustees shall also from time to time be invested by them in like manner and held upon the like trust.

Appropriation of reserve fund.

4. It shall be the duty of the Trustees from time to time, whenever any loans or debentures shall fall due by the Justices, to realize the whole or a sufficient portion of the securities held by them as aforesaid, and appropriate the sale proceeds thereof, so far as the same will extend, to satisfy such loans or debentures. In case any balance in respect of such loans or debentures so falling due as aforesaid shall remain unsatisfied after appropriation thereto of the

sale proceeds of the whole of such securities, then the Justices may, for the purpose of paying such unsatisfied balance, issue new debentures in manner as is provided by Act VI of 1863, passed by the Lieutenant-Governor of Bengal in Council, section 98, clause 3, or otherwise contract new loans for any sum not exceeding such amount as may be necessary for the purpose aforesaid.

Account of reserve fund.

5. The Trustees shall at the end of every year submit a statement to the Justices showing the amount which has been invested during the year under the third section of this Act, and setting forth the date of the last investment made previous thereto, and also the aggregate amount of the securities then in their hands, and the aggregate amount which has up to the date thereof been paid off in respect of the said debentures and loans. Such statement shall be laid before the Justices and published in the *Calcutta Gazette*.

Construction of Act.

6. This Act shall be read with and as part of Act VI of 1863, passed by the Lieutenant-Governor of Bengal in Council, and of the said Act IX of 1867.

ACT NO. II OF 1872.

PASSED BY THE LIEUTENANT-GOVERNOR OF BENGAL IN COUNCIL.

(*Received the assent of the Lieutenant-Governor on the 13th February* 1872, *and of the Governor-General on the 12th March* 1872.)

An Act to amend the law for the registration of Jute Warehouses and to provide for the establishment of an efficient Fire-brigade.

Preamble.

WHEREAS it is expedient to amend so much of Act VI of 1866, passed by the Lieutenant-Governor of Bengal in Council, as provides for the registering and licensing of jute warehouses; and whereas it is expedient to provide for the organization and maintenance of a Fire-brigade; It is hereby enacted as follows:—

PART I.

PRELIMINARY.

Short title.

1. This Act may be called "The Jute Warehouse and Fire-brigade Act, 1872."

It extends to the whole of the town of Calcutta, and to such portions of the Suburbs thereof as are for the time being subject to the operation of Act II of 1866, passed by the Lieutenant-Governor of Bengal in Council, and also to the Municipality of Howrah. And it shall commence and take effect, except in the Municipality of Howrah, immediately upon the passing thereof. In the said Municipality it shall commence and take effect from such date as the Lieutenant-Governor may direct by notification published in the *Calcutta Gazette*.

Interpretation.

2. The words mentioned in this section shall for the purposes of this Act have the meanings herein assigned to them, except when from the context a contrary intention appears.

"Jute."
"Cotton."

"Jute" and "Cotton" mean respectively "Jute" and "Cotton" which have not been pressed or screwed as if for shipment.

"Person."

"Person" includes a firm and a Hindoo undivided family.

"Insurance Company."

"Insurance Company" means any Association or person who may carry on the business of fire insurance, whether such Association be incorporated or not, and the agent or agents of such Association or person.

"Magistrate."

"Magistrate" includes a Justice of the Peace for Calcutta, and any person exercising all or any of the powers of a Magistrate.

"Jute Warehouse."

"Jute Warehouse" means any warehouse, store, depôt, yard, godown, or other place used for the storing, keeping, pressing, or depositing of jute or cotton or other substance for the time being subject to the operation of this Act.

Repeal of Sections.

3. From and after the 31st July next after the passing of this Act, sections 38, 39, 40, and 41, of Act VI of 1866, passed by the Lieutenant-Governor of Bengal in Council, are hereby repealed, but such repeal shall not affect any registration made, or any act or offence done or committed, or any penalty or liability incurred under the said sections.

PART II.

JUTE WAREHOUSES.

Existing warehouses not to be used till licensed.

4. No jute warehouse, existing at the date of the commencement of this Act within the limits of its operation, shall be used after the 31st July next following such date for the storing, keeping, pressing, or depositing of jute or cotton, unless the owner or occupier thereof shall have previously obtained a license under this Act for such use.

Existing warehouses to be inspected and reported on.

5. As soon as may be after the passing of this Act the Justices at a special meeting shall appoint from their own number a special committee, consisting of seven members, one of whom must be the Chairman of the Justices, whose duty it shall be to visit, inspect, and report on every jute warehouse existing within the town of Calcutta. And the special committee shall report before the 15th day of the said month of July to the Justices whether a license can be granted to all or any such warehouses without risk to life and property in the neighbourhood thereof respectively. No jute warehouse shall be reported upon by the special committee until it shall have been visited by a quorum of not less than three members of the special committee. The Justices at a special meeting may award such fee as they may think fit to each member of the special committee, not being a salaried member of the corporation of Justices.

Licenses for existing warehouses.

6. On receiving the report of the committee it shall be within the discretion of the Justices at a special meeting to grant or refuse a license for any jute warehouse mentioned in the said report. Provided that if in the opinion of the Justices the said jute warehouse may be rendered fit for use without risk to life or property in the neighbourhood thereof the Justices shall certify to the owner and occupier thereof the conditions and restrictions under which the said jute warehouse may in their opinion be so rendered fit for use, and upon the said owner or occupier complying with the terms of such conditions and restrictions to the satisfaction of the Justices at a special meeting they shall grant to him a license in respect thereof. Every license granted under this section shall be subject to the payment of an annual fee to be imposed and paid in manner as in the next succeeding section is directed, and to such other of the conditions mentioned therein as the Justices may think fit.

Licenses for new warehouses.

7. Any person proposing to establish a new jute warehouse within the town of Calcutta shall send to the Justices a plan of the warehouse so proposed to be established, and it shall be within the discretion of the Justices at a special meeting to grant or refuse a license to establish the same.

Every license for a jute warehouse granted under this section shall be subject to the following conditions, *viz.* :—

(1.) That no loose jute, jute-rejections or cuttings, or cotton, shall be stored or screwed, or pressed or combed or dried, save within a building, the walls of which shall be of burnt bricks or of stone or of iron, and all the roof of which, including the beams on which such roof rests, shall be of iron, or of masonry, or of tiles ;

(2.) That such jute warehouse and the buildings therein shall be supplied with solid doors or gates which can be securely closed ;

(3.) That no portion of such jute warehouse shall be used as a residence, and no artificial light or lucifer matches shall be introduced therein, and that no person shall smoke therein :

(4.) That such jute warehouse shall be at any time open to inspection ;

(5.) That the engines and furnaces used in such jute warehouse shall be placed as may be considered necessary for safety by the Justices ;

(6.) That an annual fee, as the Justices at a special meeting may think fit, shall be imposed in respect thereof at one of the following rates, *viz.* :—

Rupees	1,000
"	750
"	500
"	250

and shall be paid in such instalments as the Justices may direct.

In fixing the amount of fee to be paid in respect of any jute warehouse, the Justices at such special meeting shall have regard to the annual value thereof as it is for the time being assessed to the payment of municipal taxes, to the size and position of the jute warehouse, to the number and excellence of the pressing machines erected in such jute warehouse, and to the probable income derived from such jute warehouse by its occupier or owner.

(7). Such other special conditions as the Justices may, on consideration of the special circumstances of such jute warehouse, deem necessary to prevent risk to life and property in the neighbourhood.

Appointment of inspecting officers.

8. The Justices shall appoint suitable officers for the inspection of jute warehouses within the town of Calcutta; and it shall be lawful for any officer so appointed, and for any superintendent or inspector of police within the said town, to enter at any time into any jute warehouse, where jute or cotton may be kept, and to inspect the same.

Breach of conditions.

9. It shall be in the discretion of the Justices at a special meeting, to cancel, or to suspend for such time as they shall think fit, the license of any jute warehouse in respect of which any one or more of the conditions under which such license has been granted shall appear to them to have been broken.

Municipal Commissioners to have the same powers as Justices.

10. In regard to any jute warehouse situated or used or proposed to be established or used out of the town of Calcutta and within the limits of the operation of this Act, the powers and duties conferred and imposed by this Part, and by every section thereof upon the Justices, or the Justices at a special meeting, shall be exercised and discharged by the Municipal Commissioners, or the Municipal Commissioners at a meeting respectively within whose jurisdiction such jute warehouse is situated. The annual fee in respect of any license for a jute warehouse granted by the said Municipal Commissioners may be at the rate of Rs. 150, or at any one of the rates mentioned in section 7, clause 6.

Penalties.

Penalty for not taking out license.

11. Any person who shall after the 31st day of the said July without a license under this Act use any jute warehouse, for keeping or depositing jute or cotton, shall be liable, on conviction before a Magistrate, to a penalty not exceeding one hundred rupees for each day during which he may use or continue to use such jute warehouse as aforesaid.

Penalty for establishing warehouse without license.

12. Any person who shall without a license use any jute warehouse, for keeping or depositing jute or cotton established after the commencement of this Act shall be liable, on conviction before a Magistrate, to a penalty not exceeding five hundred rupees, and to a further penalty not exceeding fifty rupees for every day during which such jute warehouse is used for keeping or depositing jute or cotton without a license.

Penalty for using warehouse after refusal of license.

13. Any person who shall after the 31st day of the said July use a jute warehouse for the keeping or depositing of jute or cotton after the Justices or Municipal Commissioners shall have refused or cancelled a license in respect thereof, or during the time for which such license shall have been suspended, shall be liable, on conviction before a Magistrate, to a penalty not exceeding five hundred rupees, and to a further penalty not exceeding one hundred rupees for every day during which any such jute warehouse may be so used as aforesaid.

Penalty for introducing fire, &c.

14. Whoever in contravention of the license shall introduce or use in any jute warehouse, in which jute or cotton is kept or deposited, any fire or lucifer matches or shall smoke therein, and whoever shall violate any of the conditions or restrictions under which the said license is granted, shall be liable on conviction before a Magistrate to a penalty not exceeding fifty rupees for any one such offence.

PART III.

FIRE-BRIGADE.

Organization of fire-brigade.

15. Within six months from the date of the passing of this Act, the Justices shall organize and thereafter maintain an efficient fire-brigade for the town and suburbs of Calcutta.

All existing public fire-engines, with the establishments and buildings thereto belong-ng, except those belonging to the Military Department or to the Port Commissioners in-corporated under Act V of 1870, shall be transferred to the fire-brigade to be established under this Act. The Justices shall have power to appoint and remove any members or officers of the fire-brigade; and they shall furnish the fire-brigade with all such steam or other fire-engines, horses, oxen, accoutrements, tools, and implements, as may be necessary for the complete equipment of the force, or conducive to the efficient performance of their duties.

Power to frame Bye-laws.

16. The Justices at a special meeting may frame bye-laws in respect of the following subjects :—

(1.) Giving of gratuities to persons who have given notice of fires.

(2.) Awarding gratuities by way of a gross sum or annual payment to be from time to time awarded to any member of the fire-brigade or other person specially deserving of reward.

(3.) For the training, discipline, and good conduct of the members of the force, not being members of the Calcutta and Suburban Police Force.

(4.) For the speedy attendance of such members with engines and all necessary implements on the occasion of any alarm of fire.

(5.) Imposing and summarily realising a fine not exceeding one week's wages from any member of the brigade who may infringe these bye-laws.

(6.) And generally for the maintenance of the fire-brigade in a due state of efficiency.

Powers of fire-brigade in case of fire.

17. On the occasion of a fire, the chief or other officer in charge of the fire-brigade on the spot may remove, or may order any member of the brigade to remove any persons whose presence shall interfere with the due operation of the brigade; and generally, he may take any measures which may appear necessary for the preservation of life and property; and he shall have power by himself or by his men to break into or through or pull down any premises for the purpose of putting an end to the fire, doing as little damage as possible; and he may also cause the mains and pipes of any district to be shut off so as to give greater pressure of water in the place where the fire has occurred. He may also call on the officer in charge of the Port Commissioners' fire-engine to render such assistance as may be possible in the case of any fire occurring near the river bank. The chief officer on the spot in charge of the brigade may verbally nominate and depute one or more officers of the brigade to act at a distance, and such officer or officers shall have for the time being the like powers as the chief officer himself possesses under this section.

Police officers to render assistance.

Police officers of all grades shall be authorized to aid the fire-brigade in the execution of its duties. They may close any street in or near which a fire is burning, and they may, of their own motion or on the request of the chief or other officer of the fire-brigade, remove any persons who interfere by their presence with the operations of the fire-brigade.

Damage done to be deemed damage by fire.

Any damage done by the fire-brigade in the due execution of their duties shall be deemed to be damage by fire within the meaning of any policy of insurance of property in Calcutta or the suburbs against fire.

But nothing in this section shall exempt any officer of the police or of the fire-brigade from liability to damages on account of any acts done by him without reasonable cause.

Inquiry into origin of fire.

18. In the case of any fire occurring in Calcutta or the suburbs, the chief officer of the fire-brigade shall ascertain the facts as to the origin and cause of such fire, and shall make a report thereon to the Magistrate having jurisdiction in the place in which such fire shall have occurred, and the said Magistrate, in any case where he may see fit, shall summon witnesses and take evidence in order to the further ascertainment of such facts.

LICENSES AND PENALTIES.

License for using fire-works.

19. No person shall let off rockets or send up fire-balloons in the town or suburbs of Calcutta without a license from the Commissioner of Police, for which license a fee of ten rupees shall be payable.

License for sale or manufacture thereof.

20. No person shall sell or manufacture fire-works in the town or suburbs of Calcutta without a license from the Commissioner of Police, for which a yearly fee of ten rupees shall be payable in advance.

Penalty for using without license.

21. Whoever shall let off rockets or send up fire-balloons in the town or suburbs of Calcutta without a license as aforesaid shall be liable on conviction before a Magistrate to a penalty not exceeding fifty rupees for any one such offence.

Penalty for selling, &c.

22. Whoever shall sell or manufacture fireworks in the town or suburbs of Calcutta without a license as aforesaid, shall be liable on conviction before a Magistrate to a penalty not exceeding fifty rupees.

Power to withdraw license.

23. The Commissioner may at his discretion, and after thirty days' notice, withdraw or suspend any license granted by him under this Act.

Liability of householders.

24. In the event of any rockets being let off, or fire-balloons sent up within the precincts of any private premises or compound within the town of suburbs of Calcutta, without the express permission in writing or the Commissioner of Police, the occupier, or owner, or person under whose immediate control the said premises or compound is, shall be liable to a fine not exceeding fifty rupees, unless he can prove who the person having committed the offence is, and that the offence was committed without his knowledge.

PART IV.

EXPENSES AND FUNDS.

Application of fund.

25. The Justices and Municipal Commissioners respectively shall apply the moneys derived from the fees and penalties levied under this Act within their respective jurisdictions in payment of all expenses incurred by them respectively in or about the inspection and superintendence of jute warehouses, and the granting of licenses in respect thereof. In the case of Calcutta and the suburbs, the balance of such moneys after payment of the said expenses shall be paid to the credit of an account in the books of the Justices to be called the fire-brigade account.

Contribution by Insurance Companies.

26. Every Insurance Company that insures from fire any property within the town and suburbs of Calcutta shall pay annually to the Justices, by way of contribution towards the expenses of the said fire-brigade, a sum at the rate of half a rupee for every ten thousand rupees on the gross amount insured by it in respect of such property. All sums paid to the Justices under this section shall be credited to the fire-brigade fund. The said payments shall be made quarterly in advance, on such dates as the Justices may appoint: and arrears on account of these payments shall be realizable as if they were arrears of rates due to the Justices, and all the provisions of Act VI of 1863 (passed by the Lieutenant-Governor of Bengal in Council) and of any Act amending the same shall be applicable so far as the circumstances will permit to the recovery of moneys due under this section.

Insurance Companies to make returns.

27. For the purpose of ascertaining the amount to be contributed by every such Insurance Company as aforesaid, every Insurance Company insuring property from fire within the town and suburbs of Calcutta shall, on the 30th day of June 1872, or on such other days as the Justices may appoint, make a return to the said Justices, in such form as they may require, of the gross amount insured by it in respect of property within the said town and suburbs. At the foot of every such return shall be appended a certificate by the Secretary or chief officer or manager of such Insurance Company in Calcutta, stating that to the best of his knowledge and belief the return contains a true and faithful account of the sums insured by the Company to which he belongs in respect of such property. Such Secretary or chief officer or manager shall allow either the Chairman or the Vice-Chairman or the Secretary to the Justices to inspect at any time during the hours of business any books and papers that will enable him to ascertain the correctness of the return; and every Secretary or chief officer or manager as aforesaid failing to comply with the requisition of this section in respect of such inspection shall be liable, on conviction before a Magistrate, to a penalty

not exceeding fifty rupees for each offence. The Justices on receiving the report of such inspection may alter the return accordingly.

The return made in the June of one year, or such return as altered on inspection by the Justices, shall be the basis of the contributions for the year beginning on the first day of January next succeeding.

Penalty for not making a return.

28. If any Insurance Company makes a default in making such returns to the Justices as are required by this Act, the said Company or Secretary or chief officer or manager thereof shall be liable to a penalty not exceeding fifty rupees for every day during which it is so in default.

Proportions of contribution towards payment of expenses of fire-brigade.

29. The cost of all establishments and plant hired or purchased, and of all other charges under Part III of this Act, shall be paid from the fire-brigade fund. The full amount of such charges over and above the moneys which may accrue to the fire-brigade fund under sections 25 and 26 of this Act, shall be contributed by the Justices, and by the Commissioners of the suburbs, in the following proportions, namely,—by the Justices, seven-tenths; by the said Commissioners, three-tenths. At the end of each quarter of a year, the Justices shall certify to the said Commissioners the total cost of the fire-brigade for such year, the money which may have accrued under sections 25 and 26 of this Act, and the precise sum which must be paid by each body charged with the cost of the Calcutta fire-brigade under this Act. On the receipt of such certificate, the said Commissioners shall pay the sum certified against them by the Justices: provided that in no case shall the three-tenths payable by the said Commissioners in any year after the first year of the establishment of the fire-brigade exceed the sum of ten thousand rupees.

PART V.

MISCELLANEOUS.

Lieutenant-Governor may declare the warehousing of any other substance to be subject to Act.

30. It shall be lawful for the Lieutenant-Governor of Bengal, on the recommendation of the Justices passed by resolution, to declare that any other fibre or any commodity which is stored or deposited in warehouses besides jute or cotton shall be warehoused and kept subject to the provisions of Part II of this Act. When such declaration shall have been made in the *Calcutta Gazette*, this Act shall be read as if the name or names of the said fibre or commodity had been printed in addition to the words "jute" or "cotton" in the several sections of Part II wherein the said words "jute" or "cotton" may occur.

Submission of reports.

31. The Justices and Municipal Commissioners respectively shall make a report to the Lieutenant-Governor as soon as conveniently may be after the 31st July next, showing how the provisions of this Act have been carried out, and specifying the jute warehouses in respect of which licenses have been granted. Such reports shall be forthwith published in the *Calcutta Gazette*. And thereafter the Justices and Municipal Commissioners shall make a like report once a year at such time as the Lieutenant-Governor shall direct.

Power to arrest.

32. Any person committing any offence in respect of which a penalty is provided by section 14 or section 24 of this Act may, if his name and address be unknown, be arrested by any officer to be by the Justices or the Municipal Commissioners within their respective jurisdictions thereunto appointed, and by such officer or any person by him thereunto authorized, or by any officer of police, forthwith conveyed before some Magistrate having jurisdiction in the place in which such offence shall have been committed, or shall be taken to the nearest police station within the said jurisdiction in order that such person may be detained until he can be brought before a Magistrate, or until he shall enter into recognizance with or without sureties, for his appearance before a Magistrate.

Offenders to be brought to trial.

33. Whenever such person shall be taken to a police station, the officer in charge of such station shall, as soon as conveniently may be, cause him to be conveyed before some Magistrate having jurisdiction in the matter.

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